

立法會
Legislative Council

Ref : CB4/BC/2/16

LC Paper No. CB(4)1112/16-17
(These minutes have been seen
by the Administration)

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

**Minutes of the third meeting
held on Tuesday, 14 March 2017, at 8:30 am
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 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

Public officers attending : Item I

Department of Justice

Mr Wesley WONG, SC
Solicitor General

Mr Peter WONG
Deputy Solicitor General (Policy Affairs)

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)

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 previous meetings

LC Paper No. CB(4)667/16-17(01) -- List of follow-up actions arising from the discussion at the meeting on 28 February 2017

LC Paper No. CB(4)667/16-17(02) -- Administration's response to the issues raised at the meeting on 28 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 James TO and Dr Junius HO declared that they were practising solicitors.

Committee stage amendments ("CSAs") to the Bill

4. Members raised no query on the Administration's proposed CSAs.
5. Members noted the Administration's response to the CSA proposed by Dr Junius HO. Members agreed that the Chairman would move a CSA to the Bill on behalf of the Bills Committee to delete the new section 98G(2), to the effect that third party funding of arbitration will, after the deletion, include the provision of arbitration funding directly or indirectly by a person practising law or providing legal services, whether in Hong Kong or elsewhere. As agreed at the meeting, the Legal Adviser to the Bills Committee would study the impact of the said CSA in detail and circulate her views to members for consideration, if any.
6. Members also noted that Mr CHUNG Kwok-pan had indicated his possible intention to propose a CSA to delete the word "indirectly" only in the new section 98G(2).

(Post-meeting note: the Administration's proposed CSAs to the new section 98G(2) was issued for members' reference vide LC Paper No. CB(4)852/16-17(01) on 13 April 2017.)

Legislative timetable

7. Members noted that due to the Second Reading debate on the Appropriation Bill 2017, the earliest time for resumption of the Second Reading debate on the Bill would be in May 2017. The Chairman would report the deliberations of the Bills Committee to the House Committee in accordance with the legislative timetable.

II. Any other business

8. There being no other business, the meeting ended at 10:33 am.

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 third meeting
held on Tuesday, 14 March 2017, at 8:30 am
in Conference Room 2A of the Legislative Council Complex**

