



THE HONG KONG INSTITUTE OF SURVEYORS

Your Ref: SC 355/6/18(6.3)

14 March 2006

Secretary
Steering Committee on Civil Justice Reform
LG2, High Court Building
38 Queensway
Hong Kong

By Fax & Post
2501 4636

Attn: Miss Vega Wong

Dear Sir,

**Re : Draft Practice Direction 6.3
Pilot Scheme for Voluntary Mediation of Cases
in the Construction and Arbitration List**

I refer to your letter dated 10 February 2006.

On behalf of the Hong Kong Institute of Surveyors ("HKIS"), I thank you for giving us the opportunity to comment on the proposed pilot scheme of voluntary mediation in the Construction and Arbitration List of the High Court.

Within HKIS there is a Dispute Resolution Committee which looks after matters relating to dispute resolution, in particular mediation and arbitration. There are also six divisions in which there are members whose modes of practice are closely related to dispute resolution. It is therefore in the interest of HKIS to see the success of the pilot scheme.

In 2004, HKIS and the Hong Kong Institute of Architects ("HKIA") set up a joint panel of accredited construction mediators ("the HKIS/HKIA Joint Panel"). The members of the HKIS/HKIA Joint Panel are accredited based on a standard equivalent at least to those on the HKIAC panel of accredited mediators. Moreover, they have undertaken training specifically designed for construction disputes provided by an HKIAC accredited trainer with the same number of training hours as those accredited training courses offered by HKIAC. Most importantly, assessment of the mediation skills for the members was done by HKIAC accredited assessors based on the same criteria as those on the HKIAC general accredited mediators' panel save and except, as mentioned above, that the members are specifically trained for construction disputes. The HKIS/HKIA Joint Panel was set up to meet the requirement in the appointment of mediators in the new standard forms of building contracts, which give HKIS and HKIA the power of appointment of mediators and were published in March 2005.



HKIS is of the view that the HKIS/HKIA Joint Panel should be able to contribute towards the pilot scheme.

The HKIS has studied the Draft Practice Direction and the Draft Leaflet with the assistance of a special task force and the following are our initial comments (reference to paragraph numbers herein below are those in the Draft Practice Direction or the Draft Leaflet as the heading indicates, unless stated otherwise):

As to the preparation of the Draft Leaflet

1. Paragraph 3 in your letter dated 10 February 2006 mentioned a Mediation Working Party Interest Group consisting of representatives of Hong Kong organisations with an interest in construction mediation. With the above background, HKIS is disappointed that it has not been included as one of those representatives in the group. To enable the interest group to be accountable to the public, HKIS suggests that members of the group and the organisations which they represent should be made known to the public, and the representation should be as wide as to be able to cover all the relevant bodies.

As to the Draft Practice Direction

2. Paragraphs 5, 6 and 7 all relates to the same issue, namely the content of the Mediation Notice and it seems that the requirements stated therein should be better grouped under one paragraph instead of scattered in 3 paragraphs as is the present case.
3. In paragraph 6, as there may be different mediation rules available other than the HKIAC's, and that it may or may not be the case that the mediation rules would provide for the appointment of the mediator(s) (which is provided for in the case of the HKIAC mediation rules), it is suggested that "including the manner in which a mediator is to be appointed" should be amended to "including the proposed mediator or the manner in which a mediator is to be appointed where this is not provided in the proposed mediation rules".
4. In the last line of paragraph 6, it is suggested that a more exact description should be given to "the estimated costs". It is not clear whether it is referring to the total costs (for example, including all those charged by the parties' lawyers, expert witnesses, the mediator(s) and cost for the venue) or it refers only to the above costs excluding those for the lawyers and experts, and whether it is referring to one side's costs or both sides' costs.
5. In relation to the estimated costs in paragraph 6, naturally the party putting forward the estimate will be concerned about whether there will be any liability or consequence from any inaccuracy of the estimate. It is suggested that a statement to clarify this should be included.



