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來函檔號 Your Ref: CB4/BC/2/16

Ms Sophie LAU  
Clerk to the Bills Committee  
Legislative Council Complex  
1 Legislative Council Road  
Central  
Hong Kong

Dear Ms LAU,

**Bills Committee on  
Arbitration and Mediation Legislation  
(Third Party Funding) (Amendment) Bill 2016 (“Bill”)  
Meeting on 28 February 2017**

We refer to your letter of 16 February 2017 and would like to reply as follows.

**I. Proposed Committee Stage Amendment to Clause 4 of the Bill**

2. At the meeting of 14 February 2017, the Department of Justice (“DoJ”) expressed our intention to introduce Committee Stage Amendments (“CSAs”) to the Bill in respect of Clause 4 of the Bill to amend the Mediation Ordinance (Cap. 620). A copy of the proposed CSAs is at Annex for Members’ consideration.

3. Clause 4 of Bill proposes to add a new section 7A to the Mediation Ordinance (Cap. 620) (“MO”). Under the proposed new section 7A, the new Part

10A of the Arbitration Ordinance will be applied to the MO with modifications. One of the provisions so applied to the MO is a new section 98S which, among other things, permits a party to a mediation or an agreement to mediate to disclose mediation communication to a potential third party funder (“Tier One Exception”). The third party funder may further disclose the mediation communication to protect or pursue a legal right or interest of the third party funder in legal proceedings in or outside Hong Kong (“Tier Two Exception”).

4. The modifications made to the new section 98S under the original section 7A(d) adopted a minimalist approach. Nevertheless, on further reflection, it is proposed that the whole section 98S as applied to the MO (“section 98S”) be substituted so as to address the issues set out below that are specific to the MO context. Committee Stage Amendment (“CSA”) is therefore proposed to substitute the original section 7A(d) with a new one as set out in the Annex .

***(a) Application of the Tier One Exception to a person who intends to mediate a dispute***

5. Under the current section 8(1) of the MO, the statutory duty to maintain confidence in mediation communication is imposed on any person. This is unlike section 18(1) of the Arbitration Ordinance (Cap. 609) (“AO”) which imposes a duty of confidence on the parties to an arbitration agreement or arbitration.

6. A person who intends to mediate a dispute may wish to seek third party funding at a stage before that person executes an agreement to mediate or commences mediation. Hence, the Tier One Exception should be extended to enable such person to make the necessary disclosure for the purpose of having or seeking third party funding. The revised section 98S(1)(a) reflects this.

***(b) Application of the Tier Two Exception to the funded person***

7. At the moment, section 8 of the MO does not contain any specific provision that enables a funded party to disclose mediation communication for the purpose of protecting or pursuing the party’s legal right or interest in relation to third party funding in legal proceedings in or outside Hong Kong. DoJ considers that such funded party should also be given the same right to make disclosure of mediation communication as the third party funder in such circumstances. The revised section

98S(2) reflects this.

***(c) Leave of the relevant court or tribunal is required under the Tier Two Exception***

8. Under section 8(3) of the MO, a person may only disclose mediation communication for the purpose of, among other things, enforcing or challenging a mediated settlement agreement if leave of the relevant court or tribunal is obtained under section 10 of the MO.

9. DoJ considers that a third party funder and a funded party should equally be required to obtain the court's or tribunal's leave prior to disclosing mediation communication to protect or enforce its rights in legal proceedings. Tier Two Exception should be aligned with section 8(3) of the MO. The revised section 98S(2) and (3) reflects this.

***(d) Proposed new section 98S(2)(a)(ii) of the AO is not applicable to mediation***

10. Under the proposed new section 98S(2)(a)(ii) of the AO ("AO section 98S(2)(a)(ii)"), a third party funder of arbitration may disclose information relating to arbitral proceedings under an arbitration agreement or an award made in such arbitral proceedings to enforce an award made in the arbitration. This exception to the restriction on disclosure of the relevant information is not applicable to mediation. Mediation is not an adjudicative process as a mediator does not adjudicate the legal rights or liabilities of the parties to mediation. No award will be made at the end of mediation. It is therefore not necessary for the revised section 98S to contain an equivalent of the AO section 98S(2)(a)(ii).