Time Marker	Speaker(s)	Subject(s)	Action required
Meeting with The Administration			
000130-000323	Chairman Administration	Opening remarks Members noted the Chinese version of Annex A to the Administration's response to the issues raised at the meeting on 28 February 2017 (LC Paper No. CB(4)667/16-17(02)) and a submission from the Hong Kong International Arbitration Centre ("HKIAC") (LC Paper No. CB(4)691/16-17(01)).	
000323-001432	Administration	The Administration explained the reply to the issues raised at the meeting of the Bills Committee on Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 ("the Bills Committee") held on 28 February 2017, which was set out in LC Paper No. CB(4)667/16-17(02).	
001432-001551	Chairman Administration	The Chairman's enquiry and the Administration's response on whether Hong Kong should take an approach more proactive than that of Singapore to permit the provision of third party funding of arbitration by lawyers, so as to enhance Hong Kong's competitiveness as an international legal and dispute resolution centre.	
001551-001954	Mr CHUNG Kwok-pan Chairman Administration	In response to Mr CHUNG Kwok-pan's enquiry on the meaning of "Hong Kong is not exposed disproportionately to the kind of risks which may threaten its reputation as an international	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>legal and dispute resolution centre" mentioned in paragraph 6 of LC Paper No. CB(4)667/16-17(02), the Administration advised that the issue of conflict of interest might arise if a person practising law or providing legal services had a financial stake in the outcome of the claim. The Law Reform Commission of Hong Kong ("the LRC") expressed the same concern in its report on conditional fees published in 2007. The Administration took the view that unless a proper mechanism was in place to monitor and regulate the potential conflicts of interest, people's confidence in Hong Kong as an international arbitration centre in the Asia-Pacific Region might be jeopardized. In view of the above, the Administration maintained the view that it was not appropriate to touch on matters relating to allowing the provision of arbitration funding by the legal profession so that Hong Kong would not be exposed to the kind of risks which might threaten its reputation as an international legal and dispute resolution centre.</p> <p>Regarding Mr CHUNG's further query that the relevant professional conduct rules of the two legal professional bodies already provided substantial protection to avoid the potential conflicts of interest, the Administration's response was that, notwithstanding there were professional conduct rules governing conflicts of interest in the resolution of disputes through litigation, Hong Kong lawyers were still not permitted to charge conditional and contingency fees. Given that third party funding was a new industry in Hong Kong, and the Singapore parliament was also taking a very cautious approach when passing the relevant bill to amend the law to permit third party funding for certain categories of dispute resolution proceedings, the Administration considered it not appropriate to assume that the existing professional conduct rules were</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		adequate to address the issue of conflict of interest, and that a very cautious and prudent approach in implementing the reform for third party funding of arbitration should be adopted.	
001954-002240	Chairman Administration	<p>The Chairman's enquiry as to whether a lawyer would breach the law if he/she was a director of a company and/or a private equity fund which engaged in third party funding activities.</p> <p>The Administration reiterated that lawyers should not place themselves in a conflict of interest position by engaging directly or indirectly in the provision of arbitration funding. To avoid being directly or indirectly involved in third party funding, a lawyer who held a position as a director in a company and/or a private equity fund which engaged in third party funding activities might consider excusing oneself from the meeting when the item relating to third party funding business was discussed.</p> <p>The Administration would revisit the question of whether the legal profession should be allowed to participate as a third party funder with reference to the practical experience gained after three years' implementation of the legislation.</p>	
002240-003545	Mr James TO Administration	<p>Declaration of interest by Mr James TO</p> <p>In reply to Mr James TO, the Administration stated that in considering whether a legal practitioner, who was a director of a company and/or a private equity fund which engaged in third party funding activities, had directly or indirectly provided third party funding, it was important to take into account the conduct of the legal practitioner when the company and/or the private equity fund provided such kind of funding. If a legal practitioner who provided legal services also engaged directly or</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>indirectly in the activities of third party funding, the current proposed amendments would not be taking as providing a clear confirmation in law as to whether such activities would definitely not be caught by the common law doctrines of maintenance and champerty.</p> <p>Mr TO expressed that the new section 98G(2) would create pitfalls for unwary lawyers. Given that an increasing number of companies intended to recruit lawyers to be members of the board of directors with a view to achieving better corporate governance, Mr TO suggested that the Administration should consider amending the new section 98G(2) to avoid the lawyers falling into such a potential legal trap.