

**The Hong Kong Bar Association's Submissions on  
the Draft Practice Direction in respect of the  
Pilot Scheme for Voluntary Mediation in Petitions resented under Sections  
168A and 177(1)(f) of the Companies Ordinance, Cap. 32**

---

**A. General**

1. The Hong Kong Bar Association (“**HKBA**”) agrees that disputes raised in petitions presented under sections 168A and/or 177(1)(f) of the Companies Ordinance (Cap. 32) are the types of disputes that are amenable to voluntary mediation. The HKBA, however, takes the view that it will be desirable to clarify the exact scope of this Pilot Scheme. As it presently stands, it is not clear whether the reference to “purely disputes between shareholders” in paragraph 2 of the draft Practice Direction is intended to include disputes between some (as opposed to all) shareholders. It is not uncommon to find in a sections 168A and/or 177(1)(f) petition neutral shareholders who have not been joined as respondents or if joined, have no substantive involvement (as where no allegations have been made against them) in the proceedings. If it is the intention to extend voluntary mediation to petitions involving such neutral shareholders, consideration should be given as to what, if any, roles they should play in the process.

**B. Initiation of Mediation under the Pilot Scheme**

2. In relation to the contents of the Mediation Notice, the HKBA considers it appropriate and desirable to devise a standard form Notice to ensure that there is consistency in its format and contents, which is the usual requirement for all documents to be filed in Court.

3. As for the estimated costs mentioned in paragraph 3(3) of the draft Practice Direction, we propose that the estimate should extend to cover the costs of renting the venue for mediation.
4. The HKBA proposes that consistent with the requirement to file the Mediation Notice, the Respondent's Notice should also be filed in Court. This degree of formality is necessary as both documents will be considered by the Court at the time when it is asked to make a ruling on the process or in determining the question of costs.
5. It is suggested that a time limit be prescribed for the parties to make their applications described in paragraphs 7 and 8 of the draft Practice Direction as say, within 21 days of the filing of the Respondent's Notice.

**C. Voluntary Nature of Mediation under the Pilot Scheme**

6. The HKBA supports the proposal in paragraphs 11 to 13 of the draft Practice Direction.

**D. Costs Sanction**

7. The HKBA appreciates that paragraph 15 of the Practice Direction can provide comfort to litigants and may thereby be helpful in encouraging litigants to make use of mediation to resolve their disputes. However, whilst what takes place during a mediation is generally confidential and privileged, the jurisprudence in this regard is still developing. There may be circumstances (or perhaps exceptional circumstances) where certain matters which fall within the scope of paragraphs 15(1) to (3) may be taken into account by the Court when it comes to the consideration of costs. In such scenario, paragraph 15 may potentially be an unnecessary fetter on the Court's jurisdiction and there may also be issues as to whether a practice direction can prevent a Court from considering certain matters when the common law points to a different

direction. Having considered the matter in the round and to err on the safe side, the HKBA suggests that paragraph 15 of the draft Practice Direction be deleted so that the matter can be dealt with by the Court on the basis of applicable case law.

**E. Administration of Pilot Scheme**

8. The HKBA has no comments on the proposal in paragraphs 16 to 18 of the draft Practice Direction, save that it may be desirable to devise a standard form for the parties or their legal representatives to fill in for the purpose of lodging the report mentioned in paragraph 16.

Hong Kong Bar Association

6 March 2008