

立法會
Legislative Council

Ref : CB2/BC/2/11

LC Paper No. CB(2)1595/11-12
(These minutes have been seen
by the Administration)

Bills Committee on Mediation Bill

Minutes of the fourth meeting
held on Wednesday, 1 February 2012, at 8:30 am
in Conference Room 2A of the Legislative Council Complex

- Members present** : Dr Hon Margaret NG (Chairman)
Hon Albert HO Chun-yan
Hon Miriam LAU Kin-ye, GBS, JP
Prof Hon Patrick LAU Sau-shing, SBS, JP
Hon CHEUNG Kwok-che
- Members absent** : Hon LAU Kong-wah, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon Cyd HO Sau-lan
- Public Officers attending** : Department of Justice

Mr Simon LEE
Deputy Law Officer (Civil Law)

Miss Shandy LIU
Senior Government Counsel (Law Drafting Division)

Miss Venus CHEUNG
Government Counsel
- Clerk in attendance** : Miss Flora TAI
Chief Council Secretary (2)3
- Staff in attendance** : Mr YICK Wing-kin
Assistant Legal Adviser 8

Ms Wendy LO
Council Secretary (2)3

Mrs Fanny TSANG
Legislative Assistant (2)3

Action

I. Meeting with the Administration

[LC Paper No. CB(2)894/11-12(01), CB(3)154/11-12 and
CB(2)644/11-12(01)]

The Bills Committee deliberated (index of proceedings attached at **Annex**).

Follow-up actions required of the Administration

Admin 2. The Administration was requested to –

- (a) consider whether the inclusion of clause 5(3) was necessary and review the drafting of clause 5(1) in the light of members' views;
- (b) clarify the purpose for excluding mediation proceedings referred to in sections 32 and 33 of the Arbitration Ordinance and to consider the need to amend item 12 of Schedule 1 to specifically refer to sections 32(3) and 33 of the Arbitration Ordinance (Cap. 609) for the purpose; and
- (c) provide a written response to the drafting issues raised by deputations attending the meeting on 13 January 2012.

Date of next meeting

3. The Bills Committee agreed to hold the next meeting on 7 February 2012 at 4:30pm.

II. Any other business

4. There being no other business, the meeting ended at 10:33 am.

Council Business Division 2
Legislative Council Secretariat
2 April 2012

**Proceedings of the fourth meeting of the
Bills Committee on Mediation Bill
on Wednesday, 1 February 2011, at 8:30 am
in Conference Room 2A of the Legislative Council Complex**

Time Marker	Speaker(s)	Subject(s)	Action required
000117 - 000255	Chairman	Opening remarks	
000256 - 002829	Chairman Administration	<p>The Administration's briefing on its responses to the submissions made by deputations as detailed in its paper [LC Paper No. CB(2)894/11-12(01)].</p> <p>In response to the Chairman's enquiry concerning the request for mediators to appear as witness or give evidence in subsequent legal proceedings, the Administration advised that the instances that a mediator would be called to appear as a witness or give evidence in subsequent legal proceedings should be rare, given that the instances where the mediation communications could be disclosed and the requirement that the leave of the court had to be obtained for disclosure and for admission of mediation communication in evidence were clearly specified in the Bill.</p>	
002830 - 003237	Chairman Administration	<p>The Chairman summarized the main areas of concern raised by deputations as follows –</p> <ul style="list-style-type: none"> (a) establishment of a single mediation accrediting body; (b) accreditation and training of mediators; (c) code of practice for mediators and sanction for non-compliance; (d) professional indemnity insurance and immunity for mediators; (e) meaning of mediation (clause 4); (f) confidentiality and admissibility of mediation communication (clauses 8 and 9); and (g) leave for disclosure or admission in evidence (clause 10). 	

Time Marker	Speaker(s)	Subject(s)	Action required
003238 - 004413	Chairman Prof Patrick LAU Administration	<p>Prof Patrick LAU's expression of concern that the Bill had not dealt with the accreditation of mediators and query about whether consideration would be given to specifying a panel of accredited mediators in the Bill.</p> <p>The Chairman's advice that the proposed legislation was meant not to affect the current practices of mediation in the community. In the absence of an industry-led single accreditation body, the Bill could not specify the accreditation of mediators and the statutory requirement on the professional qualification of the mediators because doing so would preclude some existing mediators from practicing as such.</p> <p>The Administration's response that –</p> <ul style="list-style-type: none"> (a) the Administration was working with stakeholders to facilitate the establishment of a single non-statutory industry-led accreditation body for mediators; and (b) a provision could be included in an agreement to mediate to provide for the appointment of a mediator by the Hong Kong International Arbitration Centre or other mediation service providers in case where consensus could not be reached by the parties to a dispute on the appointment of the mediator. <p>Mr Albert HO's views that –</p> <ul style="list-style-type: none"> (a) as mediation did not involve the adjudication of a dispute and the expertise and experience required for mediation in specific industries varied, there was no urgent need to establish a standardized accreditation system for mediators at this stage in order not to hinder its diversified development; and (b) the Administration should conduct a public consultation in future to gauge the views of stakeholders on the accreditation system of mediators. 	
004414 - 005518	Chairman Mr Albert HO Administration	Mr Albert HO's enquiry about the definition of "mediation" in the Bill and query about whether some causal meetings or initial communications which took place before the formal conduct of	

