

## LEGISLATIVE COUNCIL BRIEF

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

#### INTRODUCTION

At the meeting of the Executive Council on 20 December 2016, the Council ADVISED and the Chief Executive ORDERED that the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 (“Bill”), at Annex A, be introduced into the Legislative Council, so as to amend the Arbitration Ordinance (Cap. 609) (“AO”) and the Mediation Ordinance (Cap. 620) (“MO”) to –

- (a) clarify that third party<sup>1</sup> funding of arbitration and mediation is not prohibited by the common law doctrines of maintenance and champerty<sup>2</sup>; and
- (b) provide for related measures and safeguards,

based on the recommendations made in the Report on *Third Party Funding for Arbitration* published by the Law Reform Commission of Hong Kong (“LRC”) in October 2016 and the views of the Steering Committee on Mediation.

---

<sup>1</sup> In the Report, the Chinese version of “third party” is “第三方”. As a third party funder is not a “party” (一方、方) as defined in section 2 of the AO, the DoJ takes the view that it is more appropriate to use “第三者” as the Chinese equivalent of “third party” in the proposed legislative amendments.

<sup>2</sup> In brief, maintenance can be defined 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 recognized by the law as justifying his interference. Champerty is maintenance for a share in the proceeds of litigation. See *Winnie Lo v HKSAR* (2012) 15 HKCFAR 16, at paras. 10 and 11.

## JUSTIFICATIONS

2. A third party funding contract commonly provides that the third party funder will pay for the funded party's costs (including expenses) of the arbitration or other associated proceedings in return for a percentage of the arbitral award or judgment or other financial benefit from the funded party's recovery in the proceedings if successful, as defined in the funding agreement. If the proceedings are unsuccessful, the third party funder will not receive any repayment or return on the funds it has paid to, or on behalf of, the funded party for the proceedings' costs (hence the common description of third party funding as "non-recourse" funding).

3. Third party funding of arbitration and other dispute resolution proceedings has become increasingly common over the last decade in numerous jurisdictions, including Australia, England and Wales, various European jurisdictions and the United States. To date, third party funding arrangements have usually been motivated by a funded party's lack of financial resources to pursue its own claims in contentious proceedings. However, increasingly, parties who do have the financial resources to fund contentious proceedings may also seek third party funding as a financial or risk management tool.

4. Hong Kong is one of the major centres of international arbitration in the Asia Pacific region. It is likely that a party to an arbitration taking place in Hong Kong may wish to consider whether or not it should seek third party funding of its participation in such an arbitration if it is clearly permitted by Hong Kong law to do so.

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

6. However, whilst the Hong Kong Courts do not object, in principle, to third party funding of arbitration and related proceedings (including mediation), it is unclear whether the doctrine of maintenance and champerty also apply to third party funding of arbitrations taking place

in Hong Kong. Indeed, the Court of Final Appeal judgment in *Unruh v Seeberger*<sup>3</sup> expressly left open this question.

### *LRC's Study*

7. In 2013, the Chief Justice and Secretary for Justice asked the LRC to review the position relating to third party funding for arbitration for the purposes of considering whether reform was needed, and if so, to make such recommendations for reform as appropriate.

8. In June 2013, the Third Party Funding for Arbitration Sub-committee of the LRC (the “Sub-committee”) was appointed to review the subject. On 19 October 2015, the Sub-committee published a consultation paper on *Third Party Funding for Arbitration* (the “Consultation Paper”) with a proposal to amend the relevant legislation.

9. In total, 73 submissions were received during the public consultation conducted by the Sub-committee from 19 October 2015 to the end of February 2016 (“Public Consultation”). Those who submitted responses included accounting firms, arbitral institutions, arbitrators, barristers, chambers of commerce, consumer/public interest groups, the financial sector, third party funders, Government departments, insurers/insurers associations, law firms, insolvency practitioners, professional bodies, and academics.

10. Based on the submissions received, the LRC concluded that the reform of Hong Kong law is needed to clearly state that the said common law doctrines do not prevent third party funding of arbitration and associated proceedings under the AO.

11. The LRC further recommended that third party funders funding arbitration should be required to comply with a Third Party Funding for Arbitration Code of Practice (“Code”) issued by a body authorized under the AO. The LRC took the view that the Code should set out the standards and practices (including financial and ethical standards) with which third party funders would ordinarily be expected to comply in carrying on activities in connection with third party funding of arbitration.<sup>4</sup>

12. The LRC also recommended that consideration should be given to whether to make consequential amendments to the MO so as to extend

---

<sup>3</sup> (2007) 10 HKCFAR 31, at para 123.

<sup>4</sup> See Recommendation 3(3) of the Report.

the proposals described in paragraphs 10 and 11 above to mediation within the scope of the MO.<sup>5</sup>

13. After the completion of its study, the LRC released the Report on *Third Party Funding for Arbitration* (the “Report”) on 12 October 2016.

*The Government responses to the Report*

14. A table showing the detailed recommendations as set out in the Report and the Government responses to those recommendations is at Annex B. The Government takes the view that, from the perspective of promoting Hong Kong as an international arbitration centre and for the purpose of clarifying the law, the proposed law reform is desirable, so that Hong Kong, as one of the leading centres for international legal and dispute resolution services in the Asia Pacific region, can keep up with the latest development in international arbitration and thereby enhance its competitive position.

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

16. In essence, mediation is a consensual negotiation process which parties to a dispute voluntarily resort to with a view to reaching a settlement through the assistance of an impartial mediator. If the mediation is successful, the parties need not and will not resort to or further pursue legal proceedings or arbitration. Hence, mediation per se is not a legal action or proceeding. Instead, it facilitates settlement of disputes without resorting to litigation or other formal process. As pointed out in paragraph 1.30 of the Consultation Paper, it is considered that mediation is not a contentious proceeding to which the doctrines of maintenance and champerty apply although legal professional conduct rules do apply.

17. However, the amendments proposed in the Report to the AO are confined to mediation conducted in Hong Kong under the AO<sup>6</sup> but not

---

<sup>5</sup> See Recommendation 1(2) of the Report

<sup>6</sup> Section 32 of the AO facilitates the appointment of mediator pursuant to an arbitration agreement which provides for mediation. Under section 33 of the AO, an arbitrator may act as a mediator with the consent of the parties to a dispute.

otherwise. In the absence of any consequential amendment to the MO, doubts may arise on whether the following will be prohibited by the doctrines of maintenance and champerty:

- (a) mediation conducted in Hong Kong within the meaning of the MO, whether as an independent process, or incidental to arbitration seated outside Hong Kong or litigation; and
- (b) mediation conducted outside Hong Kong with third party funding being provided in Hong Kong.

18. In addition to achieving legal clarity and hence certainty, the consequential amendment to the MO will also help promote the use of mediation services in Hong Kong and reinforce Hong Kong as a leading centre for international legal and dispute resolution services in the Asia Pacific region.

19. It must, however, be emphasized that notwithstanding paragraph 17(a) above, where litigation in court ensued despite the mediation, the doctrines of maintenance and champerty will continue to apply so that third party funding of such litigation (if any) will remain prohibited under the common law. The said common law doctrines will only be declared to be inapplicable to the mediation conducted prior to or during the course of the litigation.

