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

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**Part 3**

**Amendment to Mediation Ordinance**

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# 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.
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## 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;

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- (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.”
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## 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.”.

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## **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.