

**立法會**  
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**Paper for the House Committee Meeting  
on 13 January 2017**

**Legal Service Division Report on  
Arbitration and Mediation Legislation  
(Third Party Funding) (Amendment) Bill 2016**

**I. SUMMARY**

- 1. The Bill**                      The Bill seeks to amend the Arbitration Ordinance (Cap. 609) and the Mediation Ordinance (Cap. 620) to ensure that third party funding ("3<sup>rd</sup> PF") of arbitration and mediation is not prohibited by the common law doctrines of maintenance and champerty, and to provide for related measures and safeguards.
- 2. Public Consultation**      The Law Reform Commission of Hong Kong ("LRC") conducted a public consultation on 3<sup>rd</sup> PF for arbitration between October 2015 and February 2016 and a report was published. The Administration consulted certain legal and arbitration professional bodies in Hong Kong and the Steering Committee on Mediation ("SCM") after the LRC report was released. According to the Administration, the said bodies and SCM support the proposed reform.
- 3. Consultation with LegCo Panel**      According to the Clerk to the Panel on Administration of Justice and Legal Services, the Panel was consulted on 28 November 2016. Members generally supported the introduction of the Bill into the Legislative Council but expressed concerned about the regulation and control of third party funders.
- 4. Conclusion**                The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. Since the Bill involves a reform of the law relating to 3<sup>rd</sup> PF of arbitration and mediation, Members may wish to form a Bills Committee to study the Bill in detail.

## **II. REPORT**

The date of First Reading of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 ("Bill") is 11 January 2017. Members may refer to the Legislative Council ("LegCo") Brief (File Ref.: LP 19/00/16C) issued by the Department of Justice on 28 December 2016 for further details.

### **Object of the Bill**

2. The Bill seeks to amend the Arbitration Ordinance (Cap. 609) and the Mediation Ordinance (Cap. 620) 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.

### **Background**

3. In gist, maintenance and champerty are common law doctrines which prohibit a person's officious intermeddling with someone else's litigation. Champerty is, in essence, a type of maintenance which involves a share of the proceeds of the litigation maintained. In Hong Kong, the above doctrines prohibit third party funding of court litigation as a tort and a criminal offence, subject to certain exceptions. However, it is unclear whether these doctrines also apply to third party funding of arbitrations taking place in Hong Kong.

4. Between October 2015 and February 2016, the Law Reform Commission of Hong Kong ("LRC") consulted the public to seek their views on third party funding for arbitration, including whether the common law doctrines of maintenance and champerty should apply to third party funding arrangements in arbitrations. A report ("Report") entitled "Third Party Funding for Arbitration" was published in October 2016 in which LRC recommended that reform of the Hong Kong law is needed to clearly state that the said common law doctrines do not prevent third party funding of arbitration and related proceedings under Cap. 609. LRC also recommended that consideration should be given to extending the proposals to mediations under Cap. 620.

### **Provisions of the Bill**

5. The Bill seeks to implement the above LRC's recommendations by amending Cap. 609 and Cap. 620. The main provisions are summarized below.

Proposed amendments to Cap. 609 — New Part 10A (Divisions 1 to 6)

*Definition of third party funding of arbitration ("3<sup>rd</sup> PF of arbitration")*

6. Under the new section 98G, "third party funding of arbitration" is defined to mean the provision of arbitration funding for an arbitration under a funding agreement to a funded party by a third party funder, and in return, for the third party funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement. It is proposed that the provision of arbitration funding by a person practicing law or providing legal services, whether in Hong Kong or elsewhere, would be excluded from the definition.

*Non-application of certain common law doctrines to 3<sup>rd</sup> PF of arbitration*

7. The new sections 98K and 98L in Division 3 of the new Part 10A provide that the following offences and tort do not apply to 3<sup>rd</sup> PF of arbitration: (a) the common law offence of maintenance (including the common law offence of champerty); (b) the common law offence of being a common barrator; and (c) the tort of maintenance (including the tort of champerty).