20. The Government also agrees that the Code should be issued by an authorized body in accordance with procedure to be set out in the AO. The authorized body will be required to consult relevant stakeholders on the draft Code in accordance with the procedures to be laid down in the AO.

---

21. A draft Code prepared by the Department of Justice (“DoJ”) is at Annex C for reference only. This draft Code focuses on the standards and practice with which third party funders will ordinarily be expected to comply in carrying on third party funding of arbitration. Relevant stakeholders and the public will also be consulted on a draft third party funding for mediation code of practice in the course of being drawn.

## **THE BILL**

22. The main provisions of the Bill are summarized below.

### *New Part 10A added to the AO*

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

### *Division 1—Purposes*

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

### *Division 2—Interpretation*

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

26. Significantly, in the new section 98F

- (a) arbitration is given an extended meaning to include not only arbitrations to which the AO applies, but also proceedings before the court, an emergency arbitrator or a mediator that are covered by the AO; and
- (b) the meaning of “provision” in relation to the provision of arbitration funding to or by a person is also extended to cover the cases where the person arranges for the provision of the arbitration funding to or by another person.

27. The new section 98G provides for the definition of third party funding of arbitration, which is central to the new Part 10A—

- (a) One of the essential features of third party funding of arbitration is that the arbitration funding is provided in return for the third party funder receiving a financial benefit only if the arbitration is successful (new section 98G(1)(d)).
- (b) Also, the definition of third party funding of arbitration excludes the provision of arbitration funding by lawyers and persons providing legal services (new section 98G(2)). This is to avoid any conflict of interest that might arise if those who provide legal services also engage in third party funding.

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

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

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

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

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

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

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

*Division 4—Code of Practice*

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

34. The new section 98O empowers an authorized body (see paragraph 42 below) to issue a code of practice setting out practices and standards for third party funders to follow when they carry on activities in connection with third party funding of arbitration. The authorized body may also amend or revoke the code of practice.

35. The new section 98P sets out some of the matters that may be covered in the code of practice, including those regarding funding agreements, internal procedures of third party funders and measures to facilitate monitoring by an advisory body (see paragraph 42 below).

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

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

*Division 5—Other Measures and Safeguards*

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

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

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



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

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

#### *Division 6—Miscellaneous*

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

#### *New section 7A added to the MO*

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

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

## **LEGISLATIVE TIMETABLE**

45. The legislative timetable will be as follows –

Publication in the Gazette	30 December 2016
First Reading and Commencement of Second Reading debate	11 January 2017
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

## **IMPLICATIONS OF THE PROPOSAL**

46. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. The proposal does not have any economic, environmental, sustainability, civil service, gender or productivity implications, and it does not have any significant family implications.

47. The proposal might have financial implications. The proposal aims to clarify the legal position as to whether third party funding of arbitration is permitted under Hong Kong law and thereby attract and facilitate more parties to resolve their disputes by arbitration in Hong Kong. In the long run, this might reduce the Judiciary's workload and expenses as more disputes will be resolved by arbitration which is conducted by arbitrators (as opposed to judges). We consider that it is not possible to quantify with certainty the extent of impact, if any, on reduction of the litigation costs and Government's expenditure.

48. The Bill will not affect the current binding effect of the AO and the MO.

## **CONSULTATION**

49. As reported by the LRC in the Report, an overwhelming majority of the respondents to the Public Consultation were in support of the proposal that third party funding of arbitration should be permitted under Hong Kong law.

50. Following the release of the Report, the DoJ has written to key legal and arbitration professional bodies in Hong Kong to consult them on the recommendations set out in the Report. The organizations which have

responded so far<sup>7</sup> have all indicated their support for the above proposed reform.

51. On 4 November 2016, the Steering Committee on Mediation was consulted by the DoJ and the Steering Committee supported the proposed consequential amendments to the MO.

52. The LRC Secretariat briefed the Panel on Administration of Justice and Legal Services (“AJLS Panel”) of LegCo on the Report at its meeting on 28 November 2016. At the same meeting, the DoJ briefed the AJLS Panel on the views of the legal and arbitration professional bodies consulted as well as the Steering Committee on Mediation on the Report. Members of the AJLS Panel expressed support for the introduction of the Bill into LegCo.

## **PUBLICITY**

53. A press release is to be issued on 28 December 2016. A spokesperson will be available to handle enquiries.

## **ENQUIRY**

54. Any enquiry on this brief can be addressed to Mr LEE Tin-yan, Senior Assistant Solicitor General (Arbitration), Legal Policy Division, Department of Justice at telephone number 3918 4038.

**Department of Justice**  
**28 December 2016**

---

<sup>7</sup> They are: Chartered Institute of Arbitrators (East Asia Branch), China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center, China Maritime Arbitration Commission Hong Kong Arbitration Center, Hong Kong Bar Association and Hong Kong International Arbitration Centre.

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

## Contents

Clause	Page
<b>Part 1</b>	
<b>Preliminary</b>	
1. Short title and commencement.....	1
2. Enactments amended .....	2
<b>Part 2</b>	
<b>Amendment to Arbitration Ordinance</b>	
3. Part 10A added.....	3
<b>Part 10A</b>	
<b>Third Party Funding of Arbitration</b>	
<b>Division 1—Purposes</b>	
98E. Purposes.....	3
<b>Division 2—Interpretation</b>	
98F. Interpretation.....	3
98G. Meaning of <i>third party funding of arbitration</i> .....	5
98H. Meaning of <i>funding agreement</i> .....	6
98I. Meaning of <i>funded party</i> .....	6
98J. Meaning of <i>third party funder</i> .....	7

Clause	Page
<b>Division 3—Third Party Funding of Arbitration Not Prohibited by Particular Common Law Offences or Tort</b>	
98K. Particular common law offences do not apply .....	7
98L. Particular tort does not apply .....	7
98M. Other illegality not affected .....	8
98N. Limited application of Part 10A for non-Hong Kong arbitration.....	8
<b>Division 4—Code of Practice</b>	
98O. Code of practice may be issued .....	8
98P. Content of code of practice .....	9
98Q. Process for issuing code of practice.....	11
98R. Non-compliance with code of practice .....	12
<b>Division 5—Other Measures and Safeguards</b>	
98S. Communication of information for third party funding of arbitration .....	12
98T. Disclosure about third party funding of arbitration.....	13
98U. Disclosure about end of third party funding of arbitration.....	14
98V. Non-compliance with Division 5 .....	14
<b>Division 6—Miscellaneous</b>	
98W. Appointment of advisory body and authorized	

Clause	Page
body .....	15
<b>Part 3</b>	
<b>Amendment to Mediation Ordinance</b>	
4. Section 7A added .....	16
7A. Third party funding of mediation .....	16

# A BILL

## To

Amend the Arbitration Ordinance and the Mediation Ordinance to ensure that third party funding of arbitration and mediation is not prohibited by the common law doctrines of maintenance and champerty; and to provide for related measures and safeguards.

Enacted by the Legislative Council.

