Kluwer Mediation Blog

How is med-arb regulated in Hong Kong?

Nadja Alexander (Editor) (Singapore International Dispute Resolution Academy) · Sunday, March 10th, 2013

In a previous posting I looked at Hong Kong's new Mediation Ordinance, which came into force on 1 January 2013. This legislative activity comes hot on the heels of a major revision of the Hong Kong Arbitration Ordinance which came into effect in 2011.

Given the increasing interest in multi-tiered dispute resolution (MDR) processes such as med-arb and arb-med-arb, I thought it would be useful to consider the application of these two ordinances to MDR practice in Hong Kong.

The Arbitration Ordinance (AO)
One of the underlying intentions of the revised AO was to encourage the use of:
• med-arb where a mediator is appointed to try to resolve the dispute before arbitral proceedings are commenced; and
• arb-med-arb where the arbitral tribunal assumes the role of mediator part way through the proceedings with a view to settlement of the dispute and encapsulates the terms of such settlement in a consent award.

Sections 32(3) and 33(1) and (2) of the AO deal with mediation and the appointment of mediators in an arbitration setting.

Section 32 (3) deals with the situation where mediation arises from an arbitration agreement in a med-arb procedure as described above. Section 33 (1) provides for the arb-med–arb procedure described above, namely that an arbitrator may act as a mediator after the arbitral proceedings have commenced, with the continued consent in writing from the parties. Section 33 (2) provides that where an arbitrator acts as a mediator, arbitral proceedings must be stayed to facilitate the conduct of the mediation proceedings.

Sections 33(3) and (4) of the AO deal with confidentiality of information obtained by an arbitrator acting as a mediator in conducting the mediation proceedings.

Section 32 (1) and (2) of the AO deals with default appointments of mediators by the HKIAC (Hong Kong International Arbitration Centre) in circumstances where an arbitration agreement provides for the appointment of a mediator.

The Mediation Ordinance (MO)

As explained in my December posting, the MO applies to all mediations where parties have entered into a written agreement to mediate (s 5 (1)). The MO applies to domestic and cross-border mediations (s 5(1)(a)) and it specifically applies to the government (s 6). However, there are some exceptions to the application of the MO. One of those exceptions relates to mediation proceedings referred to in ss 32(3) and 33 of the AO. In other words, the MO does not apply to mediation in med-arb or arb-med-arb processes. Here the AO applies.

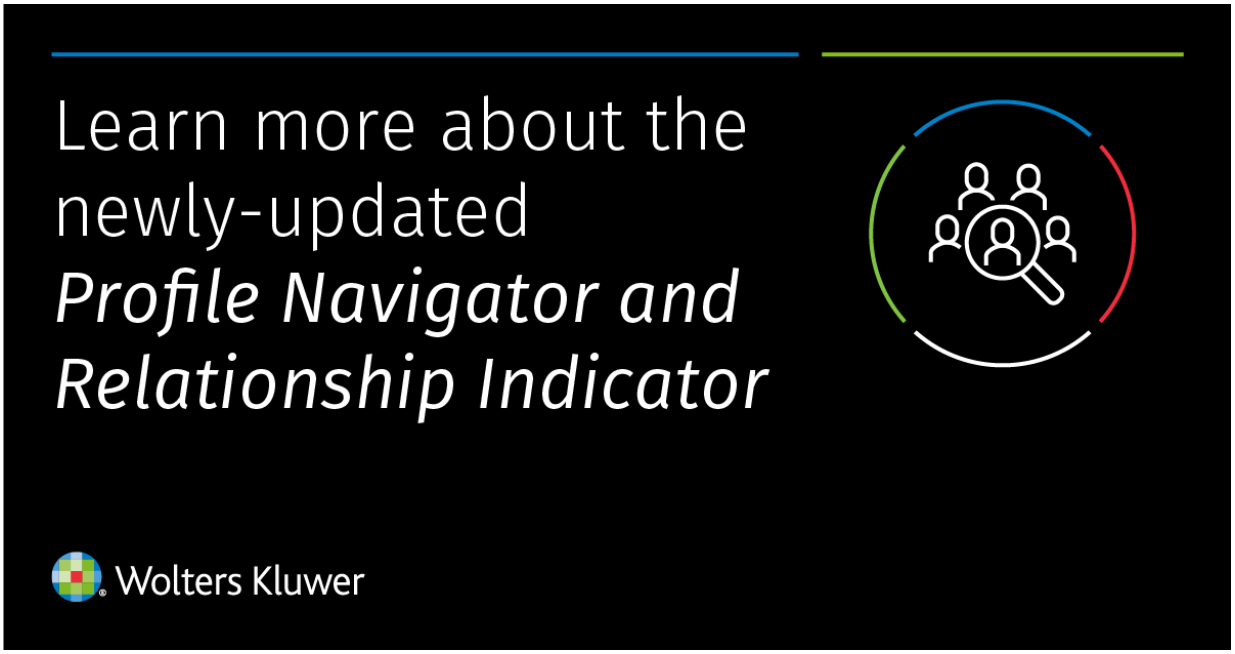
What does this mean? How are med-arb and arb-med-arb processes regulated in Hong Kong?

What this means is that mediation conducted as a part of an MDR process envisaged in ss 32 (3) and 33 (2) of the AO is governed by the AO (and not the MO). From a practical perspective, this means that the confidentiality of mediation and admissibility of mediation communications as evidence are regulated differently, depending on whether the mediation is conducted independently or as part of a specified MDR process. Of particular relevance here is s 33 (3) and (4) of the AO which deals with confidentiality of information obtained by an arbitrator acting as a mediator during mediation. For example, s 33(4) provides that where an arbitrator acts as mediator and the mediation does not result in settlement with the result that the arbitration resumes, then the arbitrator must disclose *all* confidential information revealed in private sessions to all parties.

It is important to note that the MO applies to general mediations (that is, mediation that is not part of a med-arb or arb-med-arb process as defined in the AO) conducted pursuant to an arbitration agreement. It also applies to mediations conducted by mediators appointed under the default appointment mechanism in s 32(1) of the AO. This is consistent with the legislative intention of the MO that mediation as a stand-alone process be regulated by the MO but mediation within or connected to arbitration proceedings continue to be regulated by the AO.

Why should mediation be dealt with differently if it is connected to an arbitration?

Although mediation and arbitration are both private dispute resolution processes, they are fundamentally different in terms of decision-making, nature of process, legal status of outcome and other factors. Mediation conducted within an arbitration framework, especially where the mediator also acts as the arbitrator, takes on a unique dynamic. Rules are required that specifically deal with issues that emerge around confidentiality, natural justice and other matters as one process transitions into the other.



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