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Report of the Bills Committee on Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016

Purpose

This paper reports on the deliberations of the Bills Committee on Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 ("the Bills Committee").

Background

2. The legal doctrines of maintenance and champerty, developed some 700 years ago under English common law, have been held by the Hong Kong courts to prohibit third party funding of court litigation both as a tort (civil wrong) and as a criminal offence, save in three exceptional areas: (1) where a third party can prove that it has a legitimate interest in the outcome of the litigation; (2) where a party can persuade the court that it should be permitted to obtain third party funding to enable it to have access to justice; and (3) a miscellaneous category of proceedings including insolvency proceedings.

3. According to the Administration, whilst the Hong Kong courts do not object, in principle, to third party funding of arbitration and related proceedings (including mediation), it is unclear whether the doctrine of maintenance and champerty also apply to third party funding of arbitrations taking place in Hong Kong. Indeed, the Court of Final Appeal judgment in *Unruh v Seeberger*[1] expressly left open this question.

4. In 2013, the Chief Justice and Secretary for Justice asked the Law Reform Commission of Hong Kong ("LRC") to review the position relating

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1 (2007) 10 HKCFAR 31, at para 123.

to third party funding for arbitration for the purposes of considering whether reform was needed, and if so, to make such recommendations for reform as appropriate. In June 2013, the Third Party Funding for Arbitration Subcommittee of the LRC (the "LRC Sub-committee") was appointed to review the subject. On 19 October 2015, the LRC Sub-committee published a consultation paper on *Third Party Funding for Arbitration* (the "Consultation Paper") with a proposal to amend the relevant legislation.

5. According to the Administration, based on the 73 submissions received from different sectors, including accounting firms, arbitral institutions, arbitrators, barristers, chambers of commerce, consumer/public interest groups, the financial sector, third party funders, law firms, professional bodies, academics and others, the LRC concluded that reform of Hong Kong law is needed to clearly state that the said common law doctrines do not prevent third party funding of arbitration and associated proceedings under the Arbitration Ordinance (Cap. 609) ("AO").

6. The LRC further recommended that third party funders funding arbitration should be required to comply with a code of practice ("the Code") issued by a body authorized under the AO. The LRC took the view that the Code should set out the standards and practices (including financial and ethical standards) with which third party funders would ordinarily be expected to comply in carrying on activities in connection with third party funding of arbitration[2].

7. The LRC also recommended that consideration should be given to whether consequential amendments to the Mediation Ordinance (Cap. 620) ("MO") should be made so as to extend the proposals described in paragraphs 5 and 6 above to mediation within the scope of the MO[3]. After the completion of its study, the LRC released the Report on *Third Party Funding for Arbitration* (the "Report") on 12 October 2016.

8. The Administration takes the view that, from the perspective of promoting Hong Kong as an international arbitration centre and for the purpose of clarifying the law, the law reform proposed by the LRC is desirable, so that Hong Kong, as one of the leading centres for international legal and dispute resolution services in the Asia Pacific region, can keep up with the latest development in international arbitration and thereby enhance its competitive position.

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[2] See Recommendation 3(3) of the Report.

[3] See Recommendation 1(2) of the Report.

9. The Administration, having consulted the Steering Committee on Mediation, also agrees with the recommendation of the LRC that consequential amendments should be made to the MO at the same time as the above proposed amendments to the AO. This would extend the non-application of the doctrines of maintenance and champerty (both as to civil and criminal liability) to mediation within the scope of the MO.

10. At the meeting on 20 December 2016, the Executive Council advised and the Chief Executive ordered that the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 be introduced into the Legislative Council ("LegCo"), so as to amend the AO and the MO to clarify that third party funding of arbitration and mediation is not prohibited by the common law doctrines of maintenance and champerty; and provide for related measures and safeguards.

The Bill

11. The Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 ("the Bill") was published in the Gazette on 30 December 2016 and introduced into the LegCo on 11 January 2017. The Bill seeks to amend the AO and the MO to ensure that third party funding of arbitration and mediation is not prohibited by the common law doctrines of maintenance and champerty, and to provide for related measures and safeguards[4].

12. An overview of the main provisions of the Bill is set out in **Appendix I**.

The Bills Committee

13. At the House Committee meeting on 13 January 2017, members agreed to form a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix II**.

14. Under the chairmanship of Hon Dennis KWOK Wing-hang, the Bills Committee held four meetings to deliberate on the details of the Bill with the Administration.

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[4] See the Long Title of the Bill.