## Part 1

### Preliminary

#### 1. Short title and commencement

- (1) This Ordinance may be cited as the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2016.
- (2) Subject to subsection (3), this Ordinance comes into operation on the day on which it is published in the Gazette.
- (3) The following provisions come into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette—
  - (a) section 3, in so far as it relates to Divisions 3 and 5 of the new Part 10A;
  - (b) section 4, in so far as it relates to the new section 7A(c) and (d).

**2. Enactments amended**

- (1) The Arbitration Ordinance (Cap. 609) is amended as set out in Part 2.
  - (2) The Mediation Ordinance (Cap. 620) is amended as set out in Part 3.
- 

**Part 2**

**Amendment to Arbitration Ordinance**

**3. Part 10A added**

After Part 10—

**Add**

**“Part 10A**

**Third Party Funding of Arbitration**

**Division 1—Purposes**

**98E. Purposes**

The purposes of this Part are to—

- (a) ensure that third party funding of arbitration is not prohibited by particular common law doctrines; and
- (b) provide for measures and safeguards in relation to third party funding of arbitration.

**Division 2—Interpretation**

**98F. Interpretation**

In this Part—

*advisory body* (諮詢機構) means the person appointed by the Secretary for Justice under section 98W(1);

*arbitration* (仲裁) includes the following proceedings under this Ordinance—

- (a) court proceedings;
- (b) proceedings before an emergency arbitrator; and
- (c) mediation proceedings;

**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;

**arbitration funding** (仲裁資助), in relation to an arbitration, means money, or any other financial assistance, in relation to any costs of the arbitration;

**authorized body** (獲授權機構) means the person appointed by the Secretary for Justice under section 98W(2);

**code of practice** (實務守則) means the code of practice issued under Division 4 and as amended from time to time;

**costs** (費用), in relation to an arbitration, means the costs and expenses of the arbitration and includes—

- (a) pre-arbitration costs and expenses; and
- (b) the fees and expenses of the arbitration body;

**emergency arbitrator** (緊急仲裁員) has the meaning given by section 22A;

**funded party** (受資助方)—see section 98I;

**funding agreement** (資助協議)—see section 98H;

**mediation proceedings** (調解程序) means mediation proceedings referred to in section 32(3) or 33;

**potential third party funder** (潛在出資第三者) means a person who carries on any activity with a view to becoming a third party funder;

**provision** (提供)—

- (a) in relation to the provision of arbitration funding to a person (**recipient**)—includes the provision of the arbitration funding to another person (for example, to the recipient's legal representative) at the recipient's request; and
- (b) in relation to the provision of arbitration funding by a person (**funder**)—includes the provision of the arbitration funding by another person that is arranged by the funder;

**third party funder** (出資第三者)—

- (a) means a third party funder within the meaning of section 98J; and
- (b) in Division 4, includes a potential third party funder;

**third party funding of arbitration** (第三者資助仲裁)—see section 98G.

#### 98G. Meaning of *third party funding of arbitration*

- (1) Third party funding of arbitration is the provision of arbitration funding for an arbitration—
  - (a) under a funding agreement;
  - (b) to a funded party;
  - (c) by a third party funder; and

- (d) in return for the third party funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement.
- (2) However, third party funding of arbitration does not include the provision of arbitration funding directly or indirectly by a person practising law, or providing legal services, whether in Hong Kong or elsewhere.

**98H. Meaning of *funding agreement***

A funding agreement is an agreement for third party funding of arbitration that is—

- (a) in writing;
- (b) made between a funded party and a third party funder; and
- (c) made on or after the commencement date of Division 3.

**98I. Meaning of *funded party***

- (1) A funded party is a person—
  - (a) who is a party to an arbitration; and
  - (b) who is a party to a funding agreement for the provision of arbitration funding for the arbitration to the person by a third party funder.
- (2) In subsection (1)(a), the reference to a party to an arbitration includes—
  - (a) a person who is likely to be a party to an arbitration that is yet to commence; and
  - (b) a person who was a party to an arbitration that has ended.

**98J. Meaning of *third party funder***

- (1) A third party funder is a person—
  - (a) who is a party to a funding agreement for the provision of arbitration funding for an arbitration to a funded party by the person; and
  - (b) who does not have an interest recognized by law in the arbitration other than under the funding agreement.
- (2) In subsection (1)(b), the reference to a person who does not have an interest in an arbitration includes—
  - (a) a person who does not have an interest in the matter about which an arbitration is yet to commence; and
  - (b) a person who did not have an interest in an arbitration that has ended.

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

**98K. Particular common law offences do not apply**

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.

**98L. Particular tort does not apply**

The tort of maintenance (including the tort of champerty) does not apply in relation to third party funding of arbitration.



**98M. Other illegality not affected**

Sections 98K and 98L do not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.

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

Despite section 5, this Part applies in relation to an arbitration for which the place of arbitration is outside Hong Kong or there is no place of arbitration as if—

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

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

**Division 4—Code of Practice**

**98O. Code of practice may be issued**

- (1) The authorized body may issue a code of practice setting out the practices and standards with which third party funders are ordinarily expected to comply in carrying on activities in connection with third party funding of arbitration.
- (2) The authorized body may amend or revoke the code of practice.
- (3) Section 98Q applies in relation to an amendment or revocation of the code of practice in the same way as it applies in relation to the code of practice.

**98P. Content of code of practice**

- (1) Without limiting section 98O, the code of practice may, in setting out practices and standards, require third party funders to ensure that—
  - (a) any promotional material in connection with third party funding of arbitration is clear and not misleading;
  - (b) funding agreements set out their key features, risks and terms, including—
    - (i) the degree of control that third party funders will have in relation to an arbitration;
    - (ii) whether, and to what extent, third party funders (or persons associated with the third party funders) will be liable to funded parties for adverse costs, insurance premiums, security for costs and other financial liabilities; and
    - (iii) when, and on what basis, parties to funding agreements may terminate the funding agreements or third party funders may withhold arbitration funding;
  - (c) funded parties obtain independent legal advice on funding agreements before entering into them;
  - (d) third party funders provide to funded parties the name and contact details of the advisory body;
  - (e) third party funders have a sufficient minimum amount of capital;
  - (f) third party funders have effective procedures for addressing potential, actual or perceived conflicts of interest and the procedures enhance the protection of funded parties;

- (g) third party funders have effective procedures for addressing complaints against them by funded parties and the procedures allow funded parties to obtain and enforce meaningful remedies for legitimate complaints;
  - (h) third party funders follow the procedures mentioned in paragraphs (f) and (g);
  - (i) third party funders submit annual returns to the advisory body on—
    - (i) any complaints against them by funded parties received during the reporting periods; and
    - (ii) any findings by a court or arbitral tribunal of their failure to comply with the code of practice or Division 5; and
  - (j) third party funders provide to the advisory body any other information it reasonably requires.
- (2) Without limiting subsection (1), the code of practice may—
- (a) specify terms to be included, or not to be included, in funding agreements; and
  - (b) specify what is to be included, or not to be included, in order to have effective procedures.
- (3) The code of practice—
- (a) may be of general or special application; and
  - (b) may make different provisions for different circumstances and provide for different cases or classes of cases.

