

立法會
Legislative Council

Ref : CB4/BC/2/16

LC Paper No. CB(4)1111/16-17
(These minutes have been seen
by the Administration)

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

**Minutes of the second meeting
held on Tuesday, 28 February 2017, at 8:30 am
in Conference Room 3 of the Legislative Council Complex**

Members present : Hon Dennis KWOK Wing-hang (Chairman)
Hon Paul TSE Wai-chun, JP
Hon CHUNG Kwok-pan
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 James TO Kun-sun
Hon Jimmy NG Wing-ka, JP

Public officers attending : Item I

Department of Justice

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

Miss Ada CHEN
Commissioner of the Joint Dispute Resolution Strategy
Office and Senior Assistant Law Officer (Civil Law)
(Mediation)

Ms Theresa JOHNSON
Law Draftsman

Mr Peter SZE
Senior Government Counsel

Mr Bernard YUE
Senior Government Counsel

Clerk in attendance : Ms Sophie LAU
Chief Council Secretary (4)2

Staff in attendance : Miss Evelyn LEE
Assistant Legal Adviser 10

Ms Jacqueline LAW
Council Secretary (4)2

Miss Vivian YUEN
Legislative Assistant (4)2

I. Meeting with the Administration

Follow-up to the issues arising from the meeting on 14 February 2017

- LC Paper No. CB(4)620/16-17(01) -- List of follow-up actions arising from the discussion at the meeting on 14 February 2017
- LC Paper No. CB(4)620/16-17(02) -- Administration's response to the issues raised at the meeting on 14 February 2017
- LC Paper No. CB(4)620/16-17(03) -- Draft Committee stage amendments proposed by the Administration
- LC Paper No. CB(4)642/16-17(01) -- Committee stage amendment proposed by Dr Hon Junius HO Kwan-yiu

Other relevant papers

- 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

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

Declaration of interests

3. Mr Paul TSE declared that he was a practising solicitor.

Follow-up actions to be taken by the Administration

- Admin 4. The Administration was requested to:
- (a) provide a written response to the Committee stage amendment which was intended to be proposed by Dr Junius HO; and

- (b) consider amending the new section 98G(2) (or any other clause(s) of the Bill) to provide that under certain circumstances third party funding of arbitration would include the provision of arbitration funding by a person practising law (or providing legal services) in Hong Kong or elsewhere and, in those circumstances, the person would not be prohibited by the common law doctrines of champerty and maintenance from providing the said kind of funding.

5. Members noted that the new section 7A of the Mediation Ordinance (Cap. 620) would extend the application of the new Part 10A of the Arbitration Ordinance (Cap. 609) to mediation to which Cap. 620 applied. According to section 5(2) of Cap. 620, Cap 620 did not apply to the processes specified in Schedule 1 to Cap. 620 ("specified processes"). It was noted that these processes were mainly mediation and conciliation referred to in other ordinances. As such, it seemed that the application of the new Part 10A of Cap. 609 did not extend to the specified processes. In the light of the above, the Administration was requested to:

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- (a) provide the policy and/or legal considerations of the above arrangement relating to the extent of application of the new Part 10A of Cap. 609; and
- (b) consider whether the application of the said new Part 10A of Cap. 609 might be extended so that it also applied in respect of the specified processes (or any of the processes) and provide the relevant policy and/or legal considerations.

(Post-meeting note: The Administration's response was issued to members vide LC Paper No. CB(4)667/16-17(02) on 10 March, 13 March and 14 March 2017 respectively.)

II. Any other business

6. The Chairman advised that the next meeting would be held on 14 March 2017 at 8:30 am.

7. There being no other business, the meeting ended at 10:02 am.

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

**Proceedings of the second meeting
held on Tuesday, 28 February 2017, at 8:30 am
in Conference Room 3 of the Legislative Council Complex**