Deliberations of the Bills Committee

15. The Bills Committee generally supports the Bill. During the course of examination, the Bills Committee has focused on a number of areas, including the meaning of third party funding of arbitration (paragraphs 16 – 33), meaning of funding agreement and third party funder (paragraphs 34 – 39), safeguards to be provided by the Code and consequences of non-compliance (paragraphs 40 – 50) and application of the new Part 10A of the AO to mediation to which the MO applies (paragraphs 51 – 62). The deliberations of the Bills Committee are summarized in the ensuing paragraphs.

Meaning of third party funding of arbitration – new section 98G

Definition

16. It is noted that the new section 98G defines the meaning of the term "third party funding of arbitration". In gist, it means the provision of arbitration funding by a third party funder to a funded party under a written funding agreement and, in return, for the third party funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement. It is also noted that under the new section 98G(2), third party funding of arbitration excludes the provision of arbitration funding directly or indirectly by lawyers and persons providing legal services. Hence, the Bills Committee requests the Administration to explain the relevant policy considerations.

17. The Administration has advised that as noted in paragraph 3.9 of the Consultation Paper, lawyer funding of a party's participating in the arbitrations or litigation proceedings may occur through the use of fee arrangements under which a lawyer agrees to represent a party at a discount or for no fee, but with a success fee payable in the event of a favourable outcome[5]. The case will therefore be fully or partly funded out of the working capital of the lawyer's firm. The Administration has further advised that depending on the jurisdiction, fee arrangements may take the form of speculative[6] or no win/no fee agreements and conditional[7] or

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5 Australian Productivity Commission, Access to Justice Arrangements, Draft Report (2014), at 524.

6 An arrangement where a lawyer is entitled to charge his/her normal fee only in the event of successful litigation. A lawyer will not be entitled to a fee if the action does not succeed. See The Law Reform Commission of Hong Kong, *Consultation Paper on Conditional Fees* (2005), at paragraph 8.

7 An arrangement where, in the event of success, the lawyer charges his usual fee plus an agreed flat amount or percentage "uplift" on the usual fee. The additional fee is often referred to as an *"Uplift Fee"* or a *"Success Fee"*. See The Law Reform

contingency fee[8] agreements. Damages based agreements may also apply, where a success fee is charged as a percentage of any recovery in proceedings[9].

18. The Administration has pointed out that according to paragraph 3.68 of the Consultation Paper, neither a barrister nor a solicitor in Hong Kong may enter into a conditional or contingency fee arrangement to act in contentious business. These restrictions stem from legislation, professional conduct rules, and the common law.

19. The Administration has further advised that it 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 (see paragraph 3.36 of the Report).

20. The Administration has stressed that the subject of conditional fees is a separate LRC reference[10] and it was therefore excluded from the LRC recommendations with respect to third party funding for arbitration. The Administration has advised that the subject of conditional and contingency fees went beyond the LRC's review on third party funding for arbitration and the scope of the present legislative exercise because it was a much wider issue which warranted deeper considerations.

21. Hon YUNG Hoi-yan asks whether a lawyer is allowed to provide arbitration funding so long as the lawyer and lawyer's firm is not a party to the relevant arbitral proceedings. The Administration has advised that given the complex commercial relationships that a lawyer might have with the lawyer's clients and business partners, particularly in a commercialized society like Hong Kong in which some unscrupulous recovery agents are found, the policy objective of the Bill is to exclude arbitration funding provided by a person practising law or providing legal services (whether in Hong Kong or elsewhere) from the definition of the provision of arbitration funding under the Bill.

Commission of Hong Kong, *Consultation Paper on Conditional Fees* (2005), at paragraph 7.

[8] An arrangement between lawyer and client whereby the lawyer receives additional fees or a percentage uplift of a lawyer's usual fees upon the success of litigation. A "Contingency Fee" has been defined as meaning a "percentage fee", whereby the lawyer's fee is calculated as a percentage of the amount awarded by the court (see Consultation Paper paragraph 3.11)

[9] Australian Productivity Commission, Access to Justice Arrangements, Draft Report (2014), at 524-532.

[10] See the LRC Report on Conditional Fees (2007)

22. Whilst expressing their support to the Bill, the Chairman and some members, including Dr Hon Junius HO Kwan-yiu, Hon Paul TSE Wai-chun, Hon James TO Kun-sun, Hon Jimmy NG Wing-ka and Hon YUNG Hoi-yan, do not subscribe to the Administration's views. They raise queries on why the definition of third party funding of arbitration under the new section 98G excludes the provision of arbitration funding for an arbitration by the legal profession, but not such funding provided by professionals in other disciplines. Some of them consider it unfair and over-stringent to apply the exclusion solely to third party funding for arbitration provided by persons practising law or providing legal services in Hong Kong or elsewhere.

Agent referring a party to an arbitration to a third party funder

23. Some members ask 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, if passed, and in particular the Code to be issued under the new section 98O.