**98Q. Process for issuing code of practice**

- (1) Before issuing a code of practice, the authorized body must—
  - (a) consult the public about the proposed code of practice; and
  - (b) publish a notice to inform the public of the proposed code of practice.
- (2) In preparing the proposed code of practice for public consultation, the authorized body may consult a person with knowledge or experience of arbitration or third party funding of arbitration.
- (3) The notice must state the following information—
  - (a) the purpose and general effect of the proposed code of practice;
  - (b) how a copy of the proposed code of practice may be inspected; and
  - (c) that written submissions by any person about the proposed code of practice may be made to the authorized body before a specified time.
- (4) After considering all written submissions made before the specified time, the authorized body may issue the code of practice (with or without revision) by publishing it in the Gazette.
- (5) The code of practice comes into operation on the day on which it is published in the Gazette under subsection (4).
- (6) The code of practice is not subsidiary legislation.

**98R. Non-compliance with code of practice**

- (1) A failure to comply with a provision of the code of practice does not, of itself, render any person liable to any judicial or other proceedings.
- (2) However—
  - (a) the code of practice is admissible in evidence in proceedings before any court or arbitral tribunal; and
  - (b) any compliance, or failure to comply, with a provision of the code of practice 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.

**Division 5—Other Measures and Safeguards**

**98S. Communication of information for third party funding of arbitration**

- (1) Despite section 18(1), information referred to in that section may be communicated by a party to a person for the purpose of having, or seeking, third party funding of arbitration from the person.
- (2) However, the person may not further communicate anything communicated under subsection (1), unless—
  - (a) the further communication is made—
    - (i) to protect or pursue a legal right or interest of the person; or
    - (ii) to enforce or challenge an award made in the arbitration,

in legal proceedings before a court or other judicial authority in or outside Hong Kong;

- (b) the further communication is made to any government body, regulatory body, court or tribunal and the person is obliged by law to make the communication; or
    - (c) the further communication is made to a professional adviser of the person for the purpose of obtaining advice in connection with the third party funding of arbitration.
- (3) If a further communication is made by a person to a professional adviser under subsection (2)(c), subsection (2) applies to the professional adviser as if the professional adviser were the person.
- (4) In this section—

*communicate* (傳達) includes publish or disclose.

**98T. Disclosure about third party funding of arbitration**

- (1) If a funding agreement is made, the funded party must give written notice of—
  - (a) the fact that a funding agreement has been made; and
  - (b) the name of the third party funder.
- (2) The notice must be given—
  - (a) for a funding agreement made on or before the commencement of the arbitration—on the commencement of the arbitration; or
  - (b) for a funding agreement made after the commencement of the arbitration—within 15 days after the funding agreement is made.
- (3) The notice must be given to—
  - (a) each other party to the arbitration; and

(b) the arbitration body.

- (4) For subsection (3)(b), if there is no arbitration body for the arbitration at the time, or at the end of the period, specified in subsection (2) for giving the notice, the notice must instead be given to the arbitration body immediately after there is an arbitration body for the arbitration.

**98U. Disclosure about end of third party funding of arbitration**

- (1) If a funding agreement ends (other than because of the end of the arbitration), the funded party must give written notice of—
- (a) the fact that the funding agreement has ended; and
  - (b) the date the funding agreement ended.
- (2) The notice must be given within 15 days after the funding agreement ends.
- (3) The notice must be given to—
- (a) each other party to the arbitration; and
  - (b) the arbitration body (if any).

**98V. Non-compliance with Division 5**

- (1) A failure to comply with this Division does not, of itself, render any person liable to any judicial or other proceedings.
- (2) However, any compliance, or failure to comply, with this Division 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.

**Division 6—Miscellaneous**

**98W. Appointment of advisory body and authorized body**

- (1) The Secretary for Justice may, by notice published in the Gazette, appoint as the advisory body a person the Secretary for Justice considers appropriate to monitor and review the operation of this Part.
- (2) The Secretary for Justice may, by notice published in the Gazette, appoint as the authorized body a person the Secretary for Justice considers appropriate to exercise the powers under section 98O.”
-

## Part 3

### Amendment to Mediation Ordinance

#### 4. Section 7A added

After section 7—

**Add**

##### “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.”.

### Explanatory Memorandum

The main object of this Bill is to settle the legal position regarding whether the common law doctrines of maintenance and champerty apply to third party funding of arbitration and mediation in Hong Kong. The Bill is based on the recommendations made in the Report on Third Party Funding for Arbitration published by the Law Reform Commission of Hong Kong in October 2016 (*LRC Report*).

#### New Part 10A added to Arbitration Ordinance

2. In particular, clause 3 adds a new Part 10A to the Arbitration Ordinance (Cap. 609) (*AO*). The new Part 10A, which is based on the draft provisions in the LRC Report, contains 6 Divisions.
3. The new Part 10A is intended to come into operation in 2 stages: Divisions 1, 2, 4 and 6 will commence on the gazettal of the Ordinance, while Divisions 3 and 5 will commence on a day to be appointed (see clause 1(2) and (3)). This is to facilitate the preparatory work for the relevant regulatory framework to be done before the provisions clarifying the legal position come into operation.

#### Division 1—Purposes

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

#### Division 2—Interpretation

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

6. Significantly, in the new section 98F—
  - (a) arbitration is given an extended meaning to include not only arbitrations to which the AO applies, but also proceedings before the court, an emergency arbitrator or a mediator that are covered by the AO; and
  - (b) the meaning of *provision* in relation to the provision of arbitration funding to or by a person is also extended to cover the cases where the person arranges for the provision of the arbitration funding to or by another person.
7. The new section 98G provides for the definition of *third party funding of arbitration*, which is central to the new Part 10A—
  - (a) One of the essential features of third party funding of arbitration is that the arbitration funding is provided in return for the third party funder receiving a financial benefit only if the arbitration is successful (new section 98G(1)(d)).
  - (b) Also, the definition of *third party funding of arbitration* excludes the provision of arbitration funding by lawyers and persons providing legal services (new section 98G(2)). This is to avoid any conflict of interest that might arise if those who provide legal services also engaged in third party funding.
8. The new section 98H defines *funding agreement* as an agreement which (among other requirements) is made on or after the commencement date of Division 3 of the new Part 10A. That means funding agreements made before that date are not covered by the new Part 10A.
9. The new sections 98I and 98J define *funded party* and *third party funder* respectively. A person can be a funded party or third party funder whether before, during or after an arbitration.

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

10. Division 3 of the new Part 10A seeks to ensure that third party funding of arbitration is not prohibited by the common law doctrines of maintenance, champerty and barratry (both as to civil and criminal liability).
11. The new sections 98K and 98L declare that those doctrines do not apply in relation to the provision of arbitration funding under a funding agreement as defined in the new section 98H. Notably, that means the legal position regarding funding agreements made before the commencement date of Division 3 of the new Part 10A is not affected. The new section 98M also makes it clear that the declaration does not affect whether a contract is to be treated as illegal for other reasons.
12. Under section 5 of the AO, in general, the AO applies only to an arbitration where the place of arbitration is in Hong Kong. For cases where the place of arbitration is outside Hong Kong or there is no place of arbitration, the new section 98N extends the application of the new Part 10A to these arbitrations but only in respect of funding the costs and expenses of services provided in Hong Kong. This is to facilitate the third party funding of services provided in Hong Kong in relation to non-Hong Kong arbitrations.

