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By Fax No: 2877 5029

10 February 2017

Ms Evelyn LEE
Assistant Legal Adviser
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Legislative Council Secretariat
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Hong Kong

Dear Ms Lee

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

We refer to your letter dated 27 January 2017, and reply to the questions raised in it as follows.

General

(a) Please provide for Members' reference and consideration, whether the Administration, in drafting the Bill, has referred to or modelled on any legislation implemented in other jurisdiction(s), including those referred to in Chapter 4 of the Consultation Paper; and detailed information on such legislation, and the reasons for referring to or modelling on them.

2. Given the specific context (in terms of both the legal position and the industry situation) of third party funding for arbitration in Hong Kong, most parts of the Bill (e.g. Divisions 1, 2, 4, 5 and 6 of the new Part 10A under clause 3 and the new section 7A under clause 4) are prepared based on the particular needs of the Hong Kong context.

3. We understand that the recommendations in the Report (the "**LRC Report**") published by the Law Reform Commission of Hong Kong (the "**LRC**") entitled *Third Party Funding for Arbitration* on 12 October 2016, on which the Bill is based, were also made against this background.

4. With regard to the new sections 98K, 98L and 98M in Division 3, however, reference has been made to sections 13 and 14 of the Criminal Law Act 1967 of the United Kingdom (the "**UK**"). In particular, the new section 98K also deals with the offence of being a common barrator in a way similar to section 13(1)(a) of the UK Act; while new section 98M largely follows section 14(2) of the UK Act.

5. Please see our further discussion below in reply to your questions on the proposed new sections 98K and 98L.

Scope of non-application of the common law doctrines of maintenance and champerty

(b) Please explain the rationale for restricting the non-application of the doctrines of maintenance and champerty to written third party funding agreements only.

6. The code of practice (the "**Code**") to be issued (under the new section 98O(1)) by the authorized body appointed under the new section 98W(2) is specifically empowered under the new section 98P(1)(b) to require third party funders to ensure that a funding agreement sets out its key terms.

7. As we do expect the Code to so ensure that the key terms are set out, it is desirable to require a funding agreement to be in writing in order to evidence that the relevant statutory requirements are complied with.

8. In any event, it is highly likely that a funding agreement, as a commercial contract concluded between sophisticated parties, will be made in writing.

(c) Whether legal practitioners are subject to the common law doctrines of maintenance and champerty if they provide third party funding for arbitration in the jurisdictions referred to in Chapter 4 of the Consultation Paper.

9. As noted in paragraph 3.9 of the Consultation Paper (the "**Consultation Paper**") published by the LRC entitled *Third Party Funding for Arbitration* on 19 October 2015, lawyer funding of a party's participating in the arbitration 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.[1] The case will therefore be fully or partly funded out of the working capital of the lawyer's firm. Depending on the jurisdiction, fee arrangements may take the form of speculative[2] or no win/no fee agreements and conditional[3] or contingency fee[4] agreements. Damages based agreements may also apply, where a success fee is charged as a percentage of any recovery in proceedings.[5]

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[1] Australian Productivity Commission, *Access to Justice Arrangements*, Draft Report (2014), at 524.

[2] 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.

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

[4] 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).

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

10. Further, paragraph 3.68 of the Consultation Paper pointed out that in Hong Kong, neither a barrister nor a solicitor 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. For example, the Legal Practitioners Ordinance (Cap. 159) provides that a solicitor's power to make agreements as to remuneration and the provisions for the enforcement of these agreements do not give validity to:

> "any agreement by which a solicitor retained or employed to prosecute any action, suit or other contentious proceeding stipulates for payment only in the event of success in that action, suit or proceeding."[6]

11. As pointed out in paragraph 1.28 of the Consultation Paper, the subject of conditional fees is a separate LRC reference: see the LRC, *Report on Conditional Fees* (2007). It was therefore excluded from the LRC recommendations with respect to third party funding for arbitration.

12. While it is one thing to ask whether lawyers are subject to the general common law doctrines of maintenance and champerty, it is quite another to ask whether they should specifically be permitted from funding their own clients in the resolution of legal disputes.

