Bills Committee on Mediation Bill

Administration's Response to issues raised at the meetings held on 10 January 2012 and 1 February 2012

Introduction

This paper sets out the Administration's response to the issues raised by Members at the meetings of the Bills Committee on the Mediation Bill ("the Bill") held on 10 January 2012 and 1 February 2012.

Note under the definition of ***agreement to mediate*** in clause 2

2. We acknowledged the comments made by some Members on the note currently inserted under the definition of ***agreement to mediate*** in the Bill. As previously explained in our letter of reply to the Assistant Legal Adviser dated 6 January 2012, the note was inserted following our consultation with stakeholders in June 2011 to address their concern as to whether an agreement to mediate could be in electronic form. Having included the note in the Bill to bring their attention to the general application of the Electronic Transactions Ordinance (Cap. 553), we have not received any further enquiry in this regard. Among the various comments we have received from stakeholders and academics, there is no unfavourable comment made on the use of the note in the Bill. In view of this, we consider that the note is useful as an aid to readers by providing factual information available in other relevant legislation, and will help to further the objective of the Bill in promoting and facilitating the use of mediation to resolve disputes.

Chinese text of the definition of ***agreement to mediate*** （調解協議）

3. We have reviewed the use of the conjunction "及" at the end of paragraph (b) of the Chinese text of this definition as suggested. We consider it acceptable to use either "及" or "或" in the context. As the contents of paragraphs (a), (b) and (c) of this definition are clearly spelt out and the meaning of the whole definition would not be affected by the use of the conjunction "及" or "或" at the end of paragraph (b), we would recommend that no change is to be made to this definition.

Chinese text of the definition of ***mediation communication*** （調解通訊）

4. We have considered whether the words "**說出**" in paragraph (a) of the Chinese text of this definition may be replaced by "**所說**". If the word "**所**" is used before the verb "**說**", then this auxiliary word (**助詞**) would also have to be added before the verbs "**作**", "**擬備**" and "**提供**" for consistency. As the meaning of the Chinese text is clear without making the suggested revision, we would recommend that the current version of this definition be kept.

Chinese text of clause 2(2)

5. The English reference to the "parties to mediation" is rendered into Chinese in slightly different ways depending on the context of the relevant provisions as follows:

Provision	Chinese text	English text
Clause 2(1), definition of ***mediated settlement agreement***	**調解的部分或全部當事人**就他們的全部或部分爭議所達成的和解協議	an agreement by **some or all of the parties to mediation** settling the whole, or part, of their dispute
Clause 8(2)(a)	在下述情況下，任何人可披露調解通訊— (a) 所有下述人士均同意作出該項披露— (i) 有關的**調解的每一方**； (ii) .....；及 (iii) 作出該項調解通訊的人(如該人並非有關的**調解的任何一方**或調解員)；	A person may disclose a mediation communication if— (a) the disclosure is made with the consent of— (i) **each of the parties to the mediation**; (ii) .....; and (iii) if the mediation communication is made by a person other than **a party to the mediation** or a mediator—the person who made the communication;

6. As some statute users may only read the Chinese text of legislation, we consider that the Chinese text of clause 2(2) should include these different Chinese renditions so that there will not be any doubt as to the meaning of the relevant provisions.

7. Unlike the word "reference" (which is used as a noun in the English text

of clause 2(2)), the term "提述" is used as a verb in the corresponding Chinese text. We consider that the meaning of the Chinese text is clearer if it reads: "提述....，不包括提述....".

Clause 5 (Mediation and mediation communications to which this Ordinance applies)

8. We have reviewed the composition of clause 5 as suggested. In delineating the scope of application of the Bill, we have considered the variables concerning when and where an agreement to mediate is entered into, when and where the mediation is conducted and when it is completed, and when the related mediation communications are made.

9. As an underlying agreement to mediate is an important prerequisite for the Bill to apply to any mediation, clause 5(1) refers to the agreement upfront in the opening words. The further requirement is set out in clause 5(1)(a) and (b) as alternative circumstances. Exceptions are then made by clause 5(2) for processes specified in Schedule 1, which are processes referred to in certain existing enactments not intended to be affected by the Bill.