**Division 4—Code of Practice**

13. Division 4 of the new Part 10A seeks to facilitate the regulatory framework for third party funding of arbitration in Hong Kong.
14. The new section 98O empowers an authorized body (see paragraph 22) to issue a code of practice setting out the practices and standards for third party funders to follow when they carry on activities in connection with third party funding of arbitration. The authorized body may also amend or revoke the code of practice.

15. The new section 98P sets out some of the matters that may be covered in the code of practice, including those regarding funding agreements, internal procedures of third party funders and measures to facilitate monitoring by an advisory body (see paragraph 22).
16. The new section 98Q sets out the process which is to be followed in issuing the code of practice. The process includes public consultation and publishing the finalized code of practice in the Gazette. It applies in relation to an amendment or revocation of the code of practice as well.
17. Under the new section 98R, a person will not incur legal liability simply because the person fails to comply with the code of practice. However, the code of practice will be admissible in evidence in court or arbitral proceedings and any compliance or failure to comply with it may, if relevant to a question being decided by a court or arbitral tribunal, be taken into account by the court or arbitral tribunal.

**Division 5—Other Measures and Safeguards**

18. Division 5 of the new Part 10A provides for certain measures and safeguards where an arbitration involves third party funding.
19. The new section 98S allows the communication of confidential information to an existing or potential third party funder and its professional adviser. However, the recipient is then subject to confidentiality requirements.
20. The new sections 98T and 98U deal with disclosure of third party funding. If a funding agreement is made, the funded party must inform each other party and the arbitration body by written notice of that fact and the name of the third party funder within a specified time frame (new section 98T). Similarly, disclosure about the end of a funding agreement is also required (new section 98U). This is to minimize the possibility of conflicts of interest being the subject of a challenge to the arbitration process.

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

#### **Division 6—Miscellaneous**

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

#### **New section 7A added to Mediation Ordinance**

23. Apart from proposing draft provisions to be added to the AO, the LRC Report also recommended that consideration be given to whether to amend the Mediation Ordinance (Cap. 620) (**MO**) at the same time to extend the application of the new Part 10A of the AO to mediation to which the MO applies (**MO mediation**).
24. In response to this, clause 4 adds a new section 7A to the MO, which provides for the application of the new Part 10A of the AO in relation to MO mediation with modifications to adapt the provisions of the new Part 10A to the MO context.
25. For instance, modifications are made to construe references to arbitration and arbitration body respectively as references to mediation and mediator covered by the MO. Certain definitions specific to the AO context are omitted, and references to certain AO provisions are replaced with references to similar provisions in the MO.



**Responses of the Government to the recommendations made by the  
Law Reform Commission of Hong Kong (“LRC”)  
in the Report on Third Party Funding for Arbitration (October 2016)**

<b>LRC’s Recommendations</b>	<b>Government’s responses</b>
<p><b><u>Recommendation 1</u></b></p> <p>The LRC set out the following recommendations:</p> <p>(1) The Arbitration Ordinance should be amended to state that the common law doctrines of maintenance and champerty (both as to civil and criminal liability) do not apply to arbitration to which the Arbitration Ordinance applies, to proceedings before Emergency Arbitrators as defined under the Arbitration Ordinance, and to mediation and court proceedings under the Arbitration Ordinance (“Arbitration”) (see sections 98H to 98K of the Proposed AO Amendment). The non-application of these doctrines in relation to Arbitration does not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal (see section 98J of the Proposed AO Amendment).</p> <p>(2) Consideration should be given to whether to make consequential amendments at the same time to the Mediation Ordinance to extend such non-application of the common law doctrines of maintenance and champerty (both as to civil and criminal liability) to mediation within the scope of the Mediation Ordinance (the “MO Mediation”), including whether the proposed regulatory regime for Arbitration should apply to MO Mediation.</p>	<p>We accept Recommendation 1(1). We agree that the Arbitration Ordinance (Cap. 609) (“AO”) should be amended to state that third party funding of arbitration and associated proceedings is not prohibited by the common law doctrines of maintenance and champerty.</p> <p>We accept Recommendation 1(2). We agree that consequential amendments should be introduced to the Mediation Ordinance (Cap. 620) (“MO”) at the same time. On 4 November 2016, the Steering Committee on Mediation was consulted by the Department</p>

LRC's Recommendations	Government's responses
<p>(3) The Proposed AO Amendment should apply to Funding Agreements for Third Party Funding of Arbitration made on or after the coming into effect of the Proposed AO Amendment (see section 98G(4) read with sections 98H and 98I of the Proposed AO Amendment).</p> <p>(4) If the place of Arbitration is outside Hong Kong, then, despite section 5 of the Arbitration Ordinance, the Proposed AO Amendment should apply in relation to funding of services provided in Hong Kong in relation to the Arbitration, as if the place of Arbitration were in Hong Kong (see section 98K of the Proposed AO Amendment).</p> <p>(5) The definition of “Third Party Funding” in the Proposed AO Amendment should not include any funding provided either directly or indirectly by a person practising law or providing legal services (whether in Hong Kong or elsewhere) (see section 98G(2) of the Proposed AO Amendment).</p> <p>(6) The professional conduct rules applicable to barristers, solicitors, and foreign registered lawyers should be amended to expressly state the terms and conditions upon which such lawyers may represent parties in Arbitrations and related court proceedings funded by Third Party Funder.</p>	<p>of Justice and members of the Steering Committee supported the proposed consequential amendments to the MO.</p> <p>We accept Recommendation 1(3).</p> <p>We accept Recommendation 1(4). We agree that the recommendation should be reflected in the proposed amendments to the AO.</p> <p>We accept Recommendation 1(5). We agree that the recommendation should be reflected in the proposed amendments to the AO.</p> <p>We note that, on 12 October 2016, the LRC Secretariat wrote to the Law Society of Hong Kong and Hong Kong Bar Association, the professional bodies that are responsible for making the relevant rules.</p>

LRC's Recommendations	Government's responses
<p>(7) The Arbitration Ordinance should be amended to allow the communication of information relating to arbitral proceedings and awards to a Third Party Funder or its professional adviser (see section 98P of the Proposed AO Amendment).</p> <p>(8) If a Funding Agreement is made, the Funded Party must give written notice of the fact that a Funding Agreement has been made and the identity of the Third Party Funder. The notice must be given, for a Funding Agreement made on or before the commencement of the Arbitration, on the commencement of the Arbitration; or, for a Funding Agreement made after the commencement of the Arbitration, within 15 days after the Funding Agreement is made. The notice must be given to each other party to the Arbitration and the Arbitration Body. However, if there is no Arbitration Body for the Arbitration at the time specified for giving the notice, the notice must instead be given to the Arbitration Body immediately after there is an Arbitration Body for the Arbitration (see section 98Q of the Proposed AO Amendment). There should also be disclosure about the end of third party funding (see section 98R of the Proposed AO Amendment).</p>	<p>We will follow up with the Law Society of Hong Kong and Hong Kong Bar Association on this recommendation in due course.</p> <p>We accept Recommendation 1(7). We agree that the recommendation should be reflected in the proposed amendments to the AO and take the view that the related matters should be reflected in the Code referred to in Recommendation 3(3).</p> <p>We accept Recommendation 1(8). We agree that the recommendation should be reflected in the proposed amendments to the AO and take the view that the related matters should be reflected in the Code referred to in Recommendation 3(3).</p>