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		<p>mediation would be regarded as a mediation process subject to the application of the Mediation Ordinance.</p> <p>Referring members to the definition of "agreement to mediate" in clause 2 and the content of clauses 4 and 5, the Administration's explanation that –</p> <ul style="list-style-type: none"> (a) an agreement to mediate under the Mediation Ordinance to be enacted had to be made in writing to submit a dispute to mediation and the agreement would include provisions to protect the confidentiality of mediation communications, and govern the conduct of mediation and the appointment of a mediator etc; (b) the consent of the parties to submit a dispute between them to mediation should be clearly indicated in the agreement to mediate and it was the common practice to include such a provision in an agreement to mediate in Hong Kong; (c) the mere records of the initial communications of the parties without clear indication of their consent to submit their dispute to mediation would not constitute an agreement to mediate; and (d) an agreement to mediate could be reached after the initial communications between the parties as mediation was a voluntary and flexible process. 	
005519 - 010522	Chairman Ms Miriam LAU Administration	<p>Ms Miriam LAU's suggestion that consideration be given to specifying clearly in the Bill that the parties to a dispute must sign an agreement to mediate for the conduct of mediation and the Mediation Ordinance applied to those who had reached an agreement to mediate.</p> <p>The Chairman's views that clause 5 of the Bill had provided for the circumstances to which the Mediation Ordinance applied.</p> <p>The Administration's response that stakeholders did not raise particular view on the provision</p>	

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		concerning the "agreement to mediate", but publicity and education work would be stepped up to promote the use of mediation to the public.	
010523 - 011655	Chairman Administration Assistant Legal Adviser	<p>The Administration's briefing on clause 4 ("Meaning of mediation") of the Bill and its responses to concerns raised by deputations concerning the impartiality of mediators and the definition of a mediation session as detailed in its paper.</p> <p>The legal adviser to the Bills Committee's enquiry whether a mediator would be regarded as adjudicating the dispute if the mediation process incidentally involved evaluation of any party's case (on merit or evidence) in the subject dispute by the relevant mediator.</p> <p>The Administration's response that –</p> <p>(a) mediation was a flexible process and mediators were mindful that they might be requested by parties to provide their evaluation, in particular in disputes in professional fields; and</p> <p>(b) mediators would not be adjudicating so long as there were no determinations binding on the parties in disputes, nevertheless, mediators had to maintain their impartiality when providing any evaluation requested to the parties with a view to facilitate the parties to reach an agreement to resolve their disputes.</p> <p>The Chairman's view that the crux of the issue was whether the evaluation given by a mediator had affected his/her impartiality in resolving the dispute.</p>	
011656 - 013619	Mr CHEUNG Kwok-che Chairman Administration	<p>Mr CHEUNG Kwok-che's expression of concern that there might be further disputes after the mediation if a party to a dispute was not satisfied with the mediated settlement agreement or held the mediator responsible for not conducting the mediation in an impartial manner.</p> <p>The Administration's response that –</p> <p>(a) complaints relating to the performance of mediators and further disputes after mediated</p>	

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		<p>settlement agreements were reached were rarely seen;</p> <p>(b) a party to a dispute would need to apply for the leave of the court for disclosure and admissibility of mediation communications for the purpose of challenging a mediated settlement agreement according to the provisions in the Bill; and</p> <p>(c) complaints about the misconduct of mediators could be made to the relevant mediation service providers which had set up robust complaints handling systems.</p> <p>Mr CHEUNG Kwok-che further enquired whether a governmental organization would be put in place to protect the rights of mediators against complaints and civil claims by the parties to disputes as the aggrieved parties might abuse the complaint or court procedures.</p> <p>The Administration's advice that –</p> <p>(a) there was no plan to put in place a government organization referred to;</p> <p>(b) complaints against mediators were rarely seen, however, recourse should be available against mediators who might have misconducted themselves; and</p> <p>(c) as leave of the court would be required for disclosure and admission of mediation communication, abuse could be prevented.</p> <p>Referring to the role of the parties to a dispute specified in clause 4(1), the Chairman's expression of concern that the parties to a dispute might be under the impression that their rights were protected by the Mediation Ordinance and would not be aware of their proactive roles in the mediation process. She urged the Administration to educate the public more on their responsibilities in mediation.</p> <p>The Administration's undertaking of enhancing the related promotional work to educate the public on the use of mediation.</p>	

