

LC: Speech by Secretary for Justice in moving second reading of Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016

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Following is the translation of the speech made by the Secretary for Justice, Mr Rimsky Yuen, SC, in moving the second reading of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 at the Legislative Council meeting today (January 11):

President,

I move that the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 (Bill) be read the second time. The main objective of the Bill is to amend the Arbitration Ordinance (Cap 609) and the Mediation Ordinance (Cap 620) to clarify that third party funding of arbitration, mediation and related proceedings is permitted under Hong Kong law.

The proposed amendments were formulated on the basis of the recommendations made in the Report on Third Party Funding for Arbitration (Report) published by the Law Reform Commission of Hong Kong (LRC) in October 2016 and the views of the Steering Committee on Mediation.

Whether third party funding of arbitration is permitted under Hong Kong law

The Government has a long-standing policy of promoting Hong Kong as a leading centre for international legal and dispute resolution services in the Asia Pacific region. In recent years, third party funding of arbitration and other dispute resolution proceedings has become increasingly common in various 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.

Hong Kong is one of the major international arbitration centres 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.

The Hong Kong Courts do not object, in principle, to third party funding of arbitration and related proceedings (including mediation). However, it is currently unclear whether the common law doctrines of maintenance and champerty also apply to third party funding of arbitration taking place in Hong Kong. Indeed, a Court of Final Appeal judgment handed down in 2007 (Note) expressly left open this question. As there is uncertainty as to whether third party funding of arbitration is permitted under the current Hong Kong law, the attractiveness of Hong Kong as a venue of arbitration may be affected. This may also affect the competitiveness of Hong Kong as an arbitration centre in handling cross-border investment and commercial disputes.

The review and recommendations by the LRC

Against the above background, I, together with the Chief Justice, asked the LRC in June 2013 to set up a sub-committee to review the current position relating to third party funding of arbitration for the purpose of considering whether reform is needed. In October 2015, the sub-committee published a consultation paper proposing that third party funding for arbitration taking place in Hong Kong should be permitted under Hong Kong

law.

Based on the submissions received during the public consultation period, the LRC published the Report in October 2016, concluding that the reform of Hong Kong law is needed to state that the common law doctrines of maintenance and champerty do not prevent third party funding of arbitration and associated proceedings under the Arbitration Ordinance.

The LRC recommended that third party funders funding arbitration should be required to comply with a Code of Practice issued by a body authorised under the Arbitration Ordinance. The Code should also set out the standards (including financial and ethical standards) and practices with which third party funders would ordinarily be expected to comply when carrying on the funding activities.

The LRC also recommended that consideration should be given to whether to make consequential amendments at the same time to the Mediation Ordinance to extend the above proposals to mediation within the scope of the Mediation Ordinance.

## The Government responses to the Report

The Government considers that, from the perspective of promoting Hong Kong as an international dispute resolution centre and for the purpose of clarifying the law, the proposed law reform is desirable. It is important 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 international development and thereby enhance its competitive position.

## Consultation

Following the release of the Report, the Department of

Justice (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 organisations which have responded so far have all indicated their support for the proposed reform. The DoJ has also consulted the Steering Committee on Mediation and the Steering Committee supported the proposed consequential amendments to the Mediation Ordinance.

At the meeting of the Panel on Administration of Justice and Legal Services (Panel) of the Legislative Council (LegCo) held in November last year, I, together with the Chairperson of the Sub-committee, provided a briefing on the proposed reform and the views of the aforementioned stakeholders. The Panel expressed support for the introduction of the Bill into the LegCo.

#### Main Amendments under the Bill

The Bill proposes that a new Part 10A be added to the Arbitration Ordinance, so as to ensure that third party funding of arbitration is not prohibited by the common law doctrines of maintenance and champerty and to provide for related measures and safeguards. 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 two 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. 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.

The Bill also proposes that a new section 7A be added to the Mediation Ordinance so as to extend the application of the new Part 10A of the Arbitration Ordinance to mediation to which the Mediation Ordinance applies and to funding of services provided in Hong Kong for non-Hong Kong

mediation.

Under the above proposal, where litigation in court ensued despite the mediation, the doctrines of maintenance and champerty will continue to apply. The doctrines will only be inapplicable to the mediation conducted prior to or during the course of the litigation.

## Conclusion

President, the DoJ has been reviewing the dispute resolution regime of Hong Kong from time to time and will also consider improvement to the Arbitration Ordinance and the Mediation Ordinance as and when appropriate, so as to ensure that the latest developments in the dispute resolution sector can be promptly reflected in the relevant legislation. There is undoubtedly a trend to permit third party funding of arbitration in international arbitration. We believe that the Bill, when enacted, will further enhance Hong Kong's position as a leading centre for international legal and dispute resolution services in the Asia Pacific region.

With these remarks, I urge Members to support the Bill.

Thank you, President.

Note: *Unruh v Seeberger* (2007) 10 HKCFAR 31, paragraph 123

Ends/Wednesday, January 11, 2017