LRC's Recommendations	Government's responses
<p><b><u>Recommendation 2</u></b></p> <p>The LRC recommended that clear standards (including ethical and financial standards) for Third Party Funders providing Third Party Funding to parties to Arbitration should be developed.</p>	<p>We accept Recommendation 2. We take the view that the relevant standards should be reflected in the Code referred to in Recommendation 3(3).</p>
<p><b><u>Recommendation 3</u></b></p> <p>The LRC set out the following recommendations:</p> <p>(1) At this first stage of Third Party Funding of Arbitration in Hong Kong, a “<i>light touch</i>” approach to its regulation should be adopted <i>for an initial period of 3 years</i>, in line with international practice and in accordance with Hong Kong's needs and regulatory culture.</p> <p>(2) The “<i>light touch approach</i>” to regulating Third Party Funders funding Arbitration should apply irrespective of whether they have a place of business inside or outside Hong Kong.</p>	<p>We accept Recommendation 3(1) in principle. We take the view that the details of implementing this recommendation should be subject to the comments received during the consultation on the drafting of the Code referred to in Recommendation 3(3).</p> <p>We accept Recommendation 3(2) in principle. We take the view that the details of implementing this recommendation should be subject to comments received during the consultation on the drafting of the Code referred to in Recommendation 3(3).</p>

LRC's Recommendations	Government's responses
<p>(3) Third Party Funders funding Arbitration should be required to comply with a <i>Third Party Funding for Arbitration Code of Practice</i> (defined earlier as the “Code”) issued by a body authorized under the Arbitration Ordinance (defined earlier as the “Authorized Body”). The Code should set out the standards and practices (including financial and ethical standards) with which Third Party Funders will ordinarily be expected to comply in carrying on activities in connection with Third Party Funding of Arbitration (see sections 98L and 98M of the Proposed AO Amendment).</p> <p>(4) Before issuing the Code (and before making any subsequent amendment to the Code), the Authorized Body should consult the public about the proposed Code (or amendment) (see section 98N of the Proposed AO Amendment).</p> <p>(5) A failure to comply with a provision of the Code should not, of itself, render a person liable to any judicial or other proceedings. However the Code should be admissible in evidence in proceedings before any court or Tribunal; and any compliance or failure to comply with a provision of the Code may be taken into account by any court or Tribunal if it is relevant to a question being decided by that court or Tribunal (see section 98O of the Proposed AO Amendment).</p>	<p>We accept Recommendation 3(3) in principle. We take the view that the details of implementing this recommendation should be subject to the comments received during the consultation on the drafting of the Code. This should be reflected in the proposed amendments to the AO.</p> <p>We accept Recommendation 3(4). We agree that, before issuing the Code (and before making any subsequent amendment to the Code), the Authorized Body should consult the public about the proposed Code (or amendment). This should be reflected in the proposed amendments to the AO.</p> <p>We accept Recommendation 3(5). We agree that the consequence of non-compliance with a provision of the Code should be set out in the proposed amendments to the AO.</p>

LRC's Recommendations	Government's responses
<p>(6) A failure to comply with a provision of the Proposed AO Amendment should not, of itself, render a person liable to any judicial or other proceedings. However, any compliance or failure to comply with a provision of the Proposed AO Amendment may be taken into account by any court or Tribunal if it is relevant to a question being decided by that court or Tribunal (see section 98S of the Proposed AO Amendment).</p>	<p>We accept Recommendation 3(6). We agree that the effect of non-compliance with a provision in the proposed amendments to the AO should be clearly set out.</p>
<p>(7) The Advisory Committee on the Promotion of Arbitration (established by the Department of Justice in 2014, and chaired by the Secretary for Justice), should be nominated by the Secretary for Justice to be the Advisory Body to monitor the conduct of Third Party Funding for Arbitration following the coming into effect of the Proposed AO Amendment in regard to Arbitration (as defined in the Proposed AO Amendment) and the implementation of the Code, and to liaise with stakeholders. The LRC suggests that the Advisory Body (or a sub-committee that it establishes to monitor Third Party Funding for Arbitration) should arrange to meet at least twice a year with representatives of primary stakeholders or interested parties in third party funding to discuss the implementation and operation of the Code and any matters arising.</p>	<p>We will consult members of the Advisory Committee on the Promotion of Arbitration and other stakeholders, including third party funders, before taking a view on Recommendation 3(7).</p>
<p>(8) After the conclusion of the first three years of operation of the Code, the Advisory Body should issue a report reviewing its operation and make recommendations as to the updating of the ethical and financial standards set out in it. At this time the Advisory Body should also make recommendations on whether a statutory or other form of body is needed, how it could be set up and as to the criteria for selecting members of such a body. In the meantime,</p>	<p>We will consult members of the Advisory Committee on the Promotion of Arbitration and other stakeholders, including third party funders, before taking a view on Recommendation 3(8).</p>

LRC's Recommendations	Government's responses
<p>the Advisory Body could at the end of each year review whether or not to speed up the process for regulation by an independent statutory or other form of body. The report should also deal with the effectiveness of the Code and make recommendations as to the way forward.</p> <p>(9) The Code should include provisions as set out below, and Third Party Funders should be required to include these terms in any third party funding agreement:</p> <ul style="list-style-type: none"> <li>(a) A Third Party Funder shall accept responsibility for compliance with the Code on its own behalf and by its subsidiary or an associated entity.</li> <li>(b) The promotional literature of a Third Party Funder in connection with Third Party Funding of Arbitration must be clear and not misleading.</li> <li>(c) As to the Funding Agreement, the Third Party Funder must: <ul style="list-style-type: none"> <li>(i) take reasonable steps to ensure that the Funded Party shall have received independent legal advice on the terms of the Funding Agreement prior to its execution, which obligation shall be satisfied if the Funded Party confirms in writing to the Third Party Funder that the Funded Party has taken legal advice from the solicitor or barrister instructed in the</li> </ul> </li> </ul>	<p>We accept Recommendation 3(9). We will incorporate the provisions as set out in this recommendation in the draft Code and consult the stakeholders accordingly.</p>

LRC's Recommendations	Government's responses
<p>dispute;</p> <p>(ii) provide a Hong Kong address for service in the Funding Agreement;</p> <p>(iii) set out and explain clearly in the Funding Agreement the key features, risks and terms of the Funding Agreement including, without limitation, as to the matters set out in section 98M(1) of the Proposed AO Amendment, including as to:</p> <ol style="list-style-type: none"> <li>1. capital adequacy requirements;</li> <li>2. conflicts of interest;</li> <li>3. confidentiality and privilege;</li> <li>4. control;</li> <li>5. disclosure;</li> <li>6. liability for adverse costs;</li> <li>7. grounds for termination; and</li> <li>8. complaints procedure.</li> </ol> <p>(10) The following measures should be implemented to facilitate the monitoring of Third Party Funding of Arbitration by the Advisory Body:</p> <p>(a) A Third Party Funder must submit an annual return to the Advisory Body of any (a) complaints received, and (b) findings that the Third Party Funder has failed to comply with the Code or</p>	<p>We accept Recommendation 3(10). We will incorporate the provisions as set out in this recommendation in the draft Code and consult the stakeholders accordingly.</p>