24. The Administration has explained that if an agent involved in such introduction or referral which does not fall within the definition of "third party funding of arbitration" under the Bill, the situation would not be covered by the Bill and it would be subject to the applicable common law principles. The Administration has added that the Bill merely aims at clarifying that third party funding of arbitration as defined under the new section 98G will not be prohibited by the common law doctrines of maintenance and champerty.

Lawyer referring a party to an arbitration to a third party funder

25. Hon Holden CHOW Ho-ding has sought confirmation regarding whether legal practitioners are permitted under the Bill to charge and/or receive a fixed referral fee/commission from the clients and/or 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 resolution of disputes by arbitration.

26. The Administration has explained to the Bills Committee that the proposed legislative amendments mentioned in the LRC Report merely seek to clarify that the third party funding of arbitration and associated proceedings (other than funding provided by a person practising law or providing legal services) is not prohibited by the common law doctrines of maintenance and champerty. The proposed law reform does not alter the

current legal position otherwise than as stated above.

27. The Chairman and Hon Holden CHOW Ho-ding ask whether a lawyer would inadvertently breach the law if the lawyer was a director of, or employed to provide professional services, by a litigation funding company or a private equity fund which engaged in third party funding activities.

28. The Administration has advised that since the arbitration funding is provided by the third party funder instead of the person practising law or providing legal services, the situation would fall within the scope of the definition of third party funding of arbitration as stipulated in the new section 98G. In this connection, the Administration has advised that provision of professional services by the said person to the third party funder might not constitute common law offences of maintenance and champerty.

29. The Administration has also advised that in the light of the definition of common law offence of maintenance, a solicitor will be allowed to charge his/her client a referral fee so long as the referral fee is properly charged within the solicitor's professional services.

30. The Chairman and two other members are of the view that based on the way that the new section 98G is drafted, a lawyer acting as an independent non-executive director ("INED") of a company might breach the law inadvertently as the lawyer is not involved in the company's daily operations and might not be aware that the company had engaged in third party funding business. Hon James TO Kun-sun and Hon Paul TSE Wai-chun therefore suggest amending the new section 98G(2) to provide that under certain circumstances, third party funding of arbitration will include the provision of arbitration funding by a person practising law or providing legal services.

31. The Chairman and Hon CHAN Chun-ying also opine that the new section 98G(2) would impair the attractiveness of Hong Kong for international arbitration institutions to set up offices in Hong Kong and is not conducive to the legislative intent of the Bill. The Administration has stated its position that any reform in third party funding for arbitration must be very cautious and prudent so that Hong Kong would not be exposed disproportionately to the kind of risks, as explained in paragraphs 19 and 21, which might threaten its reputation as an international legal and dispute resolution centre.

Avoidance of conflict of interest

32. Whilst acknowledging that conflict of interest might arise if a lawyer is permitted to fund the lawyer's own clients and to act on behalf of the clients at the same time, Dr Hon Junius HO Kwan-yiu suggests that subsection (1)(b) of the new section 98J, which defines the meaning of third party funder, has already addressed the issue of conflict of interest. He further proposes to delete the new section 98G(2).

33. The Chairman also notes that the existing statutory provisions and relevant professional conduct rules already provides substantial safeguard to avoid the potential conflict of interest concerning the legal profession. The Code to be issued under the new section 98O would also provide for standards and practices with which a third party funder is ordinarily expected to comply with in avoiding conflict of interest. (See further paragraphs 40 to 45 of the report below on the Code.)

Meaning of funding agreement and third party funder

34. Hon CHAN Chun-ying and the Legal Adviser to the Bills Committee seek clarifications on whether the non-application of the doctrines of maintenance and champerty would apply to third party funding of arbitration without a written funding agreement.

35. The Administration has 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. In the light of this, it is 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. Therefore, a funding agreement in writing is required under the proposed section 98H in order for the funding to be covered by the Bill.

The new section 98N – "no place of arbitration"

36. The Legal Adviser to the Bills Committee requests elaboration of the rationale behind mentioning "no place of arbitration" in the new section 98N. The Administration has advised that as pointed out by the LRC Sub-committee, it is important that funding of work on arbitrations taken place outside Hong Kong which are performed by lawyers and experts in Hong Kong should fall within the scope of the proposed amendments to the AO so as to preserve Hong Kong's position as a leading arbitral

jurisdiction[11].

37. The Administration therefore supported the LRC recommendation to apply the proposed amendments to the AO to services provided in Hong Kong for arbitrations taking place outside Hong Kong. Under section 5 of the AO, in general, the AO applies only to an arbitration where the place of arbitration is in Hong Kong. The Administration has proposed that for cases where the place of arbitration is outside Hong Kong or there is no place of arbitration, the new section 98N extends the application of the new Part 10A to these arbitrations covering only funding of services provided in Hong Kong.