**II. List of follow-up actions**

11. We also refer to the list of follow-up actions concerning other matters arising from the meeting on 14 February 2017, which we received on 20 February 2017. We are in the process of finalising our bilingual reply and will send it to you at the earliest opportunity for Members' consideration.

### III. Attendance list for the next meeting

12. The following officers will attend the meeting to be held on 28 February 2017:

Mr LEE Tin-yan 李天恩先生	Senior Assistant Solicitor General (Arbitration) 高級助理法律政策專員 (仲裁)
Miss Ada CHEN 陳潔儀女士	Commissioner of the Joint Dispute Resolution Strategy Office and Senior Assistant Law Officer (Civil Law) (Mediation) 爭議解決政策統籌辦公室主任及高級助理民事法律 專員(調解)
Ms Theresa JOHNSON 莊綺珊女士	Law Draftsman 法律草擬專員
Mr Peter SZE 施俊輝先生	Senior Government Counsel 高級政府律師
Mr Bernard YUE 余志匡先生	Senior Government Counsel 高級政府律師

Yours sincerely,



( LEE Tin-yan )  
Senior Assistant Solicitor General (Arbitration)  
Legal Policy Division

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

**CSA**

New section 7A of Mediation Ordinance (Cap. 620)  
(in mark-up showing the CSA)

**7A. Third party funding of mediation**

Part 10A of the Arbitration Ordinance (Cap. 609) applies in relation to a mediation as if—

- (a) in that Part—
  - (i) a reference to arbitration were a reference to mediation; and
  - (ii) a reference to an arbitration body were a reference to a mediator;
- (b) in section 98F of that Ordinance, the definitions of *arbitration*, *arbitration body*, *emergency arbitrator* and *mediation proceedings* were omitted;
- (c) section 98N of that Ordinance were replaced by the following—

**“98N. Limited application of Part 10A for non-Hong Kong mediation**

- (1) Despite section 5(1) of the Mediation Ordinance (Cap. 620), this Part applies in relation to a mediation that does not

fall within the description of that section as if—

- (a) the mediation were a mediation conducted in Hong Kong; and
- (b) the definition of *costs* in section 98F were replaced by the following—

“*costs* (費用), in relation to a mediation, means only the costs and expenses of services that are provided in Hong Kong in relation to the mediation;”.

(2) In this section—

*mediation* (調解) has the meaning given by section 4 of the Mediation Ordinance (Cap. 620).”; and

~~— (d) in section 98S(1) of that Ordinance —~~

~~— (i) the reference to “section 18(1)” were a reference to section 8(1);~~

~~— (ii) the reference to “information referred to in that section” were a reference to a mediation communication; and~~

~~— (iii) the reference to “a party” were a reference to a party to a mediation or an agreement to mediate.”.~~

~~— (d) section 98S of that Ordinance were replaced by the following—~~

**“98S. Disclosure of mediation communication for third party funding of mediation**

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- (1) Despite section 8(1) of the MO, a mediation communication—
- (a) may be disclosed by a person to another person for the purpose of having, or seeking, third party funding of mediation from the other person; and
- (b) may be disclosed by a person mentioned in paragraph (a) to a professional adviser of the person for the purpose of obtaining advice in connection with the third party funding of mediation.
- (2) Also, despite section 8(1) of the MO, a mediation communication may, with leave, be disclosed by a person mentioned in subsection (1)(a) to protect or pursue a legal right or interest of the person in relation to the third party funding of mediation in legal proceedings before a court or other judicial authority in or outside Hong Kong.
- (3) For the purposes of leave required under subsection (2), section 10 of the MO applies as if the reference to “section 8(3)” in that section included subsection (2).
- (4) If a disclosure is made by a person to a professional adviser under subsection (1)(b), subsections (1)(b) and (2) apply

to the professional adviser as if the professional adviser were the person.

(5) In this section—

**mediation** (調解) has the meaning given by section 4 of the MO;

**mediation communication** (調解通訊) has the meaning given by section 2(1) of the MO;

**MO** (《調解條例》) means the Mediation Ordinance (Cap. 620).”.