13. In Australia, for example, third party funding of litigation is not prohibited by the common law doctrines of maintenance and champerty. Lawyers, however, are banned from charging contingency fees, though conditional fee agreements have been allowed in the states of Victoria, South Australia, New South Wales and Queensland. (Consultation Paper paragraphs 3.12, 4.12, 4.33-4.50)

14. In the UK, on the other hand, while maintenance and champerty were abolished as crimes and torts in England and Wales in 1967, legislation has been implemented to permit conditional fee agreements and damages-based agreements between lawyers and their clients. (Consultation Paper paragraph 4.56)

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[6] Legal Practitioners Ordinance (Cap 159) section 64(1)(b).

15. In Singapore, the Civil Law (Amendment) Bill 2016 was passed on 10 January 2017. The Singapore amendment seeks to achieve a number of objectives in relation to third party funding of certain dispute resolution proceedings. These include the making of a related amendment to the Legal Profession Act (Cap. 161) to clarify, for the avoidance of doubt, that section 107 (Prohibition of certain stipulations) of that Act does not prevent a solicitor from –

(a) introducing or referring to a Third-Party Funder to the solicitor's client, so long as the solicitor does not receive any direct financial benefit from the introduction or referral;

(b) advising on or drafting a third-party funding contract for the solicitor's client or negotiating the contract on behalf of the client; and

(c) acting on behalf of the solicitor's client in any dispute arising out of the third party funding contract.

16. It appears that the position in Singapore remains to be that lawyers are prohibited from providing third party funding for arbitration, as seen from the relevant provisions in section 107, despite the insertion of sub-section (3A) to achieve the above purpose, of the Legal Profession Act:

"(1) No solicitor shall —

(a) purchase or agree to purchase the interest or any part of the interest of his client or of any party in any suit, action or other contentious proceeding brought or to be brought or maintained; or

(b) enter into any agreement by which he is retained or employed to prosecute any suit or action or other contentious proceeding which stipulates for or contemplates payment only in the event of success in that suit, action or proceeding.

...

(3) A solicitor shall, notwithstanding any provision of this Act, be subject to the law of maintenance and champerty like any other person.

..."

17. In the light of the above, we therefore seek to address the question of how legal practitioners as third party funders should be dealt with in the manner as follows.

(d) The relevant policy consideration for applying the exclusion solely to legal practitioners but not to professionals in other disciplines who may be involved in an arbitration and may also have a conflict of interest.

18. As pointed out by the LRC in paragraphs 3.35-3.36 of the LRC Report, it is in the public interest, including that parties be represented by independent counsel focused on their service, and of maintaining the integrity of dispute resolution, 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. Nor does Hong Kong law currently permit Hong Kong lawyers to charge conditional and contingency fees. The identity of those providing legal services (even if not admitted as lawyers), including on the internet, is expanding, so that similar considerations apply to such providers of legal services.

19. Currently, there is uncertainty under the common law as to whether the doctrines of maintenance and champerty apply to third party funding for arbitrations taking place in Hong Kong, as appears from the Court of Final Appeal (the "**CFA**") judgment in *Unruh v Seeberger*[7] where the CFA expressly left open this question.[8] (LRC Report paragraph 1.6)

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[7] (2007) 10 HKCFAR 31, at paragraph 123.

[8] While earlier in *Cannonway Consultants Limited v Kenworth Engineering Ltd* [1995] 2 HKLR 475 (a Court of First Instance Judgment), Kaplan J had held that the law of champerty did not extend to arbitration, the CFA in *Unruh v Seeberger* did not refer to this aspect of Kaplan J's judgment.

20. The proposed legislative amendments mentioned in the LRC Report merely seek to clarify that 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. As such, any persons who engage in third party funding activities not falling within the above scope would need to assess their own risks in so doing.

21. As mentioned in paragraph 11 above, the present law reform exercise does not seek to examine the question as to whether legal practitioners in Hong Kong should continue to be banned generally from entering into conditional or contingency fee agreements. That question went beyond the terms of reference of the LRC's review on third party funding for arbitration, nor does it come within the scope of the present legislative exercise.