38. The Administration has stated that by including arbitration which has no of place arbitration in the new section 98N, they aim at including investor-state arbitration proceedings governed by the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States, also known as the ICSID Convention or the Washington Convention* (the "ICSID Convention"). Proceedings under the ICSID Convention are regarded as self-contained and denationalized. They are independent of any national law including the law of the tribunal's seat. Domestic courts have no power to stay, to compel, or to otherwise influence ICSID convention proceedings. Nor do domestic courts have the power to set aside or otherwise review ICSID Convention awards.

39. Therefore, it is necessary to include "there is no place of arbitration" in the proposed new section 98N to make it clear that, when read in conjunction with other provisions of the Bill, third party funding of services provided in Hong Kong in relation to an ICSID Convention arbitration (a non-Hong Kong arbitration with no place of arbitration) is permitted under Hong Kong law.

<u>Safeguards to be provided by the Code and consequences of non-compliance</u>

The new sections 98O and 98P

40. The Bills Committee notes that the new section 98O, among other things, empowers an authorized body (to be appointed under the new section 98W(2)) to issue the Code setting out practices and standards for third party funders to follow when they carry on activities in connection with third party funding of arbitration. The authorized body may also amend or revoke the Code. The Chairman raises his enquiry as to whether the advisory body (to be appointed under the new section 98W(1))

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[11] The Report paragraphs 3.33-3.34

has the power to disclose information which was received by it pursuant to the new section 98P to the public, particularly information showing that a certain third party funder has breached the Code. Some members have also expressed concern on the absence of any mechanism to penalize the non-complying third party funders if the advisory body was not given the express power to disclose such information.

41. In relation to the question of whether the advisory body has the power to disclose information which is received by it pursuant to the new section 98P to the public, the Administration has advised that the following issues must be taken into consideration.

42. According to the Administration, in relation to information 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 details of any findings by a court or arbitral tribunal of a third party funder's failure to comply with the Code, it is up to the advisory body to determine what details of complaints and findings will be disclosed to the public in the light of the governing law on data protection. For example, data protection principle 3 ("DPP3") under Schedule 1 to the Personal Data (Privacy) Ordinance (Cap. 486) provides that "[p]ersonal data shall not, without the prescribed consent of the data subject, be used for a new purpose". A new purpose is defined to mean any purpose other than "(a) the purpose for which the data was to be used at the time of the collection of the data; or (b) a purpose directly related to the purpose referred to in paragraph (a)". "Data subject", in relation to personal data, is defined in section 2 of Cap. 486 to mean the individual who is the subject of the data. "Personal data" is defined in section 2 of Cap. 486 to mean any data –

(a) relating directly or indirectly to a living individual;

(b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and

(c) in a form in which access to or processing of the data is practicable.

43. The Administration has pointed out that third party funders typically adopt a variety of publicly listed and private corporate organizational structures (see para. 3.16 of the Consultation Paper). If the complaints lodged against the third party funders do not only cover corporate affairs but also involve an individual's misconduct, then the information may fall within the definition of "personal data" in Cap. 486 and the disclosure of the personal data to the public may constitute a new

purpose in contravention of DPP3.

44. Subject to the above Cap. 486 considerations, details of any findings by a court of a third party funder's failure to comply with the Code should have already been recorded and made known to the public through the publication of the court judgment, subject to the requirements of section 17 of the AO. The findings by an arbitral tribunal of the failure of a third party funder to comply with the Code may not fall within the meaning of "any information relating to the arbitral proceedings under the arbitration agreement or an award made in those arbitral proceedings" under the prohibition against disclosure under section 18(1) of the AO.

45. In view of the above, the Administration has advised that it appears that whether the details of complaints and findings made against the third party funder could be made known to the public would depend on the facts and circumstances of each case.

Express power of the advisory body to disclose

46. The Administration has supplemented that there is little uniformity in the form of regulation of third party funding in jurisdictions where third party funding is permitted. The main trend is towards a "light touch" approach to regulation either by including statutory regulation of financial and conflict issues (e.g. Australia) or self-regulation (e.g. England and Wales).

47. The Administration has advised that they adopted the LRC's recommendation on taking a "light touch" approach to regulation. Hence, it is proposed by way of the new section 98O in the Bill to empower an authorized body to issue the Code setting out practices and standards for third party funders to follow when they carry on activities in connection with third party funding of arbitration. In line with the "light touch" approach, the Administration has proposed, by way of the new section 98Q(6), to make clear that the Code is not subsidiary legislation. The new section 98R(1) provides that a failure to comply with a provision of the Code does not, of itself, render any person liable to any judicial or other proceedings. However, the new section 98R(2) provides that the Code is admissible in evidence in proceedings before any court or arbitral tribunal, and that any compliance, or failure to comply, with a provision of the Code may be taken into account by any court or arbitral tribunal if it is relevant to a question being decided by the court or arbitral tribunal.

