

立法會
Legislative Council

Ref : CB4/BC/2/16

LC Paper No. CB(4)1110/16-17
(These minutes have been seen
by the Administration)

**Bills Committee on Arbitration and Mediation Legislation
(Third Party Funding) (Amendment) Bill 2016**

**Minutes of the first meeting
held on Tuesday, 14 February 2017, at 4:30 pm
in Conference Room 2A of the Legislative Council Complex**

Members present : Hon Dennis KWOK Wing-hang (Chairman)
Hon James TO Kun-sun
Hon Paul TSE Wai-chun, JP
Hon Jimmy NG Wing-ka, JP
Dr Hon Junius HO Kwan-yiu, JP
Hon Holden CHOW Ho-ding
Hon YUNG Hoi-yan
Hon CHAN Chun-ying
Dr Hon YIU Chung-yim

Members absent : Hon CHUNG Kwok-pan

Public officers attending : Item II

Department of Justice

Mr Peter WONG
Deputy Solicitor General (Policy Affairs)

Mr LEE Tin-yan
Senior Assistant Solicitor General
(Arbitration)

Miss Ada CHEN
Senior Assistant Law Officer
(Civil Law) (Mediation)

Ms Theresa JOHNSON
Law Draftsman

Mr Peter SZE
Senior Government Counsel

Ms Kristal CHAN
Government Counsel

Clerk in attendance : Ms Sophie LAU
Chief Council Secretary (4)6

Staff in attendance : Miss Evelyn LEE
Assistant Legal Adviser 10

Miss Joyce CHING
Senior Council Secretary (4)2

Ms Jacqueline LAW
Council Secretary (4)2

Miss Vivian YUEN
Legislative Assistant (4)2

I. Election of Chairman (and Deputy Chairman)

Mr Dennis KWOK, the member who had the highest precedence among members present at the meeting, presided over the election of the Chairman. He invited nominations for the chairmanship of the Bills Committee.

2. Mr Jimmy NG nominated Mr Dennis KWOK and the nomination was seconded by Ms YUNG Hoi-yan. Mr Dennis KWOK accepted the nomination. As there was no other nomination, Mr Dennis KWOK was declared Chairman of the Bills Committee.

3. Members agreed that there was no need to elect a deputy chairman of the Bills Committee.

II. Meeting with the Administration

- | | | |
|---------------------------------|----|---|
| File Ref.: LP 19/00/16C | -- | Legislative Council ("LegCo") Brief |
| LC Paper No. CB(3)247/16-17 | -- | The Amendment Bill |
| LC Paper No. LS23/16-17 | -- | Legal Service Division Report |
| LC Paper No. CB(4)548/16-17(01) | -- | Letter from the Department of Justice dated 10 February 2017 responding to the letter dated 27 January 2017 from the Assistant Legal Adviser of the LegCo Secretariat |
| LC Paper No. CB(4)548/16-17(02) | -- | Marked-up copy of the Amendment Bill prepared by the Legal Service Division (Restricted to members) |
| LC Paper No. CB(4)548/16-17(03) | -- | Background brief on the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 prepared by the LegCo Secretariat |

Discussion

4. The Bills Committee deliberated (Index of proceedings attached at **Annex**).

5. The Chairman declared that he had been engaged to handle arbitration cases.

Clause-by-clause examination of the Bill

6. The Bills Committee had completed clause-by-clause examination of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment)

Admin

Bill 2016 ("the Bill"). Members noted the Administration's intention to propose Committee stage amendments ("CSAs") to the Bill in respect of Clause 4 of the Bill to amend the Mediation Ordinance (Cap. 620). To facilitate discussion at the next meeting, members noted that the Administration's proposed CSAs would be circulated to members for consideration as soon as practicable.