22. The issue of conflicts of interest is addressed in the proposed new section 98P(1)(f), which provides that the Code may, in setting out practices and standards, require third party funders to ensure that they have effective procedures for addressing potential, actual or perceived conflicts of interests and the procedures enhance the protection of funded parties.

23. Professionals in any other discipline would be subject to the provisions of the Code governing conflicts of interest, should they provide third party funding for arbitration.

(e) Please explain the meaning of the words "no place of arbitration" for the purpose of the new section 98N.

24. As pointed out by the LRC Sub-committee on Third Party Funding (the "**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 Arbitration Ordinance (the "**AO**") so as to preserve Hong Kong's position as a leading arbitral jurisdiction (LRC Report paragraphs 3.33-3.34).

25. We support 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. We now propose 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.

26. By including arbitration which has no of place arbitration in the new section 98N, we aim at including the 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.

27. 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.

(f) It appears that it is the policy intent that the new Part 10A applies to any mediation within the meaning of Cap. 620, regardless of whether it is litigation-related or not. Please explain the policy consideration for such an arrangement.

28. The common law doctrines of maintenance and champerty have been held by the Hong Kong courts to prohibit third party funding of litigation[9], save in some exceptional areas[10].

29. 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.

30. Mediation encourages settlement of disputes. In principle, assisting in or facilitating the settlement of disputes will not conflict with 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[11]. Hence, third party funding of mediation arguably facilitates the objective of mediation to bring about early resolution of dispute without resorting to litigation.

31. The LRC also takes the view that mediation as a form of alternative dispute resolution is not contentious proceeding to which the doctrines of maintenance and champerty apply[12].

32. Under the present proposed amendments to the AO, the AO will be amended to expressly disapply the common law doctrines of maintenance and champerty to mediation conducted under the AO (see new section 98K read with the definition of "arbitration" in the new section 98F). In the absence of corresponding amendments to the Mediation Ordinance (Cap. 620) (the "**MO**"), doubts will arise as to whether these doctrines apply (or becomes applicable) to mediation under the MO[13] notwithstanding the nature of mediation mentioned above and as defined under section 4 of the MO[14].

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[9] See *Unruh v Seeberger* [2007] 10 HKCFAR 31 for a detailed discussion on the meaning of "maintenance" and "champerty".

[10] For example, where a third party can prove that it has a legitimate interest in the outcome of the litigation;

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

[12] Although legal professional conduct rules do apply. See paragraph 1.30 of the Consultation Paper.

[13] By contrasting the expressly disapplication of the common law doctrines under the amended Arbitration

33. As recommended by the LRC and having consulted the Steering Committee on Mediation, the Department of Justice 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.

34. Mediation that is conducted in accordance with section 32 or section 33 of the AO will be dealt with under the proposed amendments to the AO. See paragraph 32 above.

The new section 98K

(g) The new section 98K provides that the common law offences of maintenance (including the common law offence of champerty) and of being a common barrator do not apply in relation to third party funding of arbitration.

Please explain why, in drafting the new section 98K, a style which is similar to section 13(1)(a) of the Criminal Law Act 1967 of the United Kingdom and section 3 of the Maintenance, Champerty and Barratry Abolition Act 1993 (the "1993 Act") of New South Wales is adopted, instead of setting out the offences of maintenance and champerty as separate offences (see, for

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Ordinance and the Mediation Ordinance (which is silent on third party funding), one may contend that these doctrines would apply to MO Mediation.

[14] "Mediation" is defined in section 4 of the Mediation Ordinance 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."

example, section 68 of the Law Reform (Miscellaneous Provisions) Act 1955 (the "1955 Act") of the Australian Capital Territory).

The term "common barrator" is neither referred to in the long title of nor defined in the Bill. Please explain the meaning of "being a common barrator".

35. As stated in paragraph 4.53-4.55 of the Consultation Paper, notwithstanding that the doctrines of maintenance and champerty developed in England and Wales some 700 years ago and were regularly applied, maintenance and champerty were abolished as crimes and torts in England and Wales by way of sections 13 and 14 of the Criminal Law Act 1967.

