



## HONG KONG BAR ASSOCIATION

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2nd July 2011

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

Dear *Sou,*

### Draft Mediation Bill

I refer to your invitation dated 20th June 2011 inviting the Hong Kong Bar Association to comment on the Draft Mediation Bill.

Please find enclosed a copy of the Comments of the Hong Kong Bar Association dated 2nd July 2011 for your consideration. The Comments of which have been endorsed during the Bar Council Meeting held on 30th June 2011.

Yours sincerely,

*Kumar Ramanathan*  
Kumar Ramanathan SC  
Chairman

Encl.

### 香港大律師公會

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## DRAFT Mediation Bill

### COMMENTS FROM HONG KONG BAR ASSOCIATION

#### **A. Background to Consultation**

1. Following the Report of the Working Group on Mediation in 2010, the Secretary for Justice has formed a Mediation Task Force to advise on and assist in the implementation of the various recommendations of the Working Group on Mediation.
2. One of the recommendations is that:

“Hong Kong should have legislation on mediation which should be aimed at providing a proper legal framework for the conduct of mediation in Hong Kong. However, the legislation should not hamper the flexibility of the mediation process.”
3. The HKBA is invited to comment on the consultation draft of the proposed Mediation Bill (“the Draft Mediation Bill”).

#### **B. The Draft Mediation Bill**

4. The HKBA supports and welcomes the Draft Mediation Bill which is to provide a regulatory framework in respect of certain aspects of the conduct of mediation in Hong Kong, as more particularly detailed in Clause 2: Object of this Ordinance.

5. Clause 3: Interpretation

- (a) “Agreement to mediate” is defined with reference to “an agreement in writing by 2 or more persons to submit a dispute between them to mediation, whether the agreement is made before or after the dispute arises. The HKBA notes that agreement in writing is widely defined in the case of arbitration. See section 19 of the Arbitration Ordinance (Cap.609). The HKBA also notes that various mediation services providers in Hong Kong allows the parties to file in request for mediation forms separately for reaching the agreement in writing. As such, to retain flexibility to this important step in mediation, the HKBA is of the view that the meaning of “in writing” should be widely defined to more expressly encompass the current practices.
- (b) As regards HKMAAL, which is with the preliminary name of Hong Kong Mediation Accreditation Association Limited, it is understood that the key focus of this new entity to be set up is tasked to provide unification of accreditation of mediators. In this sense, the HKBA wonders whether consideration should be given to name this as Hong Kong Mediator Accreditation Association Limited to reflect its focus. This would avoid the impression or confusion to the public that it is the mediation process, rather than the mediators, that will be accredited.
- (c) As an agreement reached in mediation may not be related to settlement, the HKBA suggests considering to use “mediated agreement” rather than “mediated settlement agreement”.

6. Clause 4: Meaning of mediation

- (a) The HKBA notes that this definition is more specific in content than the loosely used one in practice during a mediation, namely “Mediation is a voluntary, non-binding, private dispute resolution process in which a neutral person, the mediator, helps the parties to

reach their own negotiated agreement.”.

- (b) On this, the HKBA suggests the explicit incorporation of the voluntary and consensual nature of the process of mediation.
- (c) Also, mediation is a fast developing discipline and narrow thereby restrictive definitions in the legislation should be avoided. For flexibility in the event of evaluative method is used, the HKBA suggests deleting “without adjudicating a dispute or any aspect of it”.
- (d) Since some sessions of mediation may be conducted otherwise than by way of in-person meetings, such as via teleconferencing, videoconferencing or web-conferencing, the HKBA suggests that consideration may be given to include these more specifically in this clause.

7. Clause 5: Mediation to which this Ordinance applies

For clarity and to cater for international mediations, the HKBA is of the view that consideration may be given to the meaning of “place of mediation”. Indeed, to cover the situation where the mediation is in part or in whole outside Hong Kong, the HKBA suggests adding “which states that the laws of Hong Kong shall apply” to this clause.

8. Clause 7: Default appointment of mediator

- (a) The HKBA notes that this is to cater for the situation where a designated appointment body fails to appoint a mediator and is modeled upon the concept of default appointment in arbitration.
- (b) In respect of arbitration, the Arbitration Ordinance (Cap.609) empowers the Hong Kong International Arbitration Centre to make default appointment of a mediator where the appointment of a mediator is provided for in an arbitration agreement<sup>1</sup>.

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<sup>1</sup> Section 32(1) of the Arbitration Ordinance (Cap.609) provides:

- (c) The HKBA notes that, unlike arbitration, mediation require the voluntary participation of the parties, who may simply walk out anytime. Therefore, the trust and confidence of parties in the default appointing body and the mediator to be appointed is crucial to the meaningful conduct of the mediation.
- (d) In order to clarify to users, the HKBA believes that consideration should be given to utilize a regime for such default appointment of mediators to be made with the track record of mediators and the provision of mediation services.

9. Clause 9: Confidentiality of mediation communications

- (a) As a proposed Bill intended to apply to all mediations, particular regard should be made to ensure that the current drafting may accommodate the confidentiality requirements and practices in various categories of mediations, including family mediations.
- (b) The HKBA considers that Clause 9(2)(b) should be more specifically defined to restrict its application to situation where a potential criminal offence involving personal injury or property damage may be considered.
- (c) As regards Clause 9(2)(d), the HKBA is of the view that, in its present form, disclosure under this should also include those proceedings challenging a mediated settlement agreement. For the confidentiality and integrity of the process of mediation, the HKBA wonders whether clause 9(2)(d) should be included.

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*“(1) If—*

*(a) any arbitration agreement provides for the appointment of a mediator by a person who is not one of the parties; and*

*(b) that person—*

*(i) refuses to make the appointment; or*

*(ii) does not make the appointment within the time specified in the arbitration agreement or, if no time is so specified, within a reasonable time after being requested by any party to make the appointment, the HKIAC may, on the application of any party, appoint a mediator.”*

10. Clause 10: Admissibility of mediation communication in evidence

- (a) The HKBA acknowledges the need to retain a judicial discretion to admit mediation communications in exceptional circumstances and is of the view that this should be properly regulated as confidentiality is the cornerstone for success in the mediation process.
- (b) Clause 10(1) applies to judicial, arbitral, administrative or disciplinary proceedings and this is wide in extent. Some of these proceedings in this clause may be open to the public. Thus, the safeguards provided in Clause 10(2) are very important.
- (c) The present wording in Clause 10(2)(c) is merely “any other relevant circumstances or matters”. In this regard, the HKBA is of the view that further guidelines would be helpful.
- (d) Indeed, The HKBA is of the view that the protective wall of privilege and confidentiality should only be lifted by a Court and, as such, consideration for deleting “arbitral, administrative or disciplinary” may be given.

**Hong Kong Bar Association  
2nd July 2011**