Follow-up actions required of the Administration

Admin

7. The Administration was requested to:

- (a) provide a written response on whether legal practitioners are permitted under the Bill to charge and/or receive a fixed referral fee/commission from (i) the clients and (ii) the third party funders in the event that a legal practitioner referred a third party funder to his/her client with a view to facilitating the client's obtaining funding for the arbitration;
- (b) further clarify whether the provision of arbitration funding by a lawyer should be excluded from the definition of third party funding of arbitration under the Bill and explain the relevant policy consideration;
- (c) consider expressing the term "common barrator" and its corresponding Chinese rendition "唆訟者" in the new section 98K in a more modern and comprehensible manner, or providing a definition of the term in the Bill;
- (d) clarify whether the advisory body appointed under the new section 98W has the power to disclose information which is received by the said body pursuant to the new section 98P to the public, in particular that relating to any complaints made against a third party funder by a funded party received by the third party funder concerned during a reporting period, and any findings by a court or arbitral tribunal of a third party funder's failure to comply with the code of practice to be issued under the new section 98O; and
- (e) consider providing for the power referred to in paragraph (d) above in the Bill expressly if the answer to paragraph (d) above is in the affirmative.

(*Post-meeting note:* the Administration's response was circulated to members vide LC Paper No. CB(4)620/16-17(02) issued on 27 February 2017.)

III. Any other business

Date of next meeting

8. The Chairman advised that the next meeting would be held on 28 February 2017 at 8:30 am.
9. There being no other business, the meeting ended at 5:52 pm.

Council Business Division 4
Legislative Council Secretariat
29 May 2017

**Bills Committee on Arbitration and Mediation Legislation
(Third Party Funding) (Amendment) Bill 2016**

**Proceedings of the first meeting
held on Tuesday, 14 February 2017, at 4:30 pm
in Conference Room 2A of the Legislative Council Complex**

