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# The new Hong Kong mediation ordinance: Much ado about nothing?

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# The New Hong Kong Mediation Ordinance: Much Ado About Nothing?

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In June 2012 the Hong Kong Legislative Council passed the **Mediation Ordinance** (MO), the first piece of legislation on mediation in Hong Kong SAR. The MO was a much awaited and highly anticipated law and some mediation advocates have been disappointed in what they see as much ado about nothing. After all the MO appears as a very thin document containing only 11 provisions.

However the MO must be seen as part of Hong Kong's broader mediation landscape. As a member of the Mediation Taskforce that was responsible for the content of the MO, I can report that the Ordinance was the subject of serious international research and deliberation. It forms the pivotal piece of a broader legal landscape for the practice and professionalization of mediation in the Territory of Hong Kong.

What's not in the MO is equally as important as what is in it. So let's begin by looking at what the MO does not do, before considering what it does do.

The MO does not trigger mediation. In other words it does not provide any incentives for parties to attend mediation nor does it require them to do so. There are a number of practice directions in Hong Kong that have this function and they will be the subject of another blog posting.

Apart from offering a definition of mediation (ss 2 and 4), the MO does not regulate the internal process of mediation. As mediation is a flexible process, the Taskforce took the view that soft forms of regulation such as agreements to mediate (mediation agreements), codes of conduct and institutional rules such as the mediation rules of the HKIAC would be better suited to regulate process aspects of mediation. These 'soft' forms of regulation are subject to changes agreed to by the parties and therefore offer a higher level of flexibility than legislation ever could.

The MO does not deal with accreditation of mediators. Mediation is a field which is undergoing rapid professionalisation. In other words, it is developing as a profession. The important word here is 'developing'. As the profession of mediation develops, it is important to be able to adjust accreditation requirements as appropriate to achieve goals related to high levels of mediator competence and quality assurance in mediation service delivery. Again, legislation is a very precise tool and is not easily amended. For this reason an industry-based regulatory solution in the form of the Hong Kong Mediation Accreditation Association Ltd has been found for the time being at least. More on this later.

So the MO does not trigger mediation processes, it does not regulate the internal process of mediation, nor does it deal with mediator accreditation. So what does it do?

The MO primarily deals with rights and obligations of participants in mediation especially in relation to confidentiality and the non-admissibility of mediation evidence in court and other determinative tribunals.

The MO is a law of general application. It applies to all mediations and mediation communications where parties have entered into a written agreement to mediate (s 5). This provision aims to cover all professional mediations and not those mediations conducted on a non-professional basis, for example mediations conducted by village elders, school mediations and the like.

The MO applies to domestic and cross-border mediations (s 5) and it specifically applies to the government (s 6).

The MO specifically allows non-lawyers and foreign lawyers to participate in mediation is party representatives and advisers (s 7). This provision was drawn from the Hong Kong Arbitration Ordinance and is in line with the notion of

mediation is an interdisciplinary, interest-based process. In relation to cross-border mediations, this may be the case that non-Hong Kong law is applicable and here the need for foreign lawyers with expertise in the applicable law is apparent.

As indicated previously, the main focus of the MO is in relation to the rights and obligations associated with confidentiality and non-admissibility of mediation evidence in other fora (including judicial, arbitral, administrative or disciplinary proceedings). The relevant provisions are sections 8, 9 and 10. Section 8 deals with the general duty of confidentiality with which all participants in mediation must comply, section 9 deals with non-admissibility of mediation evidence and section 10 deals with obtaining leave of the court if one does wish to tender mediation evidence to the court.

Essentially mediation participants cannot disclose what has occurred in mediation to anyone outside the mediation, subject to certain exceptions. The exceptions should come as no surprise to readers familiar with mediation regulation in common law jurisdictions. They include exceptions relating to: consent to disclosure by the parties and relevant others, seeking legal advice, reporting concerns about the welfare of children or injury to a person, and the conduct of mediation research (s 8(2)). Information that is already in the public arena and that is subject to discovery remain are not affected by the confidentiality provisions (s 8(2)). Further exceptions relate to challenging or enforcing settlement agreements and allegations of professional misconduct in mediation, however here disclosure can only be made with the leave of the court (s 8(3)).

Where a person wants to admit mediation evidence in subsequent court or tribunal hearings, leave of the court must first be sought (s 9). Here s 10 provides that in exercising its discretion to grant leave, the court will be guided by the exceptions set out in s 8 (2) and (3).

Rights and obligations that relate to mediated settlements are not dealt with by the MO but rather left to the general law. Here the Taskforce adopted a view consistent with the practice in most common law countries, namely to preserve flexibility in relation to the nature of form of mediated outcomes. In other words, it is up to the parties and their representatives to determine the legal form of the mediated outcome, whether it be a legally binding contract, a settlement deed or a court order by consent.

Finally, the Taskforce formed the view that mediators, like other professionals, must be accountable for delivering mediation services to a professional standard and that such professional accountability would support the professionalisation of the field and encourage quality practice. As a result mediators are not granted immunity under the terms of the Ordinance. Most mediators will still have

provisions in their agreements to mediate limiting or excluding their legal liability. The effectiveness of these, however, are yet to be tested in court.

So there you have it. The MO was intended to provide a robust basic regulatory framework for mediation in Hong Kong to support and complement other regulatory activity in the field. And that is exactly what it does.