



5 July 2011



Our Ref.:

By email
mediation@doj.gov.hk

Ms Sou CHIAM
Secretary to Mediation Task Force
Department of Justice
3/F High Block
Queensway Government Offices
66 Queensway
Hong Kong

Dear Madam,

The Draft Mediation Bill

We refer to the above, and provide the following 'section by section' comments on the draft Bill.

1. Section 3

1.1 In the definition of agreement to mediate the word 'persons' is used. Whilst it was pointed out by the Chairman of the Task Force in the Consultation that took place on 31 June 2011 that the definition of the word 'person' can be found in the General Interpretation and Clauses Ordinance, Cap 1 of the Laws of Hong Kong, it is suggested that the definition in the draft Bill should be elaborated for the convenience of foreign parties and investors who may use the proposed mediation legislation in Hong Kong.

1.2 Proposed Hong Kong Mediation Accreditation Limited

As explained in the Consultation, this is a private company to be set up for carrying out various tasks under the proposed legislation. It appears that, at this stage, apart from the function to appoint mediators, it remains uncertain as to the scope of duties of this private company, the extent of resources that it will enjoy, and the source of such resources.

Transparency of the proposed company's operation and decisions as well as its efficiency and accountability given its nature as a private company is in serious doubt. We are also concerned about the initial learning curve of the suggested private company which may be at the expense of the reputation of Hong Kong being an advanced and efficient ADR centre in Asia.

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Another concern is the level of confidence and trust that foreign investors would have in a private company.

As such, we welcome the establishment of a statutory body similar to the Hong Kong International Arbitration Centre ('HKIAC') to promote and facilitate the development of mediation in Hong Kong. Alternatively, at the initial stage, prior to the establishment of a new statutory body HKIAC could be entrusted with the tasks to be carried out by the suggested private company with the ultimate goal of setting up a statutory organisation in the future.

- 1.3 The definition of mediation communication should exclude contemporaneous documents relating to the dispute between the parties, not prepared for the purpose of the mediation.
2. Section 4
 - 2.1 We suggest adding the wording 'deciding and' in front of 'adjudicating' in the current draft.
 - 2.2 Section 4(1)(b) was discussed in the Consultation. We propose the use of 'explore and generate options', instead of 'develop options'. The reason being that in the process of mediation, the mediator and the parties may not always succeed in developing options.
3. Section 7
 - 3.1 It is difficult to contemplate under what situation Section 7(1) will apply given the contents of Section 32 of the Arbitration Ordinance. The wordings of both are almost identical.
4. Section 9
 - 4.1 In our view, this section as it is currently drafted gives rise to most concern. Confidentiality is the general principle that is of utmost importance in the process of mediation. In many cases, confidentiality of the entire mediation process is the key factor for the parties to agree to mediate. It is important to safeguard sensitive issues that the parties are concerned about from being disclosed to the public.
 - 4.2 As such, Section 9 should set out clearly at the outset the general principle that there should be confidentiality in the entire process of mediation in Hong Kong. Secondly, the section should provide that the mediator is bound by this duty of confidentiality. It must be shown to

local and foreign users of mediation that Hong Kong respects the confidentiality of the process.

4.3 We set out below the sections that in our opinion should be taken out from Section 9, and the reasons behind:

4.3.1 Section 9(2)(b)

This is a dangerous section which is subject to parties' abuse. What constitutes 'reasonable grounds to believe' is opened to arguments. In our view, this exception is covered by the exception of requirement imposed by law in Section 9(2)(f).

4.3.2 Section 9(2)(c)

Similar provision is not commonly found in any similar legislation in other jurisdictions. It is accepted that studies and research will play a role for the advancement of the use of mediation in Hong Kong. However, this should not be achieved at the expense of the fundamental importance of confidentiality in mediation.

4.3.3 Section 9(2)(e)

In our view, this is another dangerous provision. A party may abuse this section and use it as a weapon to defeat confidentiality of the mediation process.

Misconduct of the mediator can be established without disclosing the substance of mediation communications. In any event, consideration should be given for including a provision establishing the immunity of mediators from negligence or other proceedings in the absence of fraud.

5. Section 10

5.1 Another general rule of fundamental importance is the privileged nature of mediation. Parties may negotiate freely without hesitation knowing that their communications will not be used against them in future proceedings if the mediation fails. Section 10(1) of the draft appears to defeat privilege and makes evidence in mediation potentially admissible in numerous uncertain situations.

5.2 This calls for the re-drafting of this provision. The starting point should be contrary to Section 10(1) as it is currently drafted, i.e. any mediation

communication is without prejudice, and is inadmissible as evidence in future proceedings between the parties where such proceedings relate to the disputes and issues in the mediation, with exceptions to this general rule.

- 5.3 The only acceptable exceptions should be limited to: (a) parties' unanimous consent; (b) enforcement of the mediated settlement agreement, and (c) requirement imposed by law.

Yours faithfully



Thomas Tse
Secretary General
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