Time Marker	Speaker(s)	Subject(s)	Action required
Election of Chairman			
000230-000319	Mr Dennis KWOK Mr Jimmy NG Ms YUNG Hoi-yan	Election of Chairman Mr Dennis KWOK was elected Chairman of the Bills Committee ("BC") Members agreed that there was no need to elect a deputy chairman of the BC	
Meeting with the Administration			
000319-000705	Chairman Administration	Briefing by the Administration on the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 ("the Bill")	
000705-001200	Mr Jimmy NG Chairman Administration	Mr Jimmy NG's enquiry on whether and how an agent which referred or introduced a party to an arbitration to a third party funder for the purpose of providing third party funding arrangement for the arbitration would be regulated by the Bill. The Chairman also enquired whether the agent involved in such introduction or referral would be regulated by the code of practice ("the Code") to be issued under the new section 98O. The Administration's response that – (a) an agent involved in such introduction or referral which did not fall within the definition of "third party funding of arbitration" under the Bill would not be	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>covered by the Bill and would be subject to the common law principles;</p> <p>(b) in Singapore, the Civil Law (Amendment) Bill 2016 passed in January 2017 expressly provided that a solicitor was not prevented by section 107 of the Legal Profession Act (Cap. 161) from introducing or referring a third party funder to the solicitor's client, so long as the solicitor did not receive any direct financial benefit from the introduction or referral;</p> <p>(c) the Bill merely aimed at clarifying that third party funding of arbitration as defined under the new section 98G was not prohibited by the common law doctrines of maintenance and champerty.</p>	
001200-001655	Mr CHAN Chun-ying Administration Chairman	<p>Mr CHAN Chun-ying's enquiry and the Administration's response on whether the views of major chambers of commerce in Hong Kong had been sought during the consultation process. The Administration pointed out that according to Annex 2 to the Report on Third Party Funding for Arbitration published by the Law Reform Commission of Hong Kong ("LRC"), 73 respondents had given their views on third party funding for arbitration, including the Hong Kong General Chamber of Commerce, the International Chamber of Commerce – Hong Kong, different arbitral bodies, the business sector, the legal sector, and government departments, etc. Hence, an extensive consultation had been conducted.</p> <p>Mr CHAN Chun-ying sought clarifications on whether the non-application of the doctrines of maintenance and champerty applied to</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>third party funding of arbitration without a written funding agreement.</p> <p>The Administration advised that in practice and with reference to the experience of overseas common law jurisdictions, the claim value involved in a funding agreement made between a funded party and a third party funder for third party funding of arbitration was often very large. For instance, a third party funding entity in Australia required a minimum claim value of AUD10 million dollars for third party funding of arbitration. In the light of this, it was envisaged that a written funding agreement would usually be used to set out all the key terms and conditions in relation to third party funding of arbitration. Furthermore, the Code to be issued by the authorized body was specifically empowered under the new section 98P(1)(b) to require third party funders to ensure that a funding agreement set out its key features, risks and terms. Hence, the Administration took the view that it was desirable to require a funding agreement to be in writing in order to be covered by the Bill.</p>	
001655-002135	Mr Holden CHOW Administration	<p>Mr Holden CHOW sought confirmation regarding whether legal practitioners were permitted under the Bill to charge any fee and/or receive any benefit from the clients and the third party funders in the event that a legal practitioner referred a third party funder to his/her client with a view to facilitating the client's obtaining funding for the arbitration.</p> <p>The Administration drew reference to the relevant legislation in Singapore, under which a solicitor was not prohibited from introducing or referring a third party funder to the solicitor's client so long as the solicitor</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>did not receive any direct financial benefit from the introduction or referral. The Administration advised that a third party funding arrangement for arbitration had to satisfy the definition as specified in the new section 98G in order to be covered by the Bill. Otherwise, such third party funding arrangement would be subject to common law principles. In contrast, the new section 98G(2) expressly provided that third party funding of arbitration did not include the provision of arbitration funding by a person practising law, or providing legal services.</p>	