</p> <p>The Administration stressed that the new section 98G(2) was not aimed at specifying that the provision of third party funding by a legal practitioner might amount to a civil breach or criminal offence in law. Since the provision of arbitration funding by legal profession was excluded from the definition of third party funding in the Bill, such provision of funding would continue to be governed by the common law principles. There was no question of creating traps for the unwary lawyers.</p> <p>Mr TO suggested amending the new section 98G(2) to the effect that only under certain typical circumstances as set out would the provision of arbitration funding by a person practising law or providing legal services be excluded from the meaning of "third party funding".</p> <p>The Administration responded that it would be difficult to specify all typical circumstances in the Bill. The Administration considered that it would be more appropriate to proceed on the basis of the current Bill and review the</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>legislation after three years of implementation, taking into account the practical experience gained.</p> <p>Mr TO did not subscribe to the Administration's explanation and indicated that he might support the CSA proposed by Dr Junius HO if the Administration would not narrow down the scope covered by the new section 98G(2).</p>	
003545-004123	Mr CHAN Chun-ying Administration	<p>Mr CHAN Chun-ying expressed the view that –</p> <p>(a) the legislative intent of the Bill was to promote Hong Kong as a major international arbitration centre by attracting more people to conduct arbitration / mediation in Hong Kong. However, the new section 98G(2) would make Hong Kong less attractive as a place for conducting international arbitration / mediation, which was not in line with the legislative intent of the Bill; and</p> <p>(b) similar provisions relating to the qualifications and other requirements that a qualifying third party funder must satisfy as stipulated in the Civil Law (Third-Party Funding) Regulations 2017 which was passed by the Singapore parliament should be introduced to the Bill, so that Hong Kong could compete with Singapore on a level playing field.</p> <p>The Administration responded that it was crucial to maintain Hong Kong's status as an international legal and dispute resolution services centre, and was of the view that –</p> <p>(a) the current legislative proposal would achieve the aim of enhancing access to justice through the facilitation of third party funding of arbitration. Whilst, no</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>doubt, the relevant law reform could at the same time also benefit the growth of the arbitration industry, to promote the business development of a particular sector/profession was not the major consideration of the Administration in taking forward the current legislative proposal; and</p> <p>(b) the legislative amendment passed by the Singapore parliament had indeed imposed stringent requirements on the qualifications of third party funders, and as such, it would be difficult to say whether Singapore would be more competitive than Hong Kong in that regard.</p>	
004123-004451	Dr YIU Chung-yim Chairman Administration	<p>In response to Dr YIU Chung-yim's enquiry, the Administration advised that the new Rule 49B(1) under the new Part 5A of the Legal Profession (Professional Conduct) Rules which came into operation in Singapore since 1 March 2017 stipulated the circumstances under which a legal practitioner or a law practice could introduce a client to a third party funder. Hence, it was not suitable to replace the new section 98G(2) of the Bill with this Rule.</p> <p>The Chairman mentioned that HKIAC had indicated in its submission that the current restrictions on conditional or contingency fee arrangements in Hong Kong should be reviewed and liberalized in due course.</p>	
004451-004943	Mr Holden CHOW Chairman Administration	<p>Mr Holden CHOW expressed that the new section 98G(2) was overly stringent. In his view, the legal professional conduct rules and the judgment in <i>Unruh v Seeberger</i> had provided clear guidance to legal profession in handling cases involving maintenance and champerty.</p> <p>The Administration elaborated that in <i>Unruh v</i></p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p><i>Seeberger</i>, the Court of Final Appeal ("CFA") expressly left open the question of whether the doctrines of maintenance and champerty applied to third party funding agreements concerning arbitrations taking place in Hong Kong. As such, the present legislative exercise sought to clarify that third party 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.</p>	
004943-005641	Dr Junius HO Administration	<p>Dr Junius HO considered it unfair to the legal profession because it was the only profession being excluded from the definition of third party funding of arbitration under the new section 98G(2) despite the fact that it was a major player in arbitral sector. He was of the view that the proposed new section 98J had provided sufficient safeguard in avoiding potential conflicts of interest.</p> <p>The Administration reiterated the legislative intent of the Bill, and took the view that further discussion on the conditional or contingency fee arrangements at this stage would open up complex legal policy issues which might have significant impact to the whole legal sector. The Administration also noted that while the Bill would expressly exclude the provision of funding by lawyers and persons providing legal services from the definition of third party funding of arbitration, HKIAC was supportive to the passage of the Bill as mentioned in the penultimate paragraph of its submission.</p>	