36. In the context of English law, Lord Neuberger, President of the UK Supreme Court, explained extra-judicially in an article entitled *From Barretry, Maintenance and Champerty to Litigation Funding* dated 8 May 2013 that:

> "champerty and barretry were simply subsets of maintenance, or aggravated forms of it, in that champetry was maintenance for profit, and barretry was serial maintenance. Barretry is not as well known as maintenance and champerty in this country, but it is a term that appears to live on in the USA, which is often more traditional on matters of English law than ever we are in England..." (paragraph 14 of the article)

37. Lord Neuberger further explained that historically, maintenance, champerty and barratry were all criminal offences, but they "finally ceased to be criminal offences and torts by virtue of sections 13 and 14 of the Criminal Law Act 1967, following recommendations made by the Law Commission, which described maintenance and champerty as dead letters that were no more than useless '*lumber*' that '*ought to be discarded in practice*', and treated barretry as an outdated offence." (paragraph 15 of the article)

38. As stated in paragraph 4.153 of the Consultation Paper, in the context of the United States, "barratry adds 'frequency' to the string of elements for

maintenance and champerty: multiple instances of champerty by a single person could constitute barratry in some jurisdictions".

39. Considering that "barratry" is a subset of maintenance, the reference to the non-application of the common law doctrine of maintenance in long title would be wide enough to cover the non-application of that to barratry.

40. On the other hand, we propose that the common law offence of "being a common barrator" be specifically referred to in the new section 98K in the Bill to make clear the legislative intent that such an offence does not apply to third party funding of arbitrations either. In doing so, we have made reference to the formulation of section 13(1)(a) of the Criminal Law Act 1967 when drafting the new section 98K.

41. From the drafting perspective, whether a formulation similar to section 13(1)(a) of the Criminal Law Act 1967 Act and section 3 of the 1993 Act (by which the doctrines are set out in an un-paragraphed sentence) or a formulation similar to section 68 of the 1955 Act (by which the doctrines are set separately in paragraphs) is adopted, the legal effect is the same. The new section 98K takes the current form because of the reference to the Criminal Law Act 1967.

The new section 98L

(h) Similar to the new section 98K above, please explain why, in drafting the new section 98L, a drafting style which is similar to section 4 of the 1993 Act is adopted instead of setting out the tort of maintenance and the tort of champerty separately (see, for example, section 14(1) of the 1967 Act and section 221(1) of the Civil Law (Wrongs) Act 2002 of the Australian Capital Territory).

42. Similar to the answer to (g) above, the legal effect is the same whether the doctrines are set out in paragraphs or not. The formulation of the new section 98L follows that of the new section 98K.

Code of Practice under Division 4 of the new Part 10A

(i) **According to the new section 98O(1), the authorized body may issue a code of practice ("Code") with which third party funders are ordinarily expected to comply in carrying on activities in connection with third party funding of arbitration. Please clarify the meaning of "ordinarily expected to comply"; and provide examples on circumstances under which compliance with the Code is not ordinarily expected.**

43. The wording "ordinarily expected" in the proposed new section 98O(1) merely describes that the Code will set out the benchmark standards which the third party funders are expected to comply with. The wording does not in any way imply that exceptional situations are envisaged in which third party funders would be exempt from their compliance with the Code.

44. For example, similar wording can be found in section 95 of the Insurance Companies Ordinance (Cap. 41) (the "**ICO**") (about to come into operation), which provides as far as relevant that:

> "(1) The Authority may publish, in the Gazette and in any other manner it considers appropriate, codes of conduct for giving guidance relating to the practices and standards with which licensed insurance intermediaries are ordinarily expected to comply in carrying on regulated activities.
>
> .....
>
> (5) A failure on the part of a licensed insurance intermediary to comply with a code of conduct does not by itself render the intermediary liable to any judicial or other proceedings.
>
> (6) However, the failure may be taken into account in considering, for a provision of this Ordinance, whether the intermediary is a fit and proper person to remain licensed.

(7) In any proceedings under this Ordinance before a court—

(a) a code of conduct is admissible in evidence; and

(b) if a provision in the code appears to the court to be relevant to a question arising in the proceedings, the court must, in determining the question, take into account any compliance or non-compliance of the provision."

