CLYDE&CO
其 禮 律 師 行

Update

Mediation Bill introduced into Hong Kong's Legislature

A view from Richard Keady and Warren Ganesh

Mediation is starting to have a central place in Hong Kong's reputation as an international and regional disputes resolution centre. In order to promote that reputation the Hong Kong Government will introduce a Mediation Bill (the Bill) into the local legislature on 30 November 2011. The other primary purpose of the Bill is to put the confidential nature of "mediation communications" on a statutory footing. These are laudable aims and are considered in more detail in this article.

Background

The Working Group on Mediation chaired by the Secretary for Justice published its report in February 2010 which was then open for consultation[1]. The Working Group's recommendations covered three main areas: the promotion of mediation, the establishment of a single accreditation body for mediators in Hong Kong and the Bill[2].

Following that consultation a Mediation Task Force was set up to advise on the implementation of the recommendations put forward in the Working Group's report.

The Bill should also be seen in the context of the development of mediation following the civil justice reforms in Hong Kong in April 2009. One of the key objectives of those reforms was the courts' encouragement of alternative dispute resolution processes, the most common of which is mediation. That objective is supported by the court's Practice Direction on Mediation that came into effect in January 2010 and provides for the possibility of adverse costs orders against a party who unreasonably fails to engage in mediation[3].

Anecdotal evidence to date is that while, in the main, mediation is being taken seriously by parties the success rate of mediated settlements is less than had been hoped for.

[1] http://www.doj.gov.hk/eng/public/mediation.htm
[2] See HKSAR government gazette 18 November 2011: http://www.gld.gov.hk/cgi-bin/gld/egazette/index.cgi?lang=e
[3] Practice Direction 31

Timetable

The Bill's first and second readings in the Legislative Council (Legco) are on 30 November 2011. Thereafter, Legco's House Committee will study the Bill and consider whether to appoint a Bills Committee to review it. It is too early to say whether the Bill will be passed this legislative term (which ends in the summer of 2012). If the Bill is not passed by then it will have to be reintroduced into Legco.

The Bill

Promotion of mediation

The Bill says little about how the Government proposes to promote mediation. The Government already encourages businesses and organisations to sign up to its "Mediation First Pledge"[4] to promote mediation in the resolution of disputes. A widely advertised Mediation Conference in 2012 is expected (following on from a similar initiative in December 2007), as are public broadcast announcements on television. Further initiatives were set out in a Department of Justice submission to Legco on 14 April 2011[5].

Definition

The Bill includes a definition of mediation, namely:

"Mediation is a structured process comprising one or more sessions in which one or more impartial individuals, without adjudicating a dispute or any aspect of it, assist the parties to the dispute to do any or all of the following:

(a) identify the issues in dispute;

(b) explore and generate options;

(c) communicate with one another;

(d) reach an agreement regarding the resolution of the whole, or part, of the dispute"[6].

This definition would include activity undertaken in arranging or preparing for the mediation, follow up on matters arising out of the mediation and also includes mediations in person or by electronic means.

The Bill applies to any agreement to mediate if the mediation is wholly or in part conducted in Hong Kong, or if an agreement to mediate provides that the Ordinance (as the Bill will be known if enacted) or the law of Hong Kong is to apply to the mediation[7].

It is also proposed that the Bill will apply to agreements to mediate entered into before or after the Bill comes into effect and to mediations that are conducted before or after that date. It is unusual for legislation to have retrospective effect. However, given that one of the main purposes of the Bill is to put the confidentiality of mediation on a statutory footing, the intention appears to be that this should also benefit agreements to mediate and future disputes arising out of mediations that are concluded before the Bill is passed.

The Bill applies to the Government in its mediations[8].

Schedule 1 of the Bill sets out a number of conciliation processes under various Ordinances to which the Bill does not apply; for example, certain Labour Tribunal conciliations and labour relations mediations, conciliations pursuant to certain discrimination Ordinances and "mediation-arbitrations" under the Arbitration Ordinance[9].

Accreditation

The Bill makes no mention of a single accreditation body for mediators. The Task Force considered that for now it was premature to have a statutory scheme for a single accreditation body. The Working Group recommended that this proposal be reviewed in five years.

Confidentiality

Arguably the most interesting aspects of the Bill are those sections that propose to put the confidentiality of mediation communications on a statutory footing. A mediation communication is defined as:

"Anything said or done, any document prepared or any information provided, for the purpose of or in the course of mediation, but does not include an agreement to mediate or a mediated settlement"[10].

The starting point, as with the case law, is that mediation is a confidential process and things said or written as part of that process are confidential and without prejudice. The confidentiality is either express as part of the mediation agreement and/or the mediation rules or implied and is as between the parties and the mediator. The without prejudice nature of mediation is as between the parties themselves, such that admissions made during the mediation are not admissible in court proceedings.

The Bill provides that a mediation communication must not be disclosed, except as provided for in the Bill[11]. The exceptions fall into two categories.

