

[Cursory translation]

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Guangdong-Hong Kong-Macao Greater Bay Area Mediator Code of Conduct Best Practice

(This Code was endorsed at the 3rd Guangdong-Hong Kong-Macao Bay Area Legal Departments Joint Conference on 10 December 2021 and came into effect on the day of publication.)

(A) Introduction

This document sets out the Guangdong–Hong Kong–Macao Greater Bay Area (hereinafter referred to as the “**GBA**”) mediator code of conduct best practice promulgated by the GBA Mediation Platform (hereinafter referred to as the “**Code**”), for reference of the mediation institutions of the three places when laying down their detailed professional code of conduct.

Against the background that there are three different jurisdictions in the GBA (the Mainland, Hong Kong and Macao), and that the models, systems, and developments of mediation vary in the three places, this Code may serve as a reference and basis for mediation institutions of the three places when developing their respective detailed professional code of conduct, having regard to their actual circumstances and operational needs.

(B) Fundamental duties and principles of a mediator

1. Neutrality

1.1. The mediator must act fairly in dealing with mediation participants and show no bias toward any mediation participant.

1.2. The mediator must have no personal interest in any mediated

settlement agreement.

2. Impartiality

2.1. The mediator must maintain impartiality toward all parties. Impartiality means no favoritism or bias towards any mediation participant either by word or by conduct, and a commitment to serve all mediation participants as opposed to a single party.

2.2. The mediator should disclose to all mediation participants any affiliations which the mediator may have or have previously had with any mediation participant (for example, professional acquaintance or personal friendship) and obtain all parties' informed consent prior to accepting the appointment as the mediator.

2.3. A mediator shall disclose all actual and potential conflicts of interest reasonably known to the mediator. After disclosure, the mediator shall decline to mediate unless all parties choose to retain the mediator.

2.4. A mediator shall be strictly disciplined and maintain his/her integrity, and shall not accept any favour, gift or other advantage from any mediation participant.

3. Informed consent

3.1. The mediator has an obligation to ensure that all participants understand the principles of the mediation process (voluntariness, parties' autonomy, confidentiality, impartiality, without-prejudice basis etc.), the role of the mediator (neutrality, assisting negotiation, without conflict of interest etc.), the mediation procedures, the mediation rules, and the degree of participation by all participants.

3.2. The mediator shall obtain each party's consent to proceed with mediation and where appropriate, ensure the presence of proper authority to engage in the mediation and/or reach settlement prior to the beginning of substantive negotiations.

3.3. The mediator should inform the mediation participants of their rights to withdraw from mediation at any time and for any reason. If the mediator believes that the mediation participants are unable or unwilling to participate effectively in the mediation process, the mediator should suspend or terminate the mediation.

4. Confidentiality

4.1. The mediator shall strictly adhere to the confidentiality principle, and shall not disclose any communications, information, private or business secret of any mediation participant obtained in the mediation process. The mediator shall also remind and ensure that the mediation participants understand their confidentiality obligations. The mediator may adopt special confidentiality measures based on actual circumstances of each case.

5. Competence as a mediator

5.1. The mediator shall be able to conduct or engage in mediation independently.

5.2. The mediator shall reasonably fulfil the request from mediation participants, ensure that all mediation participants fully understand the mediation process, and remain neutral and open-minded.

5.3. The mediator shall establish rapport with the mediation participants, instilling confidence in the mediator and the mediation process, thereby creating a positive atmosphere for the mediation process.

5.4. The mediator shall be able to draft an enforceable and valid written mediated settlement agreement, taking into account the enforceability issue in the context of cross-border disputes.

(C) The role and duties of a mediator

6. The role of a mediator

6.1. Managing joint and separate sessions appropriately.

6.2. Able to identify and summarise key issues, set and prioritise an appropriate agenda.

6.3. Facilitating and encouraging mediation participants to engage in direct dialogue to discuss the issues.

6.4. Identifying common ground(s) (if appropriate).

6.5. During separate sessions, uncovering interests, needs and concerns underlying the issues to assist the parties to understand the risks in maintaining their positions and develop their willingness to resolve the dispute.