(emphasis underlined)

45. Similar to the code of practice to be published under section 95 of the ICO, we propose by way of the new section 98R that a failure to comply with any provision of the Code to be issued under the new section 98O in itself should not lead to civil or criminal liability. As such, there is no necessity to create any defence or exemption for non-compliance in extraordinary or exceptional circumstances where mitigating factors are present.

(j) According to the new section 98P(1)(b)(ii), a Code issued under the new section 98O may require a third party funder to ensure, among other things, whether and to what extent that a third party funder or persons associated with such funder will be liable to a funded party for certain costs and financial liabilities. It is noted that the phrase "persons associated with the third party funders" is not defined in the Bill. Please clarify the meaning of this phrase and consider specifying it in the Bill.

46. It is not uncommon that persons associated with the third party funder, including corporate parents or subsidiaries of the third party funder, may be involved in third party funding, for example, by providing the funding despite not being party to the funding agreement.

47. The LRC recommends that the Code should provide that a third party funder must at all times maintain access to adequate financial resources to meet its obligations, and the obligations of subsidiaries or associated entities, and that the Code should include provisions that a third party funder shall accept responsibility for compliance with the Code on its own behalf and by its subsidiary or an associated entity. (LRC Report paragraphs. 2.10(9), 6.63, 6.68, emphasis added) This is intended to prevent third party funders from

avoiding compliance or complaints by pinning the blame on a subsidiary or other associated entity, typically in a situation where the funding is actually provided by a person other than the third party funder (who is a party to the funding agreement). As recognised in paragraph 5.15 of the LRC Report, the third party funding sector in Hong Kong is relatively new and more knowledge and actual experience will be required for it to develop.

48. In this context, we note that the Code of Conduct for Litigation Funders (January 2014) issued by the Association of Litigation Funders of England and Wales (the "**ALF**") defines "litigation funder" as follows:

> "A litigation funder:
>
> > 2.1 has access to funds immediately within its control, including within a corporate parent or subsidiary ('Funder's Subsidiary'); or
> >
> > 2.2 acts as the exclusive investment advisor to an entity or entities having access to funds immediately within its or their control, including within a corporate parent or subsidiary ('Associated Entity'),
>
> ('a Funder') in each case"

49. We take the view that, where associated persons are involved in third party funding, the Code should be empowered to require third party funders to set out clearly in funding agreements the degree of liability of such persons, and hence the reference to the phrase "persons associated with the third party funders" in the proposed new section 98P(1)(b)(ii).

50. Taking into account the LRC's concerns, we propose that the meaning of "associated" should be left undefined, so as to accord flexibility to the Code in devising, having regard to any changing circumstances, what kinds of persons the liability of whom would need to be covered in the funding agreements etc. Furthermore, before issuing the Code, the public (and person with knowledge or experience of arbitration or third party funding) will be consulted about the proposed Code (see the new section

98Q). If further elaboration in the meaning of the "persons associated with the third party funders" is required, the authorized body may include detailed definitions and provisions in the Code.

(k) According to the new section 98Q(4), the authorized body may issue a Code by publishing it in the Gazette after considering all written submissions made before a specified time. Please clarify whether a written submission which is made but not yet received by the authorized body before the specified time will nonetheless be considered by the authorized body.

51. Section 98Q(4) should be read together with section 98Q(3)(c).

52. The new section 98Q(3)(c) provides that the notice of public consultation must state that "written submissions ... may be made to the authorized body before a specified time". We consider it sufficiently clear that in order for a submission to be regarded as having been "made to" a person, that submission should have reached that person. From a practical point of view, it also seems likely that the authorized body would specify the channels through which written submissions may be "made to" it before the specified time, and that would provide a further indication on whether a submission is "made before the specified time" as mentioned in section 98Q(4).

(l) Whether the Administration has considered whether and how third party funders are regulated in other common law jurisdictions, in particular, whether such funders are regulated by legislation or code of practice (which is not legislation); and the rationale for providing that the Code is not subsidiary legislation.