002135-002712	Dr Junius HO Administration Chairman	<p>Whilst expressing his support to the Bill, Dr Junius HO queried why only the legal profession, but not professionals in other disciplines, was excluded from providing third party funding of arbitration under the new section 98G(2). He considered it unfair to apply the exclusion solely to persons practising law or providing legal services in Hong Kong or elsewhere.</p> <p>The Administration responded that the current legislative proposal purposely did not cover the provision of arbitration funding directly or indirectly by a person practising law or providing legal services. In Hong Kong, neither a barrister nor a solicitor might enter into a conditional or contingency fee arrangement to act in contentious business. The issue of lawyers' funding a party's participation in arbitration or litigation proceedings was regulated under another regime which had been studied by the LRC in its previous report concerning conditional and contingency fees published in 2007. The Administration stressed that the subject of conditional and contingency fees went beyond the LRC's review on third party</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>funding for arbitration and the scope of the present legislative exercise because it was a much wider issue which warranted deeper considerations. In this connection, the Administration agreed with the LRC's recommendation on excluding any funding provided by a person practising law or providing legal services from the definition of third party funding of the Bill.</p>	
002712-002857	Chairman Administration	<p>At the request of the Chairman, the Administration further advised that as explained in paragraphs 18 to 23 in its letter dated 10 February 2017 (LC Paper No. CB(4)548/16-17(01)), the Government agreed to the LRC's recommendation that it was in the public interest that lawyers should focus on their provision of professional services to their clients and should not place themselves in a conflict of interest position by engaging in the business of third party funding.</p>	
002857-003454	Dr YIU Chung-yim Administration Chairman	<p>Dr YIU Chung-yim's enquiry and the Administration's response regarding whether the provision of mediation funding by government departments or non-government organizations ("NGOs") was under the regulation of the Bill. The Administration clarified that mediation was not a legal action or legal proceedings per se, and was also very different from litigation (and arbitration) in that mediation did not involve any adjudication of legal rights or liabilities by a third party. Hence, funding of mediation, which encouraged settlement of disputes, would not in principle fall foul of the common law doctrines of maintenance or champerty.</p> <p>Dr YIU's further enquiry as to whether the provision of arbitration funding by</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>government departments or NGOs was under the regulation of the Bill. The Administration advised that one of the essential features of third party funding of arbitration was that the arbitration funding was provided in return for the third party funder receiving a financial benefit only if the arbitration was successful. Since the arbitration funding from the government departments or NGOs was not provided in return for a financial benefit, such provision of funding would not fall within the scope of third party funding of arbitration and therefore would not be subject to the provisions of the Bill.</p>	
003454-003813	<p>Chairman Mr Holden CHOW Administration</p>	<p>The Chairman took the view that a lawyer who received any commission from a third party funder for referring or introducing the third party funder to a client without notifying the client about the receipt of commission was contravening the relevant professional codes of conduct and was also in breach of the Prevention of Bribery Ordinance (Cap. 201).</p> <p>In response to Mr Holden CHOW's enquiry, the Administration undertook to provide a written response on whether legal practitioners are permitted under the Bill to charge and/or receive a fixed referral fee/commission from (i) the clients and (ii) the third party funders in the event that a legal practitioner referred a third party funder to his/her client with a view to facilitating the client's obtaining funding for the arbitration.</p>	<p>Admin (paragraph 7(a) of the minutes)</p>
Clause-by clause examination of the Bill			
003813-004923	<p>Chairman Administration</p>	Part 1 – Preliminary	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p><u>Clauses 1 and 2</u></p> <p>Part 2 – Amendment to Arbitration Ordinance ("AO")</p> <p><u>Clause 3 – sections 98E to 98M</u></p>	
004923-005149	Chairman Administration	<p><u>Clause 3 – section 98K</u></p> <p>The Chairman requested the Administration to consider expressing the term "common barrator" and its corresponding Chinese rendition "唆訟者" in the new section 98K in a more modern and comprehensible manner, or providing a definition of the term in the Bill.</p> <p>The Administration explained that the term "common barrator" referred to a person funding vexatious litigation and engaging in champerty over and over again. The Chinese rendition "唆訟者" emphasized the meaning of repeatedly abetting others to conduct vexatious litigation. The Administration also pointed out that barratry was a subset, or an aggravated form, of maintenance, in that barratry added frequency to the string of elements for maintenance.</p>	Admin (paragraph 7(c) of the minutes)
005149-005459	Mr CHAN Chun-ying Administration	<p><u>Clause 3 – section 98N</u></p> <p>The Administration's response to Mr CHAN Chun-ying's enquiry in relation to the definition of costs. The Administration advised that the definition of costs in the new section 98N put emphasis on the costs and expenses of arbitration services provided in Hong Kong.</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
005459-010545	Administration Chairman	<p><u>Clause 3 – sections 98O to 98R</u></p> <p>The Chairman's enquiry as to whether the advisory body to be appointed under the new section 98W had the power to disclose information which was received by the said body pursuant to the new section 98P to the public, in particular that relating to any complaints made against a third party funder by a funded party received by the third party funder concerned during a reporting period, and any findings by a court or arbitral tribunal of a third party funder's failure to comply with the Code to be issued under the new section 98O. The Administration undertook to provide a written response in this regard.</p>	Admin (paragraph 7(d) and (e) of the minutes)