005641-010123	Mr CHUNG Kwok-pan Chairman Administration	<p>Mr CHUNG Kwok-pan expressed concern that the scope of the new section 98G(2) was too broad if it also covered the arbitration funding provided indirectly by legal practitioners.</p> <p>In response to Mr CHUNG's further enquiry,</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>the Administration explained 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. Legal services provided by lawyers on a pro bono basis was therefore outside the scope of the Bill as the lawyers would not receive any financial benefit / recover their costs even if the arbitration was successful.</p>	
010123-011246	Mr Jimmy NG Chairman Administration	<p>Mr Jimmy NG expressed that a lenient approach should be adopted in drafting the Bill, given that in <i>Unruh v Seeberger</i>, the CFA expressly left open the question of whether the doctrines of maintenance and champerty applied to third party funding agreements concerning arbitrations taking place in Hong Kong.</p> <p>The Administration responded by stating that the doctrines of maintenance and champerty still applied to Hong Kong litigation. The judgment in <i>Unruh v Seeberger</i> stated, however, that the CFA expressly left open the question of whether the doctrines of maintenance and champerty applied to third party funding agreements concerning arbitrations taking place in Hong Kong because the issue did not arise in that case. In view of the above, the Administration took forward the present legislative exercise, based on the LRC recommendations, to clarify through statute law that third party funding of arbitration and mediation was not prohibited by the common law doctrines of maintenance and champerty.</p> <p>Mr NG expressed dissatisfaction that under the new section 98G(2) a lawyer was not permitted to provide third party funding to a client even if the lawyer did not act as the client's legal representative. The Administration explained</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>that the scenario of "repeated player" was not uncommon in litigation/arbitral proceedings whereby a legal practitioner might provide legal services to the same client in different litigation/arbitral proceedings, and it was possible that these proceedings were funded by the same third party funder. In the light of the sophisticated situations that might occur, the Administration took the view that a legal practitioner should not be allowed to provide third party funding to a client even though the legal practitioner concerned did not act on behalf of the client in that particular case.</p> <p>Mr NG asked whether a lawyer would commit the common law offences of maintenance and champerty if that lawyer was an independent non-executive director ("INED") of a company but was not involved in the company's daily operations and might not be aware that the company had engaged in third party funding business. The Administration responded that, on the basis of the provisions of the Bill, the court would consider the action taken by a lawyer in the circumstances, rather than the identity of that lawyer as such, in determining whether, under common law, that lawyer had indirectly involved in providing arbitration funding (thus exposed to the risk of committing the offences of maintenance and champerty).</p>	
011246-013107	Mr Paul TSE Chairman Administration	Mr Paul TSE considered that the Administration should take heed of the views expressed by the Bills Committee members and, in the light of the recent legislative amendment in Singapore, further consider whether the new section 98G(2) should be amended to provide that under certain circumstances, where potential conflicts of interest were identified, the provision of arbitration funding by a person practising law or providing legal services in Hong Kong or elsewhere would be excluded from the meaning	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>of "third party funding".</p> <p>Mr TSE expressed that the Administration was too stringent by prohibiting the legal profession from participating in third party funding, and that the concern about conflict of interest should be addressed through revising the relevant professional conduct rules by the two legal professional bodies, which were thought more efficient and flexible.</p> <p>The Administration responded that in order not to reopen the study on a separate but controversial issue of conditional or contingency fee, the LRC recommended that the law reform in respect of permitting third party funding of arbitration under Hong Kong law should be implemented taking into account the responses received during the consultation periods. The Administration reiterated that it was the policy intent to cover in the Bill all possible circumstances under which a person practising law or providing legal services might directly or indirectly provide third party funding of arbitration. As mentioned in the LRC's report, the identity of those providing legal services, even if not admitted as lawyers, including on the internet, was expanding. The LRC considered that if those legal service providers, either providing services in Hong Kong or elsewhere, were not covered under the new section 98G(2), there would be a significant loophole in the Bill which would undermine the efficacy of the provision.</p> <p>In reply to Mr TSE's view that the restriction on the provision of arbitration funding by legal profession could be tightened once serious conflicts of interest were identified after the first three years' implementation of the legislation, the Administration considered it not practicable as it would be difficult to tightened the relevant provisions after the implementation</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>of the legislation.</p> <p>The Chairman's enquiry and the Administration's response concerning whether a lawyer would be considered as indirectly providing third party funding if he/she was employed by a litigation funding company to provide professional services.</p>	