48. The Administration has indicated that the said "light touch" approach should be adopted for an initial period of three years. As a more long-term initiative, the LRC recommends that after the conclusion of the

first three years of operation of the Code, the advisory body should issue a report reviewing its operation and make recommendations as to the updating of the ethical and financial standards set out in it.

49. The Administration has advised that although complaints can be referred to the advisory body, the Bill does not give express powers to the advisory body to examine and investigate any complaints received. This is of particular relevance if a third party funder will be named merely by reason of a complaint having been made against it. It is possible that the complaint is ultimately found not to be substantiated. As a matter of fairness, before the advisory body decides to name a specific third party funder for its failure to comply with the Code, the third party funder in question should be given an opportunity to make representation. In devising a scheme whereby the identity of a third party funder against whom an adverse decision has been made is to be disclosed to the public, consideration should be given as to whether channels of review or appeal against the adverse decision should be provided.

50. In the light of the above consideration, the Administration has clarified that, in monitoring and reviewing the operation of the new Part 10A as envisaged under the new section 98W(1), the advisory body may consider and decide whether and what detailed information should be disclosed to the public.

Application of the new Part 10A of the AO to mediation to which the MO applies

51. The Legal Advisor to the Bills Committee asks for the policy considerations for the application of the new Part 10A to any mediation within the meaning of MO, but not the processes specified in Schedule 1 of the MO.

52. The Administration has advised that the common law doctrines of maintenance and champerty have been held by the Hong Kong courts to prohibit third party funding of litigation, save in the three exceptional areas mentioned in paragraph 2 above. On the other hand, mediation is a consensual negotiation process which parties to a dispute voluntarily resort to with a view to reaching a settlement of the dispute through the assistance of an impartial mediator. Mediation is not a legal action or legal proceedings per se. Indeed, mediation is very different from litigation (and arbitration) in that mediation does not involve any adjudication of legal rights or liabilities by a third party.

53. The Bills Committee notes the Administration's notion that mediation encourages settlement of disputes. In principle, assisting in or

facilitating the settlement of disputes does not undermine the common law doctrines of maintenance and champerty or their underlying rationale, namely, to prevent unnecessary litigation proceedings being promoted or financed by powerful individuals for the sole purpose of furthering their own interests[12]. Hence, third party funding of mediation arguably facilitates the early resolution of dispute without resorting to litigation which is the very objective of mediation. The Bills Committee also notes the LRC's view that, apart from arbitration, mediation and other forms of alternative dispute resolution are not considered as contentious proceedings to which the doctrines of maintenance and champerty apply[13].

54. The Administration has clarified that under the Bill, the AO will be amended to expressly disapply the common law doctrines of maintenance and champerty to mediation conducted under AO (see new sections 98K and 98L read with the definition of "arbitration" in the new section 98F). In the absence of corresponding amendments to the MO, doubts will arise as to whether these doctrines apply (or becomes applicable) to mediation under the MO[14] notwithstanding the nature of mediation mentioned above and as defined under section 4 of the MO[15].

55. As recommended by the LRC and having consulted the Steering Committee on Mediation, the DoJ considers that the MO should be amended to make it clear that the common law doctrines of maintenance and champerty do not apply to mediation within the meaning of the MO. Such mediation may be a standalone process or it may be initiated prior to or at any stage during litigation. Litigation is adversarial in nature and court proceedings involve adjudicative processes. As they do not fall within the meaning of "mediation" under the MO, the doctrines will continue to apply to them.

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[12] Paragraphs 2 and 16 of Chapter 1 of Part II of the Executive Summary of the Consultation Paper.

[13] Although legal professional conduct rules do apply. See paragraphs 1.29 to 1.30 of the Consultation Paper.

[14] By contrasting the expressly disapplication of the common law doctrines under the amended AO and the MO (which is silent on third party funding), one may contend that these doctrines would apply to MO Mediation

[15] "Mediation" is defined in section 4 of the MO to mean: "a structured process comprising one or more sessions in which one or more impartial individuals, without adjudicating a dispute or any aspect of it, assist the parties to the dispute to do any or all of the following—

(a) identify the issues in dispute;
(b) explore and generate options;
(c) communicate with one another;
(d) reach an agreement regarding the resolution of the whole, or part, of the dispute."

