



HONG KONG MEDIATION AND ARBITRATION CENTRE
SUMMISSION TO THE LEGISLATIVE COUNCIL
PANEL ON ADMINISTRATION OF JUSTICE AND LEGAL SERVICES

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1. Enforcement of International Mediated Settlement Agreements

The lack of consistent method of enforcement for cross-border Mediated Settlement Agreements is widely seen as a major impediment to further development of international mediation in Hong Kong: Disputants from different countries agree to appoint a mediator to help them resolve their cross-border dispute and they eventually mediate in Hong Kong (either because Hong Kong is one of their home jurisdictions, or for that dispute as a neutral jurisdiction). In the context of international commercial mediation, one technical question commonly faced by our professional members is: Can the Mediated Settlement Agreement (with legal effect similar to a contractual agreement) be enforceable overseas? If not, how can disputants involved in international commercial disputes to make full use of mediation if there is a risk that any outcome might be unenforceable? Why would international parties not simply resort to arbitration where the New York Convention of 1958, with its over 140 member states ensures the enforceability of both arbitration agreements and arbitral awards?

Even if the settlement agreement is actually enforceable, disputants still need to enforce it at court, but that's why the disputants chose to mediate in the first place, so as to avoid litigating contract at court.

In some jurisdictions (e.g. USA, UK) it will be possible to apply to the court for entering a settlement agreement as a consent judgment. For instance, the EU Mediation Directive expressly contemplates such a method of enforcement. In some jurisdictions it may be possible to obtain a consent judgment even if there are no extant proceedings. That being the case, however, the difficulties of enforcing a judgment in a foreign jurisdiction where assets reside would remain.

In this regard, various researches have been conducted by some of our professional members so as to study whether it will be legally possible, under the legal framework of Hong Kong, to convert the Mediated Settlement Agreement into an arbitration award and thereby take advantage of enforcement under the New York Convention as an arbitral award. (That is, upon reaching mediation agreement, the disputants would appoint the mediator as arbitrator who thereafter adopts the mediation agreement as arbitral award).

For some jurisdictions such as Korea (Korean Commercial Arbitration Board) and Sweden (Stockholm Chamber of Commerce), they would provide for the entry of an arbitration award to record an agreement reached in mediation. However, there are also many countries such that they would require there to be a "dispute" at the time when the arbitrator is appointed. The problem here is that once Mediated Settlement Agreement had been reached, technically there would not be "dispute" any longer at the time when the mediator is appointed as an arbitrator.

In Hong Kong, such situation is still unclear and actually untested. While some of our members would suggest that consent awards rendered by an arbitrator appointed before the settlement should be governed by the New York Convention and therefore be enforceable. Nevertheless, it is less clear whether the more straightforward process

of appointing the mediator as an arbitrator after settlement can do likewise.

Therefore, it is necessary to make development in this gray area of law so that mediation would find its rightful place at the arena of international commerce. Only if the potential problem is well discussed and resolved, would international mediation then be truly and widely adopted in Hong Kong.

2. Disciplinary proceedings under the newly enacted Mediation Ordinance (Cap. 620)

Section 8(3) of the Mediation Ordinance (Cap. 620) reads that:-

"A person may disclose a mediation communication with leave of the court or tribunal under section 10 —

(a) ...

(b) for the purpose of establishing or disputing an allegation or complaint of professional misconduct made against a mediator or any other person who participated in the mediation in a professional capacity; ..."

According to the above provision, it is our understanding that in order to establish an allegation or complaint by the public member against an accredited mediator, it would be necessary to obtain the leave of the court or tribunal before commencing any disciplinary proceedings (since it may inevitably involve the disclosure of some mediation communication).

With respect, such legal arrangements may impose substantial difficulties on the members of the general public who wish to establish a complaint of professional misconduct against a mediator. While one of the major benefits of adopting mediation is to avoid complicated court procedures, having the above mentioned complaint handling mechanisms may effectively defeat such purposes.

3. Establishment of Hong Kong Mediation Accreditation Association Limited ("HKMAAL")

We understand that HKMAAL is established as a non-statutory, industry-led body with a view to becoming the premier accreditation body for mediators in Hong Kong, discharging accreditation and disciplinary functions. It is intended that members of HKMAAL would have to abandon their own accreditation systems once being admitted (so as to eventually build up a "single mediator accreditation system" in Hong Kong).

Upon the consultations of our professional members, we wish to raise the following concerns in relation to the future development of mediation in Hong Kong:-

i. Intervention of Industry Autonomy

While HKMAAL could be the result of the recommendations of the Report of the Working Group on Mediation and the relevant Task Force, we may wish to know if there are any other figures, statistics and/or reasons to justify why it is considered a suitable time to impose interference and interventions on the autonomy of

mediation industry.

ii. Different Models of Mediation

Following some major jurisdictions around the world (such as Australia, United Kingdom and the USA), most practitioners in Hong Kong mainly adopts the "Facilitative Mediation Model" in the course of conducting mediation.

Be that as it may, there are still other well-known types of mediation models which are widely adopted (and highly regarded) internationally: the Settlement Model, Therapeutic Family Mediation Model, Evaluative Model, Structured Model, Haynes' Family Mediation Model etc.

We observe that the core reason why mediation can be well developed in the aforementioned jurisdictions is that mediation development has not been unnecessarily intervened such that different mediation theories and mediation models are like a hundred flowers in bloom. Mediation service users can therefore freely choose the services that they deem most suitable, and any single model would not dominate the whole industry practice.

In this regard, we wish to understand if Facilitative Mediation Model will be the only mediation model that should be adopted in Hong Kong. If not, what measures have been/will be done towards such development?

iii. Mediation – a future regulated professional activity?

With the establishment of HKMAAL, it is generally perceived by some of the practitioners that it may develop itself towards an ultimate statutory body, exercising all accreditation and disciplinary matters. While arguably it may be justified from the consumer protection perspective, we would like to raise our professional concerns if mediation would become a regulated activity in future, such that anyone who does not obtain an approved license cannot practice mediation within the territory of Hong Kong.

On the one hand, if mediation is **not** intended to be a future regulated activity, establishing a single statutory body seems not necessary at all as any registration thereof would be entirely voluntary but not mandatory. Like all other professions (e.g. medical, legal, accounting industries etc), a single statutory body will become meaningful **ONLY IF** any person who does not possess relevant licenses are strictly prohibited from practicing in the relevant professional areas.

On the other hand, if mediation is intended to be a regulated activity in future, serious problem will arise such that any members of the public cannot participate even in some private disputes of their friends or disputes among their own family members. In addition, overseas mediators will be deprived of their rights to exercise mediation in Hong Kong such that the choices of mediators for the consumers will be limited adversely. The applicability and flexibility of mediation will also be fiercely affected.