10. As a substantive part of the Bill deals with the confidentiality of mediation communications, clause 5(3) serves to make it absolutely clear that the Bill is meant to apply to a mediation communication arising from a mediation process to which the Bill applies according to the preceding clause 5(1) and (2).

11. We have also considered different possible scenarios including the following situations:

(a) an agreement to mediate may have been entered into before the commencement date of the Bill (if enacted) (e.g. in the form of a mediation clause in a commercial contract), and the related mediation process may also have started before that date but is still ongoing on that date, or the related mediation process may only start on or after that date;

(b) a mediation process to which the Bill applies may have already been completed before the commencement date of the Bill (if enacted), but one of the parties seeks to disclose, on or after that date, the related

mediation communications made before that date.

12. As one of the main objects of the Bill is to protect the confidential nature of mediation communications, it is our proposal that any attempt to disclose a mediation communication or to adduce it in evidence on or after the commencement date of the Bill (if enacted) should be subject to the restrictions provided in clauses 8, 9 and 10 of the Bill, even if the related mediation was completed before that date. The purpose of clause 5(4) is to express this policy intent in unambiguous terms to avoid future arguments. In particular, the clarification made by clause 5(4)(c) should be read in conjunction with clause 5(3) for completeness.

Schedule 1, item 12 (reference to sections 32 and 33 of the Arbitration Ordinance (Cap. 609))

13. By virtue of and in accordance with section 32(3) of the Arbitration Ordinance (Cap. 609), mediation proceedings may arise from an arbitration agreement which provides for the appointment of a mediator and which 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, and no objection may be raised against the appointed mediator to act as the arbitrator. This provides for the so-called "mediation-arbitration" ("med-arb") procedure.

14. Section 33 of Cap. 609, by its subsection (1) provides that an arbitrator may act as a mediator after the arbitral proceedings have commenced provided that all parties consent in writing and for so long as no party withdraws the party's consent in writing. This provides for the so-called "arbitration-mediation-arbitration" ("arb-med-arb") procedure. Section 33(2) of Cap. 609 provides that if an arbitrator acts as a mediator, the arbitral proceedings must be stayed to facilitate the conduct of the mediation proceedings.

15. The reference to sections 32 and 33 of Cap. 609 in item 12 of Schedule 1 to the Bill is to provide that the Bill does not apply to mediation proceedings referred to in section 32(3) and section 33(2), so that mediation proceedings in the context of "med-arb" under section 32 and "arb-med-arb" under section 33 of Cap. 609 will be regulated, as they are intended to, by the relevant provisions in Cap. 609, including provisions in section 33(3) and section 33(4) which deal with confidentiality of information obtained by an arbitrator acting as a mediator in conducting the mediation proceedings.

16. Since there is no reference to "mediation proceedings" in section 32(1) and (2) of Cap. 609, item 12 of Schedule 1 to the Bill will not have the effect of excluding any mediation conducted by a mediator appointed by the Hong Kong International Arbitration Centre (HKIAC) under section 32(1) of Cap. 609 from the application of the Bill if the mediation in question does not constitute "mediation proceedings" in the context of "med-arb" and "arb-med-arb" provided in sections 32 and 33 of Cap. 609.

Clause 7 (Provision of assistance and support in mediation)

17. Section 63 of the Arbitration Ordinance (Cap. 609) provides that sections 44, 45 and 47 of the Legal Practitioners Ordinance (Cap. 159) do not apply to arbitral proceedings. The Working Group on Mediation recommended a similar provision to be included in the Bill. As both arbitration and mediation are alternative dispute resolution methods, the Mediation Task Force was content that a similar provision be included in the Bill for consistency. Similar provisions can also be found in other jurisdictions with mediation legislation such as section 25 of Malta's Mediation Act 2004 and Article 12(1) and (3) of Bulgaria's Mediation Act 2004.

18. The inclusion of clause 7 will ensure that those assisting and supporting the disputing parties in mediation, taking also into account the fact that, like arbitration, they may come from overseas, will not run into the risk of infringing sections 44, 45 and 47 of Cap. 159

Department of Justice
February 2012