53. As noted by the LRC Sub-committee, 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 toward 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). (Consultation Paper paragraphs 4.6, 4.8 and 6.6)

54. In Australia, there is only limited regulation of third party funding under the federal legislation governing the financial services industry. This legislation requires that third party funders have in place adequate procedures and practices for managing conflict of interest. (Consultation Paper paragraph 4.34)

55. In England and Wales, the litigation funding industry is self-regulated through the ALF, although membership is not compulsory. The ALF system of regulation is set out in the ALF Code developed by the Civil Justice Council. Some of the main features of the ALF Code are capital adequacy requirements, limitations on the withdrawal of funding during litigation, and limitations on the third party funder's ability to influence litigation. The ALF has complaint procedures in place, under which sanctions can be imposed. However, the main force of industry self-regulation is intended to come from the market credibility to be gained by third party funders who comply with the code. (Consultation Paper paragraphs 4.51-4.52, 4.81)

56. The LRC considers that the use of codes of conduct to promote best practices in the interests of the public is common in Hong Kong, including in the financial services sector.[15] They take the view that a code is in line with the "light touch" approach to regulation adopted in other jurisdictions including in Australia and England and Wales, while being a common way in Hong Kong of ensuring that high standards of probity, accountability and transparency are set. (LRC Report paragraphs 5.20, 5.29)

57. The LRC thus recommends that a "light touch" approach to regulation, in the form of a code, should be adopted for an initial period of 3 years, and the code would not be subsidiary legislation. (LRC Report paragraphs 5.20, 5.29)

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[15] See for example the Securities & Futures Commission, the Hong Kong Federation of Insurers and the Hong Kong Monetary Authority.

58. We adopt the LRC's recommendation on taking a "light-touch" approach to regulation. We therefore propose, by way of the new section 98Q(6), to make clear that the Code is not subsidiary legislation.

59. In line with our proposal under the new section 98Q(6), the proposed 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. The proposed new section 98R(2) provides that, however, 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.

Other measures and safeguards under Division 5 of the new Part 10A

(m) According to the new section 98T(2)(a), in case where a third party funding agreement is made on or before the commencement of an arbitration, a written notice of the fact that such an agreement has been made and the name of the third party funder must be given by the funded party to each other party of the arbitration and the arbitration body on the commencement of the arbitration. Please clarify if a funded party may give such notice "on or before" the commencement of the arbitration, and if so, consider amending the provision accordingly.

60. Under the proposed new section 98T(2)(a), there is no prohibition against the funded parties giving a notice voluntarily before the commencement of the arbitration.

61. That said, the phrase "on the commencement of the arbitration" in the new section 98T(2)(a) is to be considered in the light of the new section 98T(3), under which the notice must be given to (i) each other party to the arbitration, and (ii) the arbitration body.

62. In respect of (i), as a matter of logic, there is a "party" to an arbitration only when the arbitration has commenced. Therefore, it seems that strictly speaking the earliest opportunity at which a notice may be given to a "party" is the commencement of the arbitration. It is also appropriate to require a funded party to give the notice at the same time as an arbitration is sought to be commenced under the existing section 49 of the AO.

63. In respect of (ii), similarly, it would be appropriate for a notice about funding to be given to the arbitration body[16] at the same time when the arbitration is sought to be commenced. If there is no arbitration body yet when the arbitration commences, the new section 98T(4) deals with that.

64. Hence, the use of "on the commencement of the arbitration" reflects our policy intent to make it a mandatory requirement that a notice should formally be given on the commencement of the arbitration, whether a notice has previously been given or not.