6.6. Based on the knowledge and experience of the mediator, conducting case analysis, including assisting the parties to better understand their strengths and weaknesses in the dispute and making appropriate prediction or assessment on all potential outcomes in the litigation process.

6.7. Assisting the parties to understand the alternatives that they have and identifying the best and worst case scenarios if the dispute cannot be settled.

6.8. Facilitating and prompting the parties to generate potential settlement options.

6.9. Recognising deadlocks/impasses and displaying strategies for overcoming deadlocks/impasses.

6.10. Facilitating the mediation participants to negotiate, encouraging creativity from the mediation participants, transferring the mediation participants' needs into creative settlement options, creating value in their settlement options rather than merely suggesting making concessions on their bottom lines.

7. Duties of a mediator

7.1. The mediator shall explain that mediation is not arbitration,

legal submission, or therapy and that the mediator will not decide any issues for the parties.

7.2. In mediations in which mediation participants have no legal representation and substantial legal issues exist, the mediator shall encourage the mediation participants to obtain individual legal advice as is reasonably necessary for the parties to reach an informed agreement.

7.3. The mediator shall provide each mediation participant with full opportunities to effectively express his or her interests and facilitate mutual understanding.

7.4. The mediator has a duty to define and explain any fees for the mediation and to agree with the parties on how such fees are to be shared and the manner of payment before proceeding to substantive negotiations. The mediator shall not charge contingent fees or base fees upon the outcome of mediation.

7.5. Mediators shall use their knowledge to help educate the public about mediation; make mediation accessible to those who would like to use it; correct abuses of process; and improve their professional skills and abilities.

7.6. A mediator shall not engage in or act as the arbitrator, adjudicator, juror, mediator, witness, agent, or legal representative of any mediation participant in relation to the subject matter of a mediated dispute, except with the informed written consent of all mediation participants.

(D) Competency requirement of a mediator

8. Ethical requirements

8.1. Upholding the Constitution of the People's Republic of China, the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, the Basic Law of the Macao Special

Administrative Region of the People's Republic of China, and the "One country, two systems."

8.2. Financially stable, competent, honest, reliable and with good reputation.

9. Communication skills

9.1. Communicate confidently.

9.2. Appropriate eye contact and body language.

9.3. Active listening.

9.4. Acknowledge and support expression of concerns/emotions/feelings.

9.5. Summarising the viewpoints of mediation participants.

9.6. Encouraging/supporting participation.

9.7. Appropriate use of questions.

9.8. Reframing/rephrasing.

9.9. Appropriate use of tools.

9.10. Listing issues in neutral language.

10. Management skills

10.1. Patience, perseverance, composure.

10.2. Staying in control of the mediation process (appropriately assertive).

10.3. Avoiding dominating the process.

10.4. Appropriate time management.

10.5. Diffusing tension/managing conflicts, and appropriately addressing the emotions and viewpoints of mediation participants.

10.6. Appropriately managing any power imbalances.

10.7. Expectation management.

10.8. Smooth transition between each stage of the mediation process.

11. Negotiation skills

11.1. Identifying the issues for resolution.

11.2. Identifying and focusing the parties on underlying needs/interests of the parties.

11.3. Doubt creation.

11.4. Reality test.

11.5. Avoiding or managing impasses.

11.6. Assessing potential options/offers against alternatives.

11.7. Focusing on future.

12. Writing skills

12.1. Facilitating fine-tuning of settlement terms.

12.2. Ensuring all issues are addressed.

12.3. Clarity and specificity of agreed terms and obligations, and consolidating and summarising the settlement terms into the mediated settlement agreement.

12.4. Facilitating contingency arrangements if required.

12.5. Ensuring all parties have sufficient authority to sign and execute the mediated settlement agreement.

12.6. Commending the parties for participation and reminding them of their confidentiality obligation and their commitment to the mediated settlement agreement.

12.7. Facilitating signing and execution of the mediated settlement agreement.

12.8. If no agreement or partial agreement is reached, summarising progress, assisting parties to consider the way forward, and ending the mediation with a positive note.