56. The Administration clarified that consideration had been given to the specified processes in Schedule 1 to the MO in the context of extending new Part 10A of the AO to mediation to which the MO applies. The Administration has advised that item 12 of Schedule 1 to the MO concerns mediation proceedings of section 32(3) and 33 of the AO. As the new Part 10A to the AO already covers mediation conducted under the AO, exclusion of item 12 in Schedule 1 to the MO from the application of the new Part 10A is appropriate. As regards items 1 to 11 of Schedule 1 of the MO ("Relevant Items"), they were relevant to statutory conciliation(s) which are conducted in accordance with the respective relevant legislative provisions. For example, "conciliation" under the Labour Tribunal Ordinance (Cap. 25), Labour Relations Ordinance (Cap. 55) and the Minor Employment Claims Adjudication Board Ordinance (Cap. 453) and "special conciliation" under Cap. 55 are defined to mean, in essence, discussions or actions undertaken by a specified officer to assist the parties to a specified dispute to reach settlement.

57. In the case of a statutory conciliation, the process and procedures to be adopted and the role to be performed by the conciliator or mediator would depend on the specific statutory scheme in question, the objectives to be achieved by the scheme and any rules and guidelines that may be developed for the purposes of that statutory scheme. The conciliation or mediation process conducted under the legislation referred to in the Relevant Items need not be the same as the mediation process contemplated under the definition of “mediation” under the MO.

58. The Administration has advised that given the special features of statutory conciliations and that the statutory conciliations form part of various existing self-contained statutory schemes, it is not the Administration's policy intent at this stage to extend the application of the new Part 10A to the statutory conciliations. The Administration has explained that for the time being, it seems that application of new Part 10A to mediation to which the MO applies would be sufficient to cover the kinds of mediation that are likely to attract third party funding.

59. The Administration has supplemented that if the Bill is enacted, policy bureaux having carriage of the respective statutory schemes referred to in the Relevant Items may wish to make reference to experience gained from the operation of the new section 7A of the MO and consider whether there should be a review on incorporation of express statutory provision to permit third party funding in the relevant legislation. Should such review be conducted, a policy bureau may also wish to take into account the policy objectives of the specific statutory scheme and circumstances relevant to the operation of that statutory scheme in deciding whether such express

provision is warranted.

The new section 7A under Part 3 – Amendment to MO

60. The Chairman asks 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.

61. The Administration has advised that while the above circumstance mentioned by the Chairman would not be regulated by the Bill, it would be governed by the applicable common law principles instead. The Administration has also reiterated that mediation is 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 undermine the common law doctrines of maintenance and champerty. As such, funding of mediation covered neither by the AO nor the MO would unlikely be objectionable under the said common law doctrines.

62. The Administration has 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 applies and to funding of services provided in Hong Kong for non-Hong Kong mediation.

Other issues

Provision of arbitration funding by Government departments or non-government organizations ("NGOs")

63. Dr Hon YIU Chung-yim asks whether the provision of arbitration funding by government departments or NGOs was under the regulation of the Bill. The Administration has advised that one of the essential features of third party funding of arbitration is 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.

Commencement of the Bill, if passed

64. On the Chairman's enquiry about the commencement of the Bill, the Administration has advised that it does not have a specific timetable at this stage, and that upon the enactment of the Bill, the Administration would need some time to prepare for the appointment of the advisory body and authorized body provided under the new section 98W, and the authorized body would also require some time to draft the Code to be issued under the new section 98O. Subject to the above, the Administration would appoint the date of commencement of the major operative provisions (i.e. those provisions mentioned in clause 1(3) of the Bill) by notice published in Gazette.

Committee stage amendments ("CSAs")

CSAs proposed by the Administration

Proposed CSAs to the new Section 98G(2)

65. After Members of the Bills Committee had expressed their respective views and considered the Administration's response, the Bills Committee agreed that the Bills Committee would propose a CSA to delete the new section 98G(2) and instructed the Legal Adviser to the Bills Committee to draft the CSA to be proposed by it.

66. The Bills Committee then invited in late March 2017 views on the CSA to be proposed by it to delete the new section 98G(2) from Hong Kong International Arbitration Centre, Hong Kong Bar Association and the Law Society of Hong Kong, as well as members of the public. A few weeks later, the Administration introduced in mid-April 2017 a new set of CSA, on which, the Administration confirmed, the stakeholders had been consulted.

67. The Administration has advised that having considered the views of the Members of the Bills Committee on the new section 98G(2) and with a view to striking a proper balance by ensuring that legitimate concerns over possible conflict of interest are sufficiently addressed, it is minded to propose CSAs to delete the new section 98G(2) from and to add a new section 98NA to the new Part 10A.