Yours sincerely,

(T Y LEE)
Senior Assistant Solicitor General
Legal Policy Division

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[16] "arbitration body" is defined under the new section 98F to mean:

"***arbitration body*** (仲裁機構)—

(a) in relation to an arbitration (other than the proceedings mentioned in paragraphs (b) and (c))—means the arbitral tribunal or court, as the case may be;

(b) in relation to proceedings before an emergency arbitrator—means the emergency arbitrator; or

(c) in relation to mediation proceedings—means the mediator appointed under section 32 or referred to in section 33, as the case may be;"

中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China

立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

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By Fax (3918 4799)

27 January 2017

Mr LEE Tin-yan
Senior Assistant Solicitor General (Arbitration)
Legal Policy Division
Department of Justice
5th Floor, East Wing, Justice Place
18 Lower Albert Road, Central
Hong Kong

Dear Mr LEE,

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

I am scrutinizing the subject Bill with a view to advising Members on its legal and drafting aspects and would like to seek information or clarification on the following matters:

General

It is noted that the Law Reform Commission of Hong Kong ("LRC") published a Consultation Paper ("Consultation Paper") entitled *Third Party Funding for Arbitration* on 19 October 2015. According to Chapter 4 of the Consultation Paper, LRC has considered the current law and regulation of third party funding for arbitration in various common law and civil law jurisdictions and under the Washington Convention. It is also noted that the Bill is based on the recommendations in LRC's report ("Report") on the above consultation. In the light of the above, please provide the following information for Members' reference and consideration:

(a) whether the Administration, in drafting the Bill, has referred to or modelled on any legislation implemented in other jurisdiction(s), including those referred to in Chapter 4 of the Consultation Paper; and

(b) detailed information on such legislation, and the reasons for referring to or modelling on them.

Scope of non-application of the common law doctrines of maintenance and champerty

According to the new sections 98G(1)(a) and 98H(a), the non-application of the doctrines of maintenance and champerty only applies to agreements for third party funding of arbitration in writing. In other words, the non-application does not apply to a third party funding agreement made orally. Please explain the rationale for restricting the non-application to written third party funding agreements only.

At present, the common law doctrines of maintenance and champerty are applicable in Hong Kong to any person regardless of whether the person is practising law or providing legal services ("legal practitioners") or not. Under the new section 98G(2), third party funding of arbitration does not include the provision of arbitration funding by a legal practitioner. According to paragraph 27(b) of the Legislative Council ("LegCo") Brief and paragraph 3.36 of the Report, it seems that the exclusion is based on the rationale that legal practitioners should not place themselves in a conflict of interest position by engaging in third party funding. In the light of the above, please provide the following information:

(a) whether legal practitioners are subject to the common law doctrines if they provide third party funding for arbitration in the jurisdictions referred to in Chapter 4 of the Consultation Paper; and

(b) the relevant policy consideration for applying the exclusion solely to legal practitioners but not to professionals in other disciplines who may be involved in an arbitration and may also have a conflict of interest.

Under the new section 98N, the new Part 10A applies in relation to an arbitration for which "there is no place of arbitration" (the corresponding Chinese rendition is "某仲裁無仲裁地點") as if the place of arbitration were in Hong Kong. Please explain the meaning of the words "no place of arbitration".

According to paragraph 2.8(2) of the Report, LRC recommended that consideration should be given to whether to make consequential amendments to the Mediation Ordinance (Cap. 620) to extend the non-application of the common law doctrines of maintenance and champerty to mediation within the scope of Cap. 620. It is noted that Part 3 of the Bill seeks to add the new section 7A to Cap. 620 so that the non-application applies to mediation defined in Cap. 620. In paragraph 19 of the LegCo Brief, it is stated that the common law doctrines of maintenance and champerty will only be declared to be inapplicable to the mediation conducted prior to or during the course of litigation. Further, paragraph 43 of the LegCo Brief states that the new section 7A to Cap. 620 extends the application of the new Part 10A of the Arbitration Ordinance (Cap. 609) to mediation to which Cap. 620 applies. It appears that it is the policy intent that the new Part 10A applies to any mediation within the meaning of Cap. 620, regardless of whether it is litigation-related or not. In the light of the above, please explain the policy consideration for such arrangement.

