THE HONG KONG INSTITUTE OF
SURVEYORS

Your Ref: CB2/BC/2/11

6 January 2012

Clerk to Bills Committee
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Attn: Ms Flora Tai

Dear Sirs,

Bills Committee on Mediation Bill
Meeting on 13 January 2012

I refer to your letter dated 4 January 2012 and thank you for inviting The Hong Kong Institute of Surveyors to present its views on the Mediation Bill.

The Hong Kong Institute of Surveyors welcomes the introduction of the Mediation Bill ("the Bill) which was first introduced in the Legislative Council on 30 November 2011 for providing a regulatory framework in respect of certain aspects of mediation. The Institute would like to offer its comments, in particular on confidentiality of mediation communications addressed by the Bill.

1.0 Confidentiality of mediation communications

1.1 In mediation, we consider that communications which only amount to concessions, admissions and settlement offers should be kept confidential.

1.2 First, we consider the definition of "mediation communication" under Section 2 of the Bill may be problematic. While something "said" or "provided" may be regarded as a communication, there can be something "done" or "prepared" for "the purpose of" or "in the course of mediation" but "not communicated" but the Bill seems to nevertheless include them as "mediation communication" as well. Furthermore, even if only the final product of something done or prepared is communicated, the Bill seems to include working leading to the final product (for example, some calculations done or revised during the

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香港中環康樂廣場 1 號怡和大廈 8 樓801 室
Suite 801, 8/F Jardine House, 1 Connaught Place, Central, Hong Kong
Telephone: 2526 3679 Facsimile: 2868 4612 E-mail: info@hkis.org.hk Web Site: www.hkis.org.hk

course of mediation for the purposes of putting forward some settlement proposals) as "mediation communication" as well. Such definition of "mediation communication" is undesirable and wider than necessary. One may expect only the settlement figures which have been put forward in the mediation should be kept confidential but not the details leading to settlement figures.

1.3 In any event, it is submitted that even if the definition of "**mediation communication**" under Section 2 of the Bill is revised by changing "anything said or done" to "anything said or expressed", "any document prepared" to "any document prepared and communicated" and "any information provided" to "any information provided and communicated", the scope of confidentiality of mediation communications under the Bill is still more than necessary and this may discourage parties to go for mediation.

1.4 In a mediation of a construction case, parties in the mediation have to put forward their respective arguments, submissions, statements of positions/cases, evidence, valuations, expert reports, final accounts etc, which are within the definition of "mediation communication" under the Bill. If the mediation fails, the parties may have to put forward again their respective arguments, submissions, statements of positions/cases, evidence, valuations, expert reports, final accounts etc. The Bill however prohibits disclosing these unless Section 8(2) of the Bill applies (there is no guarantee on this and some mediation communications like arguments, submissions, statements of positions/cases and non-documentary evidence are not subjects of discovery) or to go through the trouble of having the court's leave successfully (this will no doubt have time and cost implications).

1.5 Taking an example, in a mediation, a party may put forward arguments, position, evidence, valuations, expert reports, final account etc to the opponent but accepts/admits that there is chance that he may not be entitled to what he claims in full in proceedings, and as a gesture of goodwill for business relationship, he offers to accept a lower figure as settlement in the mediation. If the mediation fails, he has to put forward again the same arguments, position, evidence, valuations, expert reports, final account etc in proceedings. All these, whilst are communicated in mediation, need to be put forward again in proceedings but the current Bill unrealistically prohibits disclosing these as a norm unless one can successfully (but not guaranteed) apply Sections 8(2), 8(3), 9 and 10 of the Bill.

1.6 With the Bill as it now stands, parties have to bear in mind that if they go for mediation, and if the mediation fails, there is a risk that what they have communicated in the mediation may not be put forward

again in subsequent proceedings when in reality, it is always necessary to repeat some (if not all) mediation communications (such as arguments, submissions, statements of positions/cases, oral evidence etc) in subsequent proceedings if the mediation fails. With this risk in mind, parties may be cautious to go for mediation or even if they do, they may be cautious in their communications rather than to communicate freely, frankly and without reservation, and thereby defeating the spirit of mediation and its effectiveness.

1.7 It is therefore submitted that the prohibition of disclosure under the Bill is too wide and unnecessary. By setting the starting point that no mediation communications can be disclosed unless Sections 8(2), 8(3), 9 and 10 apply, non-disclosure of mediation communications is the norm. It ignores the reality that some (if not all) mediation communications (such as arguments, submissions, statements of positions/cases, oral evidence etc) need to be repeated in subsequent proceedings if the mediation fails. Hence, a more sensible approach has to be adopted in such a way that only settlement offers (and admissions if any) given in a mediation should be kept confidential and this will already protect the parties from being prejudiced in subsequent proceedings.

2.0 Other areas

2.1 This bill is simple and practical to meet the imminent need to regulate mediation. We, however, note that there may be some other areas such as appointment and sanction of mediators, enforcement of mediation agreements, enforcement of mediated settlement agreements, the process and the practice standards, which have been regulated in various scales in other countries. It is therefore submitted that further public consultation and deliberation on these areas should be made. Hopefully by that time, a better view on the desirability of having a comprehensive legislation on mediation that suits the local situation will be established.

3.0 Recommendation

3.1 The Institute recommends redrafting the provisions on mediation communications (i.e. Clauses 2 and 8 to 10 of the Bill) to limit the extent of prohibition of disclosing communications in mediation to a sensible extent and the Bill should not be passed until such parts are carefully revised.

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3.2 A further sub-section under Section 8(2) to allow a party to disclose to its own legal advisors, financial advisors and auditors should also be considered (all can be outside companies and employed after the mediation and thus are third party to the mediation but such disclosure is necessary for normal conduct of business).

We hope that the above comments will be addressed and help the Legislative Council in reviewing the new legislation. Should you have any further queries on the above, please feel free to contact us.

Yours faithfully,

Serena Lau
President
The Hong Kong Institute of Surveyors

cc The Hon Professor Patrick Lau (By Fax Only 2147 9155)