68. In short, the proposed CSAs operate to the effect that the common law doctrines of champerty and maintenance remain applicable to arbitration funding provided by a lawyer, if such funding is provided to a

party to an arbitration by a lawyer who, in the course of the lawyer's practice, acts for any party in relation to the arbitration. Further, a "lawyer" is taken to include the legal practice for which the lawyer works, or of which the lawyer is a member, and any other lawyer who works for, or is a member of, the legal practice. The same principle applies to mediation funding provided by lawyers.

69. The Bills Committee notes that the term "lawyer" is defined in the new section 98NA(3) to include a solicitor and a barrister and the terms "member" and "legal practice" are not defined under the Bill. In response to the request made by the Legal Adviser to the Bills Committee, the Administration has explained that the terms are not defined because the new section 98NA(2) is intended to cover the case where a lawyer works for, or is a member of, a legal practice of whatever description or structure. This is deliberate because of (a) the clear policy intent to cover lawyers qualified to practise in other jurisdictions (see paragraph (c) of the definition of lawyer in the new section 98NA(3)), and (b) the permissible business model for a legal practice to be run, as well as the ways by which lawyers are associated with a legal practice, can vary in different jurisdictions. The Administration has also clarified that the term "member" does not cover any non-lawyer member of a legal practice and a barrister of a set of barristers' chambers is not considered as a member of a legal practice.

Proposed CSAs to Clause 4 of the Bill

70. At the early part of the scrutiny of the Bill, the Administration has expressed its intention to introduce CSAs to the Bill in respect of clause 4 of the Bill insofar as it relates to the new section 7A of the MO. The new section 7A of the MO extends the application of the new section 98S of the AO to mediation to which the MO applies. In brief, the new section 98S of the AO, as modified by the new section 7A of the MO, operates to the effect that despite the confidentiality requirements provided in section 8(1) of the MO, mediation communication referred to in that section may be communicated by a party to a mediation to a person for the purpose of having or seeking third party funding of mediation from the person, and may only be disclosed by the person if certain conditions are satisfied.

71. The Administration proposes CSAs to amend the new section 7A of the MO. In gist, the CSAs operate to the effect that not only a party to mediation but also a person who intends to mediate a dispute may disclose the necessary mediation communication for the purpose of having or seeking, as well as obtaining professional advice in connection with, third party funding of mediation. Further, a funded party and a third party

funder have the right to disclose mediation communication for the purpose of protecting, pursuing or enforcing the relevant party's rights or interest in relation to the third party funding of mediation in legal proceedings. However, leave of the relevant court or tribunal must be obtained prior to the disclosure in the latter situation.

72. The Bills Committee has examined all the proposed CSAs from the Administration and raised no objection thereto. The Bills Committee will not propose any CSAs to the Bill.

Resumption of Second Reading debate

73. The Bills Committee has no objection to the resumption of the Second Reading debate on the Bill at the Council meeting on 14 June 2017.

Consultation with the House Committee

74. The Bills Committee reported its deliberations to the House Committee on 2 June 2017.

Council Business Division 4
Legislative Council Secretariat
5 June 2017

Appendix I

Overview of main provisions of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016

New Part 10A added to the AO

Clause 3 adds a new Part 10A to the AO. The new Part 10A, which is based on the draft provisions in the LRC Report, contains 6 Divisions. The new Part 10A is intended to come into operation in 2 stages: Divisions 1, 2, 4 and 6 will commence on the gazettal of the Ordinance, while Divisions 3 and 5 will commence on a date to be appointed (see clause 1(2) and (3)). This is to facilitate the preparatory work for the relevant regulatory framework to be done before the provisions clarifying the legal position come into operation.

Division 1—Purposes

2. Division 1 of the new Part 10A states the purposes of that Part. These are to ensure that third party funding of arbitration is not prohibited by the said common law doctrines and to provide for related measures and safeguards (new section 98E).

Division 2—Interpretation

3. Division 2 of the new Part 10A provides for the interpretation of key concepts.

4. Significantly, in the new section 98F

(a) arbitration is given an extended meaning to include not only arbitrations to which the AO applies, but also proceedings before the court, an emergency arbitrator or a mediator that are covered by the AO; and

(b) the meaning of "provision" in relation to the provision of arbitration funding to or by a person is also extended to over the cases where the person arranges for the provision of the arbitration funding to or by another person.

5. The new section 98G provides for the definition of third party

funding of arbitration, which is central to the new Part 10A—

(a) One of the essential features of third party funding of arbitration is that the arbitration funding is provided in return for the third party funder receiving a financial benefit only if the arbitration is successful (new section 98G(1)(d)).

(b) Also, the definition of third party funding of arbitration excludes the provision of arbitration funding by lawyers and persons providing legal services (new section 98G(2)). This is to avoid any conflict of interest that might arise if those who provide legal services also engage in third party funding.