8. The effect of the new sections 98K and 98L is that 3<sup>rd</sup> PF of arbitration would not be prohibited by the above common law offences or tort. The new sections 98K and 98L only apply to 3<sup>rd</sup> PF agreements made on or after the commencement of these provisions. For any arbitration that does not take place in Hong Kong or in case where there is no place of arbitration, the new section 98N extends the application of the new Part 10A to such arbitration but restricts the funding to the costs and expenses of services that are provided in Hong Kong in relation to the arbitration.

*Code of practice to be complied with by third party funders*

9. Division 4 of the new Part 10A seeks to empower an authorized body appointed by the Secretary for Justice to issue a code of practice<sup>1</sup> ("Code") setting out the practices and standards with which third party funders are ordinarily expected to comply in carrying on activities in connection with 3<sup>rd</sup> PF of arbitration. The new section 98P sets out some of the matters that may be covered in the Code. These include those relating to funding agreements, the internal procedures of third party funders and measures to facilitate the advisory body appointed by the Secretary for Justice under the new section 98W to monitor third party funders. According to the new section 98Q, the Code is not subsidiary legislation. The Bill also proposes that public consultation on the

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<sup>1</sup> A draft Code is at Annex C of the LegCo Brief.

proposed Code must be conducted in accordance with the new section 98Q before the issuance of the Code.

### *Other related measures and safeguards*

10. Division 5 of the new Part 10A seeks to provide for measures and safeguards to regulate the communication and disclosure of information for 3<sup>rd</sup> PF of arbitration.

### Proposed amendments to Cap. 620

11. Part 3 of the Bill seeks to add the new section 7A to Cap. 620 by making certain modifications to the new Part 10A to Cap. 609 so that the said new Part 10A also applies in relation to mediation. These modifications include a reference to "arbitration" in Part 10A to Cap. 609 is to be construed as a reference to "mediation" and a reference to certain section number which is referred to in the new Part 10A to Cap. 609 is to be construed as a reference to the relevant section in Cap. 620.

### **Commencement**

12. The Bill, if passed, would come into operation by phases. Save for provisions which relate to (a) non-application of the above common law doctrines to 3<sup>rd</sup> PF of arbitration provided in Division 3 of the new Part 10A to Cap. 609; (b) measures and safeguards concerning communication and disclosure of information in respect of third party funding of arbitration provided in Division 5 of the new Part 10A to Cap. 609; and (c) the proposed amendments to Cap. 620 concerning (i) the scope of application of the said new Part 10A to mediation under Cap. 620; and (ii) the communication and disclosure of information for third party funding of mediation under Cap. 620 (collectively known as "the remaining provisions"), the Bill would come into operation on the day on which it is published in the Gazette as an ordinance. The remaining provisions would come into operation on a day to be appointed by the Secretary for Justice by notice published in Gazette. According to paragraph 23 of the LegCo Brief, the commencement arrangement is made to facilitate the preparatory work for the relevant regulatory framework to be done before the provisions under Divisions 3 and 5 come into operation.

### **Public Consultation**

13. According to paragraphs 50 and 51 of the LegCo Brief, the Administration consulted certain legal and arbitration professional bodies in

Hong Kong and the Steering Committee on Mediation ("SCM") after the Report was released. The said bodies and SCM support the proposed amendments.

### **Consultation with LegCo Panel**

14. According to the Clerk to the Panel on Administration of Justice and Legal Services, at the meeting on 28 November 2016, the Panel was briefed by LRC on the Report. The Administration also reported to the Panel its response to the recommendations in the Report and proposed to introduce amendments to Cap. 609 and Cap. 620. Members generally supported the introduction of the Bill into LegCo but expressed concerned about the regulation and control of third party funders. In this regard, LRC had recommended that third party funders should be required to comply with a Code issued by a body authorized under Cap. 609. A draft Code had been prepared by the Administration for Members' reference. The Administration took the view that the details of implementing the above-mentioned recommendation should be subject to the comments received during the consultation on the drafting of the Code.

### **Conclusion**

15. The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. Since the Bill involves a reform of the law relating to 3<sup>rd</sup> PF of arbitration and mediation, Members may wish to form a Bills Committee to study the Bill in detail.

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