013107-014000	Ms YUNG Hoi-yan Chairman Administration	<p>Ms YUNG Hoi-yan expressed concern that a person providing legal services (e.g. legal executive, clerk or other staff working in a law firm) would also be excluded from providing third party funding of arbitration under the new section 98G(2). She also queried the relevant policy considerations of this arrangement.</p> <p>The Administration stressed its policy intent to include persons providing legal services in the new section 98G(2), having regard to the fact that the rights of consumers to access to justice might be unduly affected if a lawyer who provided legal services also engaged in third party funding.</p> <p>In response to Ms YUNG's comment that persons providing legal services were not included in the legislative amendments relating to third party funding passed by the Singapore parliament, the Administration made reference to Singapore's amendment rules which mentioned both "legal practitioner" and "law practice".</p> <p>Ms YUNG opined that the subject of conditional or contingency fee arrangements should be revisited, given that the relevant LRC report was published 10 years ago.</p>	
014000-014653	Dr Junius HO Chairman Administration	Dr Junius HO noted that Hong Kong lawyers were not generally allowed to charge conditional or contingency fees in respect of contentious business. However, as arbitration	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>did not fall within the definition of "contentious business" in section 2 of the Legal Practitioners Ordinance (Cap. 159), Dr HO considered that the subject of conditional or contingency fee arrangements was irrelevant to the discussion (as a solicitor would be permitted to make an agreement with a client for remuneration for non-contentious business under section 56(1) of Cap. 159) and that the only reason of excluding legal practitioners from the provision of arbitration funding through the new section 98G(2) was the concern about conflicts of interest. Notwithstanding this, he took the view that the issue of conflict of interest had already been addressed by the new section 98J. He therefore saw no reason why the legal profession was not allowed to provide arbitration funding under the Bill.</p> <p>The Administration responded that as stipulated in the new section 98F, arbitration was given an extended meaning to include not only arbitrations to which the Arbitration Ordinance (Cap. 609) ("AO") applied, but also court proceedings, proceedings before an emergency arbitrator and mediation proceedings. As such, the issues relating to conditional and contingency fee arrangements might still arise.</p>	
014653-015230	Dr YIU Chung-yim Administration	<p>Dr YIU Chung-yim suggested that the word "indirectly" be deleted from the new section 98G(2), having regard to the insertion of subsection (3A) to section 107 of the Legal Profession Act (Cap. 161) in Singapore which specified that a solicitor could not receive any direct financial benefit from introducing or referring a third party funder to the solicitor's client.</p> <p>The Administration responded that both the LRC and the Government had already considered the suggestion and kept the view that the word "indirectly" should be retained in</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		the new section 98G(2).	
015230-015503	Mr Holden CHOW Administration	<p>In response to Mr Holden CHOW's enquiry as to whether the new section 98G(2) would contravene Article 115 of the Basic Law, the Administration advised that all the provisions in the bills proposed by the Government were in conformity with the Basic Law, including the provisions concerning human rights.</p> <p>The Administration reiterated that the new section did not expressly provide that legal practitioners were prohibited from providing third party funding. The present legislative amendment simply did not cover such provision of third party funding when declaring that third party funding of arbitration was not prohibited by the common law doctrines of maintenance and champerty.</p>	
015503-015823	Mr Jimmy NG Administration	Mr Jimmy NG's enquiry as to whether the Administration would make reference to the relevant rules in Singapore and consider stipulating in the Bill that a legal practitioner was not allowed to hold certain percentage of shares or other ownership interest in a third party funder, instead of simply using the word "indirectly" as in the new section 98G(2). The Administration considered that the existing formulation of "directly or indirectly" was more effective insofar as the regulation of the conduct of lawyers was concerned.	
015823-020037	Chairman ALA10	The Bills Committee did not raise objection to Committee stage amendments ("CSAs") proposed by the Administration which relate to the application of the new Part 10A of Cap. 609 as modified by the new section 7A of Cap. 620 for the purposes of disclosure of mediation communication for third party funding of mediation.	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>Members supported the CSA proposed by Dr Hon Junius HO to delete the new section 98G(2), and agreed that the Chairman will move the CSA in the name of the Bills Committee.</p> <p>Way forward and legislative timetable</p>	
020037-020332	Chairman Mr CHUNG Kwok-pan Mr Holden CHOW ALA10	<p><i>(Extension of the meeting for 15 minutes beyond the appointed ending time by the Chairman.)</i></p> <p>Mr CHUNG Kwok-pan indicated that he might move CSAs to the Bill to delete the word "indirectly" in the new section 98G(2).</p>	
Any other business			
020332-020346	Chairman	Closing remarks	