

LC: Speech by Secretary for Justice on resumption of
Second Reading debate on Arbitration and Mediation
Legislation (Third Party Funding) (Amendment) Bill 2016

Following is the speech by the Secretary for Justice, Mr Rimsky Yuen, SC, on the resumption of the Second Reading debate on the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 in the Legislative Council meeting today (June 14):

President,

First of all, I would like to express our gratitude to the Hon Dennis Kwok, the chairman of the Bills Committee of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016, and other members of the Bills Committee for their hard work in completing the scrutiny of the Bill. I am also grateful to the relevant stakeholders in the legal, arbitration, mediation and related professional sectors (Note) for their valuable comments and support.

As I pointed out when introducing the Bill into this Council in January this year, the main objective of the Bill is to amend the Arbitration Ordinance (Cap 609) (AO) and the Mediation Ordinance (Cap 620) (MO) 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 published by the Law Reform Commission of Hong Kong (LRC) in October 2016 and the outcome of consultation with the Steering Committee on Mediation. The Bill will reflect in our legislation the latest developments in the dispute resolution sector, and further enhance Hong Kong's status as a leading centre for international legal and dispute resolution services in the

Asia-Pacific region.

Committee Stage Amendments

I shall move two Committee Stage Amendments (CSAs) at a later stage. The CSAs have all been endorsed by the Bills Committee, and can be briefly outlined as follows.

CSA to Clause 3

Under the proposed section 98G(2) of the AO in clause 3 of the Bill, "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". Some members of the Bills Committee have suggested to delete the proposed section 98G(2), so that the clarification to permit the provision of arbitration funding will also apply to all qualified lawyers and other legal services providers. The Government has carefully considered the request and the views of members. We take the view that a proper balance should be struck by ensuring that legitimate concerns over potential conflicts of interest are sufficiently addressed. Safeguards ought to be put in place to ensure that a lawyer should not be allowed to provide arbitration or mediation funding, if the lawyer concerned acts for any party in the relevant proceedings. Therefore, we now propose CSAs to:

(a) delete the proposed section 98G(2); and

(b) add a new section 98NA so that the new third party funding regime under the proposed Part 10A of the AO will not be applicable to lawyers acting for parties in the arbitration.

In putting forward the above proposal, we fully agree with the LRC in that it would be in the public interest for lawyers to focus on their provision of professional services

to their clients and that they should not place themselves in a conflict of interest position by engaging in the business of third party funding. By virtue of the new section 98NA, lawyers who put themselves in such a conflict of interest situation will not be protected by the proposed Part 10A of the AO.

CSA to Clause 4

Clause 4 of Bill proposes to add a new section 7A to the MO. The new section 7A of the MO extends, among others, the application of the new section 98S of the AO, with the necessary modifications, to mediation to which the MO applies. Under this original proposal, despite the confidentiality requirements provided in section 8(1) of the MO, mediation communication referred to in that section may be disclosed by a party to mediation to a person for the purpose of having or seeking third party funding of mediation from that person.

We now propose CSAs to the new section 7A. For the purpose of the MO, the original proposed section 98S will be substituted by a new section 98S. The effect of the CSAs is as follows:

- (a) a person who intends to mediate a dispute or is in the course of mediating a dispute may disclose mediation communication for specified purposes;
- (b) the disclosure must be for the purpose of having or seeking third party funding for mediation or obtaining professional advice in this connection;
- (c) with the leave of the relevant court or tribunal, a funded party and a third party funder may disclose mediation communication for the purpose of protecting, pursuing or enforcing rights or interest in relation to the third party funding of mediation in legal proceedings in or outside Hong

Kong; and

(d) the above disclosure requirements apply to a professional adviser to whom mediation communication is provided.

Conclusion

The Department of Justice has been making every effort to consolidate the status of Hong Kong as a leading centre for international legal and dispute resolution services in the Asia-Pacific region. We will consider improvements to the provisions of the AO and the MO as and when appropriate, so as to ensure that the latest developments in the dispute resolution community can be promptly and appropriately reflected in our legislation.

As I have mentioned when introducing the Bill into this Council, third party funding of arbitration and other dispute resolution proceedings has since become increasingly common in numerous jurisdictions, including Australia, England and Wales, various European countries and the United States. We believe that the passage of the Bill and the CSAs would enable Hong Kong's dispute resolution regime to stay at the forefront among major dispute resolution and financial centres around the world.

With these remarks, President, I urge Members to support the Bill and the amendments that I will move at the subsequent Committee Stage.

Thank you, President.

Note: These include the Hong Kong Bar Association, the Law Society of Hong Kong, the Hong Kong Institute of Arbitrators, the Chartered Institute of Arbitrators (East Asia Branch), the Hong Kong International Arbitration Centre, the China International Economic and Trade Arbitration

Commission Hong Kong Arbitration Center, the China Maritime Arbitration Commission Hong Kong Arbitration Center and the Hong Kong Construction Association.

Ends/Wednesday, June 14, 2017