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013620 - 014800	Chairman Administration Assistant Legal Adviser	<p>The Administration's briefing on clause 5 ("Mediation and mediation communications to which this Ordinance applies") and its responses to the concern raised by the Hong Kong Construction Association concerning the exclusion of section 32 (1) of the Arbitration Ordinance (Cap. 609) from Schedule 1 of the Bill.</p> <p>The Administration's further briefing on item 12 of the Schedule 1 of the Bill, the content of sections 32 and 33 of the Arbitration Ordinance and the reasons for excluding mediation proceedings referred to in sections 32 and 33 of the Arbitration Ordinance from the application of the Mediation Ordinance.</p> <p>The legal adviser to the Bills Committee's suggestion of specifying in Schedule 1 that the Mediation Ordinance did not apply to sections 32(3) and 33 of the Arbitration Ordinance.</p> <p>At the request of the Chairman, the Administration undertook to –</p> <p>(a) clarify the purpose for excluding mediation proceedings referred to in sections 32 and 33 of the Arbitration Ordinance and to consider the need to amend item 12 of Schedule 1 to specifically refer to sections 32(3) and 33 of the Arbitration Ordinance for the purpose; and</p> <p>(b) provide a written response to the drafting issues raised by deputations attending the meeting on 13 January 2012.</p>	Admin (para 2 of minutes)
014801 - 015609	Chairman Administration	<p>The Chairman's query about the necessity to include clause 5(3) in the Bill as the application of the Mediation Ordinance to a mediation in accordance with clause 5(1) would necessarily make the Ordinance also applicable to a mediation communication relating to such mediation.</p> <p>The Chairman's suggestion of restructuring clause 5(1) to make it clear that an agreement to mediate was a prerequisite for the application of the Mediation Ordinance.</p> <p>The Administration's explanation that –</p>	

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		<p>(a) as an agreement to mediate would be an important prerequisite for the Bill to apply to any mediation, a reference to the agreement was therefore made in the beginning of clause 5(1);</p> <p>(b) the further requirement was set out in clause 5(1)(a) and (b) as alternative circumstances with exceptions made by clause 5(2) for processes specified in Schedule 1; and</p> <p>(c) clause 5(3) as a separate provision served to make it absolutely clear that the Bill was meant to apply to a mediation communication arising from a mediation process to which the Bill applied according to the preceding clause 5(1) and (2).</p> <p>The Administration was requested to review the drafting of clause 5(1) and whether the inclusion of clause 5(3) was necessary.</p>	<p>Admin (para 2 of minutes)</p>
015610 - 015834	Chairman Administration	<p>The Administration's briefing on clause 6 ("Application to the Government").</p> <p>The Administration's response that while the Government was studying the applicability of the laws of Hong Kong to the offices set up by the Central People's Government ("CPG Offices") as a whole, the Administration would continue to sort out the applicability of specific ordinances, such as the Mediation Ordinance, to CPG Offices.</p>	
015835 - 020334	Chairman Administration Assistant Legal Adviser	<p>The Administration's briefing on clause 7 ("Provision of assistance or support in mediation").</p> <p>The Chairman shared the view of the Law Society of Hong Kong that there was no need to include clause 7 in the Bill as a mediator was not required to be qualified as a lawyer to conduct mediation.</p> <p>The legal adviser to the Bills Committee enquired whether a social worker and friends of the disputing parties assisting in mediation would be afforded protection by clause 7.</p> <p>The Administration's explanation that –</p> <p>(a) as section 63 of the Arbitration Ordinance provided that sections 44, 45 and 47 of the</p>	

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		<p>Legal Practitioners Ordinance ("LPO") (Cap. 159) did not apply to arbitral proceedings, inclusion of a similar provision in the Mediation Ordinance was considered appropriate;</p> <p>(b) the inclusion of clause 7 would ensure that those assisting and supporting the disputing parties (e.g. social workers, friends of the parties) would not run into the risk of infringing sections 44, 45 and 47 of LPO and could prevent disputes that might arise from the mediation process as it was difficult to judge whether the advice given by a mediator was related to his status as a lawyer; and</p> <p>(c) the Hong Kong Bar Association did not raise particular view on clause 7.</p>	
020335 - 020453	Chairman	Closing remarks Date of next meeting	