6. The new section 98H defines the meaning of funding agreement as an agreement which (among other requirements) is made on or after the commencement date of Division 3 of the new Part 10A. This means funding agreements made before that date are not covered by the new Part 10A.

7. The new sections 98I and 98J define the meanings of funded party and third party funder respectively. A person can be a funded party or third party funder whether before, during or after an arbitration.

Division 3—Third Party Funding of Arbitration Not Prohibited by Particular Common Law Offences or Tort

8. Division 3 of the new Part 10A seeks to ensure that third party funding of arbitration is not prohibited by the said common law doctrines (both as to civil and criminal liability).

9. The new sections 98K and 98L declare that those doctrines do not apply in relation to arbitration funding provided under a funding agreement as defined in the new section 98H. Notably, that means the legal position regarding funding agreements made before the commencement date of Division 3 of the new Part 10A is not affected. The new section 98M also makes it clear that the declaration does not affect whether a contract is to be treated as illegal for other reasons.

10. Under section 5 of the AO, in general, the AO applies only to an arbitration where the place of arbitration is in Hong Kong. For cases where the place of arbitration is outside Hong Kong or there is no place of arbitration, the new section 98N extends the application of the new Part 10A to these arbitrations but only in respect of funding the costs and expenses of services provided in Hong Kong. This is to facilitate the third party funding

of related services provided in Hong Kong in relation to non-Hong Kong arbitrations.

Division 4—Code of Practice

11. Division 4 of the new Part 10A seeks to facilitate the regulatory framework for third party funding of arbitration in Hong Kong.

12. The new section 98O empowers an authorized body (see paragraph 20 below) to issue a code of practice setting out practices and standards for third party funders to follow when they carry on activities in connection with third party funding of arbitration. The authorized body may also amend or revoke the code of practice.

13. The new section 98P sets out some of the matters that may be covered in the code of practice, including those regarding funding agreements, internal procedures of third party funders and measures to facilitate monitoring by an advisory body (see paragraph 20 below).

14. The new section 98Q sets out the process which is to be followed in issuing the code of practice. The process includes public consultation and publishing the finalized code of practice in the Gazette. It applies in relation to an amendment or revocation of the code of practice as well.

15. Under the new section 98R, a person will not incur legal liability simply because the person fails to comply with the code of practice. However, the code of practice will be admissible in evidence in court or arbitral proceedings and any compliance or failure to comply with it may, if relevant to a question being decided by a court or arbitral tribunal, be taken into account by the court or arbitral tribunal.

Division 5—Other Measures and Safeguards

16. Division 5 of the new Part 10A provides for certain measures and safeguards where an arbitration involves third party funding.

17. The new section 98S allows the communication of confidential information to an existing or potential third party funder and its professional adviser. However, the recipient is then subject to confidentiality requirements.

18. The new sections 98T and 98U deal with disclosure of third party funding. If a funding agreement is made, the funded party must inform each

other party and the arbitration body by written notice of that fact and the name of the third party funder within a specified time frame (new section 98T). Similarly, disclosure about the end of a funding agreement is also required (new section 98U). This is to minimize the possibility of conflicts of interest being the subject of a challenge to the arbitration process.

19. The new section 98V makes similar provisions to the new section 98R about the consequence of a failure to comply with the new Division 5. It is not necessary to provide for the admissibility in evidence of the legislation because sections 11 and 98 of the Interpretation and General Clauses Ordinance (Cap. 1) already provide for this.

Division 6—Miscellaneous

20. Division 6 of the new Part 10A contains a new section 98W, which empowers the Secretary for Justice to appoint an advisory body and an authorized body for the purposes of the new Part 10A and provides that the appointments are to be made by notice published in the Gazette.

New section 7A added to the MO

21. The new section 7A to the MO extends the application of the new Part 10A of the AO to mediation to which the MO applies ("MO mediation") (see section 5 of the MO for the scope) and to funding of services provided in Hong Kong for non-Hong Kong mediation ("funding of HK services"). In particular the financial and ethical safeguards proposed above for third party funding of arbitration and associated proceedings under the AO will also be applicable to MO mediation and funding of HK services.

22. Some modifications are made to fit the provisions of the new Part 10A of the AO into the context of the MO, including modifications to construe references to arbitration and arbitration body in the new Part 10A as references to mediation and mediator covered by the MO.

Appendix II

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

Membership list

Chairman	Hon Dennis KWOK Wing-hang
Members	Hon James TO Kun-sun Hon Paul TSE Wai-chun, JP Hon CHUNG Kwok-pan 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 (Total : 10 Members)
Clerk	Ms Sophie LAU
Legal adviser	Miss Evelyn LEE