First, a mediation communication may be disclosed in a number of situations without needing the permission of the court. These situations include where: the parties and the mediator agree, the content of the mediation communication is information that is lawfully in the public domain, the content of the mediation communication is information that is "otherwise subject to discovery (of documents) in civil court proceedings", disclosure is necessary to prevent or reduce the danger of injury to a person, the disclosure is made for research purposes (without revealing the identity of the person to whom the communication relates) or the disclosure is made in accordance with law.

[4] http://www.mediatefirst.hk
[5] LC Paper No.CB(2)1480/10-11(80)
[6] Section 4
[7] Section 5
[8] Section 6
[9] See sections 32-33 Arbitration Ordinance (Cap.609)
[10] Section 2(1)
[11] Section 8(1)

These exceptions are not controversial, save that the reference to a mediation communication "otherwise subject to discovery in civil proceedings" is liable to confuse. We take this to refer to no more than a simple obligation to list a relevant document in a party's list of documents in a civil action. Documents that are without prejudice are not just confidential as between the parties they are also inadmissible as evidence at trial; nothing in the Bill should change that.

The second category includes a number of situations where a person may disclose a mediation communication if the prior permission of a court or tribunal is obtained. These situations include where a party seeks to enforce or to challenge a mediated settlement agreement, makes an allegation or complaint of professional misconduct against a mediator or:

"for any other purpose that the court or tribunal considers justifiable in the circumstances of the case".

Comment

The strength of mediation is that it is a consensual and confidential process, provided the courts do not interfere. These qualities are not to be underestimated. Clyde & Co advises on numerous alternative dispute resolution processes in Hong Kong and Asia, of which mediation is the most common.

The confidentiality of a mediation process is not absolute and pursuant to case law there are limited circumstances in which a party may refer to matters disclosed in a mediation. The Bill provides for these circumstances but it is the courts (as in other jurisdictions) that will be required to grapple with the legal niceties concerning privilege, confidentiality and without prejudice protection.

Privileged communications that are revealed to the mediator alone do not thereby lose their privileged status and are part of the "mediation secrets" as between the disclosing party and the mediator. Confidentiality is normally provided for as part of the mediation agreement and/or rules and is as between the parties and the mediator. Without prejudice protection is well recognised both in a mediation context and more generally in Hong Kong, where the courts have traditionally been slow to allow inroads into such protection. In one recent case the Court of Final Appeal of Hong Kong observed:

"The fundamental importance of confidentiality in mediation is universally acknowledged and it can only be in **highly exceptional** circumstances that evidence which invades such confidentiality will be permitted to be adduced"[12] (emphasis added).

If English law is anything to go by those circumstances may not be quite so exceptional. The courts there have undone the confidentiality of material used in a mediation if (among other things) it is in "the interests of justice to do so", which in effect mirrors the catch all proviso to confidentiality in the Bill; namely, where disclosure is "justifiable in the circumstances".

In *Farm Assist Limited (in liquidation) v DEFRA [2009] EWHC 1102* a mediator was found to be a compellable witness to give evidence in court proceedings between the parties concerning the validity of a mediated settlement agreement; the court found (in a case where the parties had agreed to waive the without prejudice protection in the mediation) that it was in the interests of justice to override the mediator's right to confidentiality.

A well established exception to the without prejudice protection is a communication that is admissible in court proceedings to establish whether a concluded settlement agreement has been reached. In *Oceanbulk Shipping & Trading SA v TMT Asia Limited and Ors [2011] 1 AC 662* the UK Supreme Court held that this exception extended to situations in which a party also sought to prove the meaning of a provision in a settlement agreement; the underlying rationale being that it was in the interests of justice that a party be allowed to rely on without prejudice communications to support the factual matrix and surrounding circumstances regarding the true construction of a settlement agreement[13].

If the intention of the Bill in this regard is to develop a form of "mediation privilege" and to make Hong Kong an even more attractive centre for dispute resolution then that is a laudable aim[14]. However, in any given dispute, it is still the courts that will have to decide between the competing policies of upholding confidentiality and without prejudice protection (in order to encourage frankness and settlement) on the one hand and the exceptions thereto based on the interests of justice or what is justifiable on the other. Nothing in the Bill is going to change that.

In the meantime parties, their advisers and mediators would do well to review with greater scrutiny the confidentiality provisions of agreements to mediate.

[12] Champion Concord Limited & Anor v Lau Koon Foo & Anor, FACV Nos.16 and 17 of 2010, 27 May 2011
[13] See ICS Limited v West Bromwich Building Society [1998] 1 All ER 98
[14] Also see section 18 Arbitration Ordinance (Cap.609)

Further information
If you would like further information on any issue raised in this update please contact:

Richard Keady
richard.keady@clydeco.com.hk

Warren Ganesh
warren.ganesh@clydeco.com.hk

Written by Warren Ganesh, Senior Consultant, Clyde & Co Hong Kong

Clyde & Co LLP
Hong Kong
Cheung Kong Center
19/F Cheung Kong Center
2 Queen's Road Central
Hong Kong

T: +852 2878 8600
F: +852 2522 5907

Shanghai
Level 23, Shanghai Two IFC
8 Century Avenue
Shanghai 200120, China

T: +86 21 6035 6188
F: +86 21 6035 6199

Further advice should be taken before relying on the contents of this summary.