The new section 98K

The new section 98K provides that the common law offences of maintenance (including the common law offence of champerty) and of being a common barrator do not apply in relation to third party funding of arbitration. In paragraph 10 of *Winnie Lo v HKSAR* (FACC 2/2011), the Court of Final Appeal refers to the definition of maintenance as "the giving of assistance or encouragement to one of the parties to an action by a person who has neither an interest in the action nor any other motive recognised by the law as justifying his interference" and champerty as "a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give to the maintainer a share of the subject matter or proceeds thereof, if the action succeeds". It appears that the elements of the common law offence of maintenance and those of the offence of champerty are different. The difference is that maintenance does not require a promise to give a share of the subject matter or proceeds in respect of the lawsuit maintained whereas there is such an element in respect of champerty. In the light of the above, please explain why, in drafting the new section 98K, a style which is similar to section 13(1)(a) of the Criminal Law Act 1967 ("1967 Act") of the United Kingdom and section 3 of the Maintenance, Champerty and Barratry Abolition Act 1993 ("1993 Act") of New South Wales is adopted, instead of setting out the offences of maintenance and champerty as separate offences (see, for example, section 68 of the Law Reform (Miscellaneous Provisions) Act 1955 of the Australian Capital Territory).

It is noted that the new section 98K also provides that the common law offence of being a common barrator does not apply in relation to third party

funding of arbitration. However, the term "common barrator" is neither referred to in the long title of nor defined in the Bill. As such, please explain the meaning of "being a common barrator".

The new section 98L

The new section 98L provides that the tort of maintenance (including the tort of champerty) does not apply in relation to third party funding of arbitration. Similar to the new section 98K above, please explain why, in drafting the new section 98L, a drafting style which is similar to section 4 of the 1993 Act is adopted instead of setting out the tort of maintenance and the tort of champerty separately (see, for example, section 14(1) of the 1967 Act and section 221(1) of the Civil Law (Wrongs) Act 2002 of the Australian Capital Territory).

Code of practice under Division 4 of the new Part 10A

According to the new section 98O(1), the authorized body may issue a code of practice ("Code") with which third party funders are ordinarily expected to comply in carrying on activities in connection with third party funding of arbitration. Please (a) clarify the meaning of "ordinarily expected to comply"; and (b) provide examples on circumstances under which compliance with the Code is not ordinarily expected.

According to the new section 98P(1)(b)(ii), a Code issued under the new section 98O may require a third party funder to ensure, among other things, whether and to what extent that a third party funder or persons associated with such funder will be liable to a funded party for certain costs and financial liabilities. It is noted that the phrase "persons associated with the third party funders" is not defined in the Bill. Please clarify the meaning of this phrase and consider specifying it in the Bill.

According to the new section 98Q(4), the authorized body may issue a Code by publishing it in the Gazette after considering all written submissions made before a specified time. Please clarify whether a written submission which is made but not yet received by the authorized body before the specified time will nonetheless be considered by the authorized body.

According to paragraph 4.8 of the Consultation Paper, LRC has studied the different approaches in regulating the third party funding sector, such as by means of government regulation and industry self-regulation. As stated in paragraph 5.20 of the Report, LRC is of the view that the use of a Code is in line with the approach adopted in Australia and England and Wales, and the

Code would not be subsidiary legislation. It is also noted that under the new section 98Q(6), the Code is not subsidiary legislation. In the light of the above, please provide the following information:

(a) whether the Administration has considered whether and how third party funders are regulated in other common law jurisdictions, in particular, whether such funders are regulated by legislation or code of practice (which is not legislation); and

(b) the rationale for providing that the Code is not subsidiary legislation.

Other measures and safeguards under Division 5 of the new Part 10A

According to the new section 98T(2)(a), in case where a third party funding agreement is made on or before the commencement of an arbitration, a written notice of the fact that such an agreement has been made and the name of the third party funder must be given by the funded party to each other party of the arbitration and the arbitration body on the commencement of the arbitration. Please clarify if a funded party may give such notice "on or before" the commencement of the arbitration, and if so, consider amending the provision accordingly.

As the first meeting of the Bills Committee will be held on 14 February 2017, please let us have your reply in both Chinese and English by 10 February 2017.

Yours sincerely,

(Evelyn LEE)
Assistant Legal Adviser

c.c. Department of Justice
(Attn: Ms Theresa JOHNSON, Law Draftsman (Fax: 3918 4613))
Legal Adviser
Senior Assistant Legal Adviser 1
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