010545-010904	Mr Holden CHOW Chairman Administration	<p>Mr Holden CHOW noted that although the new section 98P spelt out the content of the Code, there was no licensing mechanism to regulate the third party funders. Mr CHOW expressed concern that the advisory body was not given the express power to disclose the information received by the advisory body regarding the non-complying act of the third party funders. The Chairman expressed a similar view.</p> <p>The Administration advised that in order to safeguard the interest of funded parties, the new section 98M expressly provided that the new sections 98K and 98L in the Bill did not affect any rule of law as to the cases in which a contract was to be treated as contrary to public policy or otherwise illegal.</p> <p>The Administration further pointed out that according to the recommendation of the LRC, a "light touch" approach to the regulation of third party funding for arbitration in Hong Kong should be adopted for an initial period</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>of three years, such an approach was in line with the main trend in other overseas jurisdictions, e.g. England and Wales. The Administration also agreed with the LRC's recommendations that there should be a review three years after implementation of the Code. In the meantime, the advisory body could at the end of each year review whether or not to speed up the process for considering other forms of regulation such as regulation by an independent statutory or other form of body.</p>	
010904-011038	<p>Ms YUNG Hoi-yan Administration Chairman</p>	<p>Ms YUNG Hoi-yan's view that a complaints procedure against third party funders should be specified in the Bill.</p> <p>The Administration responded that although the proposed new section 98R(1) provided that a failure to comply with a provision of the Code did not, of itself, render any person liable to any judicial or other proceedings, the Code was, as stipulated under the new section 98R(2), admissible as evidence, and any compliance, or failure to comply, with a provision of the Code might be taken into account by any court or arbitral tribunal if it was relevant to a question being decided by the court or arbitral tribunal.</p>	
011038-011114	<p>Chairman Administration</p>	<p>In response to the Chairman's enquiry, the Administration agreed that the scope of the Code could cover mediation to which the Mediation Ordinance (Cap. 620) applied. The Administration advised that it was up to the authorized body appointed under the new section 98W(2) to consider and decide whether using the same Code as that for arbitration to cover mediation or drafting a new set of Code specifically for mediation would be the more appropriate option.</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
011114-011350	Chairman Administration	<u>Clause 3 – sections 98S to 98V</u>	
011350-011440	Chairman Administration	<p><u>Clause 3 – section 98W</u></p> <p>The Chairman's enquiry and the Administration's response regarding the membership of the advisory body and the authorized body. According to the LRC's recommendation, the advisory body should comprise representatives of primary stakeholders or interested parties in third party funding.</p>	
011440-011728	Chairman Administration	<p>Part 3 – Amendment to Mediation Ordinance ("MO")</p> <p><u>Clause 4 – section 7A</u></p> <p>The Chairman's enquiry as to whether third party funding of mediation in respect of the mediation covered neither by the AO nor the MO would be allowed after the passage of the Bill.</p> <p>The Administration responded that while the above circumstance mentioned by the Chairman was not regulated by the Bill, it would be subject to common law principles instead. The Administration clarified that as explained earlier, mediation was very different from litigation (and arbitration) in that mediation did not involve any adjudication of legal rights or liabilities by a third party. In principle, assisting in or facilitating the settlement of disputes through mediation would not conflict with the common law doctrines of maintenance and champerty. As such, the said common law doctrines would not apply to mediation covered neither by the AO nor the MO.</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>The Administration supplemented that the new section 7A to the MO extended the application of the new Part 10A of the AO to mediation to which the MO applied and to funding of services provided in Hong Kong for non-Hong Kong mediation.</p>	
011728-012000	Chairman Administration	<p>The Administration expressed its intention to propose Committee stage amendments ("CSAs") to the Bill in respect of Clause 4 of the Bill to amend the MO. The BC requested the Administration to provide the draft CSAs to the Secretariat after the meeting for circulation to members for consideration.</p>	Admin (paragraph 6 of the minutes)
Any other business			
012000-012134	Chairman Administration	Date of next meeting	
012134-012345	Chairman Dr Junius HO Administration	<p>Dr Junius HO said that he might consider proposing CSA to delete the new section 98G(2).</p> <p>The Administration emphasized that it did not consider it appropriate in the present legislative exercise to touch on issues relating to allowing the legal profession to provide third party funding, as this might open up complex legal policy issues which went beyond the scope of the Bill.</p> <p>The Chairman took the view that the Administration should pay heed to the views of Dr Junius HO and further explain its policy considerations in this regard.</p>	Admin (paragraph 7(b) of the minutes)

Council Business Division 4
Legislative Council Secretariat
29 May 2017