LRC's Recommendations	Government's responses
<p>any of the provisions of the Proposed AO Amendment.</p> <p>(b) A Third Party Funder must provide to the Advisory Body any other information the Advisory Body reasonably requires.</p> <p>(c) A Third Party Funder must provide to the Funded Party the name and contact details of the Advisory Body.</p>	
<p><b><u>Recommendation 4</u></b></p> <p>The LRC set out the following recommendations:</p> <p>(1) While the LRC considers that, in principle, a Tribunal should be given the power under the Arbitration Ordinance to award Costs against a Third Party Funder, in appropriate circumstances, after according it due process, following any application for such Costs, the LRC considers that it is premature at this stage to amend the Arbitration Ordinance to provide for this power. The Arbitration Ordinance (based on the UNICTRAL Model Law) applies only to parties to an arbitration agreement (as set out in its section 5(1)). The LRC considers that further careful consideration of this issue is warranted bearing in mind the need to preserve the integrity of Hong Kong's regime for Arbitration, to provide due process to a third party, including a Third Party Funder, where an application for an Adverse Costs Order against it has been made, and to provide for equal treatment, fairness and efficiency for all involved.</p>	<p>We note the views expressed by the LRC under Recommendation 4(1). We agree that it is necessary to give further careful consideration of the issue of whether an arbitral tribunal should be given the power under the AO to award costs against a third party funder.</p> <p>In this connection, we will keep in view the latest development of the relevant studies being conducted by the international arbitration community, e.g., the International Council for Commercial Arbitration (ICCA) Third-Party Funding Taskforce.</p>

LRC's Recommendations	Government's responses
<p>(2) Further consideration should be given by the Advisory Body in the initial three year period following implementation of the AO Proposed Amendment as to providing for the power of a Tribunal to award Costs against a third party, including a Third Party Funder, in appropriate circumstances, including:</p> <ul style="list-style-type: none"> <li>(a) considering whether this should be achieved by an amendment of the Arbitration Ordinance to empower a Tribunal to make Costs orders against third parties, including Third Party Funders, without joinder of such a third party to the arbitration (albeit for the sole purposes of the Costs application);</li> <li>(b) the formulation of the provisions for the third party's right to be heard, to equal treatment and to due process;</li> <li>(c) the rules of procedure to be applied;</li> <li>(d) the consequences of non-participation by a third party in any such Costs application following due notice and a reasonable opportunity to participate; and</li> <li>(e) the form of any Adverse Costs Order against a third party that a Tribunal may make including whether it may form part of a final award.</li> </ul>	<p>We will consult members of the Advisory Committee on the Promotion of Arbitration and other stakeholders, including third party funders, before taking a view on Recommendation 4(2).</p> <p>We will also keep in view the latest development of the relevant studies being conducted by the international arbitration community, e.g., the International Council for Commercial Arbitration (ICCA) Third-Party Funding Taskforce.</p>

LRC's Recommendations	Government's responses
<p>(3) The LRC considers that there is no need to give a Tribunal the power to order Security for Costs against a Third Party Funder, as the powers of a Tribunal under the Arbitration Ordinance to order a party to give Security for Costs afford adequate protection.</p>	<p>We note the views expressed by the LRC in Recommendation 4(3).</p>

#452731

**Draft Third Party Funding of Arbitration Code of Practice**

**Preamble**

The authorized body is empowered under Part 10A of the Arbitration Ordinance (Cap. 609) (“Ordinance”) to issue a code of practice setting out the practices and standards with which third party funders of arbitration, including emergency arbitrator proceedings, mediation and court proceedings under the Ordinance, are ordinarily expected to comply in carrying on activities in connection with third party funding of arbitration. The code is now issued and named the Third Party Funding of Arbitration Code of Practice (“Code”).

**Relationship with Ordinance**

This Code should be read in conjunction with the Ordinance. The terms used in this Code, where they are defined in the Ordinance including for the purposes of Part 10A of the Ordinance, are intended to carry the same meanings as for the Ordinance or Part 10A as the case may be.

**Application**

This Code applies to all third party funders within the meaning of Division 2 of Part 10A of the Ordinance.

**Purpose**

The purpose of this Code is to set out the practices and standards that third party funders are ordinarily expected to adopt in the carrying on of activities in connection with third party funding of arbitration.

**The Code**

1. **Introduction**

*Scope of Code*

- 1.1 This Code applies to the pre-contractual negotiations, making and performance of any funding agreement between a third party funder and a funded party (including a potential funded party) for third party funding of arbitration commenced or entered into on or after date of commencement of the Code.

*Consequences of non-compliance with the Code*

- 1.2 Section 98R of the Ordinance sets out the consequences of failing to comply with the Code.

*Interpretation*

- 1.3 The terms defined in the Ordinance, in particular in its Part 10A, are incorporated by reference into this Code.

## 2. Standards and practices in third party funding of arbitration

### *Responsibility for Subsidiaries and Associated Entities*

- 2.1 A third party funder must accept responsibility for compliance with this Code on its own behalf and by a subsidiary or an associated entity.

### *Promotional Materials*

- 2.2 A third party funder must ensure its promotional materials in connection with third party funding of arbitration are clear and not misleading.

### *The Funding Agreement*

- 2.3 The third party funder must:
- (1) take reasonable steps to ensure that the funded party has received independent legal advice on the funding agreement before entering into it;
  - (2) provide a Hong Kong address for service in the funding agreement;
  - (3) set out and explain clearly in the funding agreement the key features, risks and terms of the proposed funding and the funding agreement including, without limitation, the matters set out in Part 10A of the Ordinance and in this Code; and
  - (4) set out the name and contact details of the advisory body responsible for monitoring and reviewing the operation of third party funding under Part 10A of the Arbitration Ordinance.
- 2.4 The obligation under paragraph 2.3(1) is satisfied if the funded party confirms in writing to the third party funder that the funded party has taken advice from its legal representative instructed in the arbitration.

### *Capital Adequacy Requirements*

- 2.5 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, to fund all the arbitrations that they have agreed to fund.
- 2.6 In particular, a third party funder must:
- (1) ensure that it, and each of its subsidiaries and associated entities (if any), maintain the capacity to:
    - (a) pay all debts when they become due and payable; and

- (b) cover aggregate funding liabilities under all of their funding agreements for a minimum period of 36 months;
- (2) maintain access to a minimum of HK\$20 million of capital;
- (3) arrange and submit to an annual audit by a recognized local or international audit firm and provide the advisory body with:
  - (a) a copy of the audit opinion given by the audit firm on:
    - (i) the third party funder's and any subsidiary and associated entity's most recent annual financial statements (but not the underlying financial statements); or
    - (ii) in the case of a third party funder who is an investment advisor to an associated entity, the audit opinion given by the audit firm in respect of the associated entity (but not the underlying financial statements),

within 1 month of receipt of the opinion and in any case within 6 months of the end of each fiscal year; and
  - (b) reasonable evidence from a qualified third party (preferably from an auditor, but alternatively from a third party administrator or bank) that the third party funder, and each of its subsidiaries and associated entities (if any), satisfies the minimum capital requirement set out in subparagraph (2);
- (4) accept a continuous disclosure obligation under each funding agreement in respect of its capital adequacy, including:
  - (a) a specific obligation to give timely notice to the funded party if the third party funder believes that its representations to the funded party in respect of its capital adequacy as required by the Code are no longer valid because of changed circumstances; and
  - (b) a specific undertaking that if an audit opinion provided for any audit period is qualified (except as to any emphasis of matters relating to the uncertainty of valuing relevant litigation funding investments) or expresses any question as to the ability of the third party funder, or any subsidiary or associated entity, to continue as a going concern:
    - (i) it will promptly inform the funded party; and
    - (ii) the funded party will be entitled to enquire further into the qualification or question

expressed and take any further action it deems appropriate.