6. In paragraph 8, follow from the suggestion in paragraph 3 herein above, it seems that there is nowhere for the Respondent to be able to respond to the proposal of mediator, if one is proposed, or the mediation rules to be used, it is suggested that the content of the Respondent's response should include "whether the Respondent agrees to the proposed mediator or the proposed mediation rules, as the case may be".
7. As to paragraph 11, where one party agrees in principle to mediation but rejects all other proposed points as provided for under paragraph 6 by providing an alternative set of responses or counter-proposals under paragraph 8, it seems that paragraph 13 could not deal with this as the difference is not limited to minimum participation.
8. Paragraph 12 deals with application for stay of the relevant action pending the progress of an agreement to mediate "reached in accordance with this Practice Direction". Depending on the true intention, it reads like once an agreement to mediate is reached, the action will continue despite the fact that mediation will go on at the same time. (please ignore this comment if this is what is intended)
9. Paragraph 13 relates to the judge's power to deal with the parties' difference on the minimum participation. It is suggested that the power should be extended to other aspects such as differences relating to time-table and rules of mediation.
10. Paragraph 14 reads like a recommendation for the court and hence a Practice Direction for judges (as to the time of hearing stay application) rather than for the parties' legal representatives and it seems that it should be more appropriately worded.
11. Paragraph 18 reads as if it is creating a piece of new law exclusively for mediation over and above the law of contract and it may need to be revised.
12. In paragraph 20, it seems that the last few words "may expose a party to an adverse costs order" could better be written as "may expose a party to the risk of an adverse costs order".
13. In paragraph 20, it seems that "unreasonable refusal" appears to be too uncertain a description and it may do the parties or their representatives more justice if more particulars can be given to elaborate on the meaning of "unreasonable refusal".
14. In paragraph 25(2), for the sake of completeness it is suggested to amend "the amount claimed ..." to "the amount claimed or counterclaimed ..."



As to the Draft Leaflet

15. Paragraph 7(e) relates to mediation settlement agreement. It is suggested that the advantage of a higher chance of a summary judgment in enforcing the settlement agreement compared to taking action based on the original contract can be included as an additional advantage of mediation.
16. In paragraph 10, given the above background information relating to the work done regarding mediation by HKIS and HKIA, it is suggested that HKIS (and HKIA) should be referred to regarding accreditation of mediators and the Code of Conduct.
17. In the third sentence of paragraph 12, "If issues are less complicated and the process goes smoothly, it may only take 2 or 3 mediation sessions of a day or less each for you to reach agreement" reads somewhat misleading as the chance of this happening is apparently quite remote (unless there is statistical data to suggest this is not the case). It is suggested to remove this sentence.
18. In paragraph 14, it is suggested to add after the last two words "particular charges" the following words "(subject to the terms of the settlement agreement if an agreement in respect of the charges can be reached subsequently)."
19. In paragraph 15(d), given the above background information regarding the work of mediation done by HKIS and HKIA, and they will publish their own mediation rules, it is suggested to change the sentence at the middle of the paragraph "In Hong Kong, mediation rules are published by the HKIAC (<http://www.hkiac.org>)" to "In Hong Kong, mediation rules are published by many different bodies, such as HKIAC (<http://www.hkiac.org>), HKIS (and HKIA)".
20. In paragraph 15(e), it is suggested that one hour is somewhat unrealistic for the purpose of minimum time for attendance and it is suggested to delete the words "one hour, or" in the second last line in that paragraph.
21. Paragraph 15(g) reads more like part of the Practice Direction than contents of a leaflet. It also seems that the paragraph is inconsistent with paragraph 12 of the Practice Direction (the former mentions joint application while the latter does not).
22. The section of "Sources of Further Information on Mediation": Given a lot of work relating to mediation has already been done by HKIS and HKIA, and given the scheme applies to mediation for construction disputes in which one could reasonably anticipate that members of HKIS and HKIA would likely be involved in different capacities, it is suggested that HKIS (and HKIA) should be included in the list as a source of further information on mediation.



All in all, HKIS supports in principle the proposed voluntary mediation scheme as transpired in the Draft Practice Direction and the Draft Leaflet and trusts that the scheme will be successful if information about the various service providers can be drawn to the attention of the parties.

HKIS has not been able to get HKIA's view where any of the above suggestions relates to HKIA. Therefore, where HKIA is referred to as part of the suggestions the term HKIA is always included in brackets to avoid confusion.

I hope the above has clarified the concern of HKIS and has sufficiently expressed the views of HKIS on the scheme, the Draft Practice Direction and the Draft Leaflet.

Should you have any enquiries about our views, please feel free to contact us.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Wong Chung Hang', is written over the closing text.

Wong Chung Hang
President