Time Marker	Speaker(s)	Subject(s)	Action required
Meeting with the Administration			
000212-000353	Chairman Administration	Opening remarks	
000353-002606	Administration	Briefing by the Administration on its responses to the issues raised at the meeting of the Bills Committee held on 14 February 2017 (LC Paper No. CB(4)620/16-17(02)).	
002606-003800	Dr Junius HO Chairman Administration	<p>Briefing by Dr Junius HO on his proposed CSA to the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 ("the Bill"), i.e. to delete the new section 98G(2), which was set out in LC Paper No. CB(4)642/16-17(01).</p> <p>Dr HO's view that the new section 98G(2) was exceedingly stringent as it excluded any funding directly or indirectly provided by a person practising law or providing legal services from the definition of third party funding of arbitration. He agreed that the issue of conflict of interest might arise if a lawyer was permitted to fund his/her own clients and to act on behalf of the clients at the same time. Notwithstanding this, he pointed out that the issue of conflict of interest had been addressed in the proposed new section 98J(1)(b) which defined the meaning of third party funder.</p> <p>The Chairman's view that existing statutory provisions and relevant professional conduct</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>rules already provided substantial safeguard to avoid the potential conflict of interest concerning the legal profession. The code of practice to be issued under the new section 98O ("the Code") would also provide for standards and practices with which a third party funder would ordinarily be expected to comply with in avoiding conflict of interest. The Chairman believed that the two legal professional bodies would amend the relevant professional conduct rules which govern conflict of interest in third party funding of arbitration/mediation as appropriate if funding by the legal profession was included in the definition of third party funding of arbitration. In the light of this, he saw no reason why the legal profession was not allowed to provide arbitration funding under the Bill.</p> <p>The Administration's response that as pointed out by the Law Reform Commission of Hong Kong ("the LRC") in its report, it was in the public interest that lawyers should focus on their provision of professional services to clients and should not place themselves in a conflict of interest position by engaging in the business of third party funding. At present, Hong Kong law did not permit Hong Kong lawyers to charge conditional and contingency fees. The LRC report on conditional fees published in 2007 also did not recommend the introduction of conditional fees in Hong Kong. If a review on the existing general ban on conditional or contingency fee arrangements was to be initiated at this stage, a comprehensive consultation exercise involving all relevant organizations and stakeholders had to be conducted which would inevitably impede the implementation of the LRC recommendation regarding third party funding.</p>	

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003800-004258	Mr Paul TSE Chairman Administration	<p>Declaration of interests by Mr Paul TSE</p> <p>Mr Paul TSE's enquiry as to whether the Administration would consider amending the drafting of the new section 98G(2) as the scope covered by the said section was too broad. The Administration's response that it was the policy intention to cover all possible circumstances under which a person practising law or providing legal services might directly or indirectly provide third party funding for arbitration. In addition, the Administration informed members that the LRC did not receive views from the two legal professional bodies that the scope of new section 98G(2) should be narrowed down during the consultation periods.</p>	
004258-005442	Mr Holden CHOW Chairman Administration	<p>Enquiries of the Chairman and Mr Holden CHOW regarding whether a lawyer would inadvertently breach the law if he/she 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.</p> <p>The Administration's advice that since the arbitration funding was provided by the third party funder instead of the person practising law or providing legal services, the situation fell within the scope of the definition of third party funding of arbitration as stipulated in the new section 98G. In this connection, the Administration considered that provision of professional services by the said person to the third party funder might not constitute common law offences of maintenance and champerty.</p> <p>Noting that some lawyers in Hong Kong were directors of litigation funding companies or private equity funds which were involved in third party funding activities, the</p>	Admin (paragraph

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>Administration agreed to consider whether the scope of the new section 98G(2) needed to be refined or not.</p> <p>In response to Mr Holden CHOW's enquiry, the Administration advised that in the light of the definition of common law offence of maintenance, a solicitor was allowed to charge his/her client a referral fee so long as the referral fee was charged within the solicitor's professional services.</p> <p>The Administration further pointed out that according to the new section 98P(1)(c), the Code might require third party funders to ensure that funded parties obtain independent legal advice on funding agreements before entering into them. In this regard, the Administration was concerned that the independence of the legal advice provided by a legal practitioner might be unduly affected if the legal practitioner involved in the case had referred a third party funder to his/her client.</p>	4(b) of the minutes)
005442-010151	Ms YUNG Hoi-yan Chairman Administration	<p>In response to Ms YUNG Hoi-yan's enquiry relating to whether a lawyer was allowed to provide arbitration funding so long as the lawyer and his/her firm was not a party to the relevant arbitral proceeding, the Administration's advice that given the continuing and 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 were found, the policy objective of the present legislative amendments was to provide for a wider coverage so that a person practising law or providing legal services (whether in Hong Kong or elsewhere) was excluded from the provision of arbitration funding.</p>	