### *Conflicts of Interest*

2.7 The third party funder must:

- (1) maintain, for the duration of the funding agreement, effective procedures for managing any conflict of interest that may arise in relation to activities undertaken by the third party funder, or any subsidiary or associated entity, or an agent of any of them, in relation to the funding agreement;
- (2) follow the written procedures mentioned in paragraph 2.8 for the duration of the funding agreement; and
- (3) not take any steps that cause or are likely to cause the funded party's legal representative to act in breach of professional duties.

2.8 For paragraph 2.7(2), the third party funder has effective procedures for managing a conflict of interest that may arise if it can show through documentation that:

- (1) the third party funder has conducted a review of its business operations that relate to the funding agreement to identify and assess potential conflicting interests;
- (2) the third party funder:
  - (a) has written procedures for identifying and managing conflicts of interest; and
  - (b) has implemented the procedures;
- (3) the written procedures are reviewed at intervals no greater than 12 months;
- (4) the written procedures include procedures about the following:
  - (a) monitoring the third party funder's operations to identify and assess potential conflicting interests;
  - (b) disclosing conflicts of interest to funded parties and potential funded parties;
  - (c) managing situations in which interests may conflict;
  - (d) protecting the interests of funded parties and potential funded parties;

- (e) dealing with situations in which a lawyer acts for both the third party funder and a funded party or potential funded party;
  - (f) dealing with a situation in which there is a pre-existing relationship between any of the third party funder, a lawyer and a funded party (or potential funded party);
  - (g) reviewing the terms of a funding agreement to ensure the terms are consistent with Part 10A of the Ordinance and this Code; and
  - (h) marketing to potential funded parties;
- (5) the terms of the funding agreement are reviewed to ensure the terms are consistent with Part 10A of the Ordinance and this Code; and
- (6) the matters mentioned in subparagraphs (1) to (5) (including those procedures mentioned in subparagraph (4)(a) to (h)) are implemented, monitored and managed by:
- (a) if the third party funder is an entity other than an individual - the senior management or partners of the third party funder; or
  - (b) if the third party funder is an individual that represents an entity - the senior management or partners of the entity.

#### *Confidentiality and Privilege*

- 2.9 A third party funder will observe the confidentiality of all information and documentation relating to the arbitration to the extent that Hong Kong law (including the Ordinance) permits, and subject to the terms of any confidentiality or non-disclosure agreement agreed between the third party funder and the funded party.
- 2.10 To avoid doubt, the third party funder is responsible for the purposes of this Code for preserving confidentiality on behalf of any subsidiary or associated entity.

#### *Control*

- 2.11 A third party funder must undertake in each funding agreement that:
- (1) it will not seek to, and will not, control or direct the funded party as to the conduct of the arbitration, including, without limitation, as to the negotiation and conclusion of any settlement;



- (2) it will not seek to influence the funded party's legal representative to give control or conduct of the arbitration to the third party funder; and
- (3) it will not take any steps that cause or are likely to cause the funded party's legal representative to act in breach of professional duties.

#### *Disclosure*

- 2.12 The third party funder must remind the funded party of its obligation to disclose information about the third party funding of arbitration under sections 98T and 98U of the Ordinance.
- 2.13 To avoid doubt, the funded party does not have any obligation to disclose details of the funding agreement except as required by the funding agreement, or as ordered by the arbitration body, or as otherwise required by law.

#### *Liability for Adverse Costs*

- 2.14 Subject to the provisions of the Ordinance, the funding agreement must state whether (and if so to what extent) the third party funder, a subsidiary or an associated entity is liable to the funded party to:
  - (1) meet any liability for adverse costs;
  - (2) pay any premium (including insurance premium tax) to obtain costs insurance;
  - (3) provide security for costs; and
  - (4) meet any other financial liability.

#### *Grounds for Termination*

- 2.15 The funding agreement must state whether (and if so, how) the third party funder may terminate the funding agreement in the event that the third party funder:
  - (1) reasonably ceases to be satisfied about the merits of the arbitration;
  - (2) reasonably believes that there has been a material adverse change of prospects to the funded party's success in the arbitration; or
  - (3) reasonably believes that the funded party has committed a material breach of the funding agreement.

- 2.16 The funding agreement must not establish a discretionary right for a third party funder to terminate the funding agreement in the absence of the circumstances described in paragraph 2.15.
- 2.17 The funding agreement must provide that if the third party funder terminates the funding agreement, the third party funder is to remain liable for all funding obligations accrued to the date of termination unless the termination is due to a material breach as mentioned in paragraph 2.15(3).
- 2.18 The funding agreement must provide that the funded party may terminate the funding agreement if it reasonably believes that the third party funder has committed a material breach of the Code or the funding agreement.

*Non-compliance by Subsidiary or Associated Entity*

- 2.19 The funding agreement must provide that a failure by a subsidiary or associated entity to comply with the Code constitutes a failure to comply with the Code by the third party funder.

*Dispute regarding Funding Agreement*

- 2.20 The funding agreement must provide a neutral and independent dispute resolution mechanism for settlement of any dispute arising under or in connection with the funding agreement between the third party funder and the funded party.

*Complaints Procedure*

- 2.21 The third party funder must maintain a complaints procedure in respect of any relevant act or omission by the third party funder as follows:
- (1) the third party funder must ensure that complaints from a funded party under or in connection with the funding agreement are handled in a timely and appropriate way;
  - (2) steps must be taken to investigate and respond to a complaint in a timely way;
  - (3) if a complaint has been received, the subject matter of the complaint must be properly reviewed;
  - (4) if a complaint is not remedied promptly, the third party funder must advise the funded party of any further steps which may be available to the funded party under the funding agreement, the Code and the Ordinance; and
  - (5) if the subject matter of the complaint raises issues of more general concern, the third party funder must take steps to investigate and remedy such issues, even if other funded parties may not have complained.

*Annual Returns*

2.22 The third party funder must:

- (1) submit annual returns to the advisory body on—
  - (a) any complaints against it by funded parties received during the reporting period; and
  - (b) any findings by a court or arbitral tribunal of its failure to comply with the Code or Division 5 of Part 10A of the Ordinance during the reporting period; and
- (2) respond to any request from the advisory body for further information or clarification concerning any matter.

#453127v2