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		<p>Ms YUNG Hoi-yan's concern that the scope of the new section 98G(2) was overly broad that even foreign lawyers who could not provide legal services in Hong Kong and other staff of law firms were prohibited from providing arbitration funding. Ms YUNG considered it unfair to exclude the provision of arbitration funding by lawyers from the definition of third party of arbitration merely because conditional or contingency fees arrangements were not allowed in Hong Kong.</p> <p>The Administration's advice that foreign lawyers who came to Hong Kong to provide arbitration services were also covered as a person practising law or providing legal services in Hong Kong and would be excluded from providing third party funding for arbitration.</p>	
010151-010448	Mr Paul TSE Chairman	Mr Paul TSE's view that existing statutory provisions and relevant professional conduct rules already provided substantial protection to avoid the potential conflict of interest concerning the legal profession. Besides, Mr TSE considered that the new section 98G(2) should specify certain circumstances where potential conflicts of interest were identified.	
010448-011050	Dr Junius HO Administration	<p>Dr Junius HO's further explanations on his view that the new section 98G(2) should be deleted. He considered it unacceptable that the legal profession was the only profession being excluded from participating in funding arbitrations under the new section 98G(2). He was of the view that it was the first time the legal profession was prohibited from engaging in other businesses through the enactment of legislation.</p> <p>The Administration's response that the Bill merely sought to clarify that third party</p>	

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		<p>funding of arbitration and associated proceedings (other than funding provided by a person practising law or providing legal services) was not prohibited by the common law doctrines of maintenance and champerty. Since the provision of arbitration funding by legal profession was excluded from the definition of third party funding in the Bill, the issue would continue to be regulated by common law principles.</p>	
011050-011513	Mr CHAN Chun-ying Administration	<p>Mr CHAN Chun-ying agreed with Mr Paul TSE's view that the new section 98G(2) should be amended to provide that under certain circumstances, where potential conflicts of interest were identified, third party funding of arbitration would include the provision of arbitration funding by a person practising law (or providing legal services) in Hong Kong or elsewhere.</p> <p>The Administration's response that more time was required to consult the views of relevant stakeholders, including the legal profession and major chambers of commerce in Hong Kong, if the new section 98G(2) was to be amended having regard to members' views expressed at the meeting.</p>	
011513-012311	Mr Holden CHOW Administration	<p>Mr Holden CHOW's view that the new section 98G(2) was not necessary, given that legal practitioners were already bound by relevant professional conduct rules governing conflicts of interest and conditional fees arrangement. In addition, he was of the view that the said section might impose unnecessary restriction on third party funding companies such that they would choose not to develop their businesses in Hong Kong, and hence impairing the competitiveness of Hong Kong as an international arbitration centre in the Asia-Pacific region.</p> <p>Noting that maintenance and champerty were</p>	

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		<p>not prohibited in the United States, Mr Holden CHOW said that the claim value involved in litigation was generally very high. In the light of this, Mr Holden CHOW's enquiry about whether the Administration's consideration of excluding legal practitioners from the provision of arbitration funding was due to the concern that the claims in arbitrations might see a giant increase.</p> <p>The Administration's advice that it would not be appropriate to make direct comparison between the legal systems of Hong Kong and the United States.</p> <p>The Administration added that it would be a more practical and progressive approach to consider amending the new section 98G(2) after the development of third party funding sector was becoming more mature in Hong Kong in time; and in the meantime the two legal professional bodies could consider how the professional conduct rules should be revised in view of the business connections between legal practitioners and third party funding companies operating in Hong Kong.</p>	
012311-012925	Chairman ALA10 Administration	<p>Discussion on the draft CSAs to Clause 4 of the Bill proposed by the Administration (LC Paper No. CB(4)620/16-17(03)).</p> <p>ALA10 pointed out that the new section 7A of the Mediation Ordinance (Cap. 620) extended the application of the new Part 10A of the Arbitration Ordinance (Cap. 609) to mediation to which Cap. 620 applied. According to section 5(2) of Cap. 620, Cap 620 did not apply to the processes specified in Schedule 1 to Cap. 620 ("specified processes"). As such, it seemed that the application of the new Part 10A of Cap. 609 did not extend to the specified processes. The Administration was requested to:</p>	

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		<p>(a) provide the policy and/or legal considerations of the above arrangement relating to the extent of application of the new Part 10A of Cap. 609; and</p> <p>(b) consider whether the application of the said new Part 10A of Cap. 609 might be extended so that it also applied in respect of the specified processes (or any of the processes) and provide the relevant policy and/or legal considerations.</p>	Admin (paragraph 5 of the minutes)
012925-013138	Dr Junius HO Administration Chairman	In response to Dr Junius HO's enquiry, the Administration clarified that the effect of the Bill was that the common law doctrines of maintenance and champerty would not be applicable to mediation conducted during the course of or prior to litigation.	
Any other business			
013138-013238	Chairman Administration	<p>The Chairman's remarks on the follow-up actions required of the Administration.</p> <p>Date of next meeting</p>	Admin (paragraphs 4 & 5 of the minutes)