

THIRD PARTY FUNDING BILL: LEGISLATIVE CHANGE BOLSTERS HONG KONG'S STANDING IN INTERNATIONAL ARBITRATION SPACE



On 14 June 2017, the Hong Kong Legislative Council passed the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 (the 2016 Bill), which, amongst other things, puts beyond doubt that third party funding of arbitration and mediation is permissible under Hong Kong law. The 2016 Bill is expected to enter force later this year.

The enactment of the 2016 Bill followed a public review by the Law Reform Commission of Hong Kong (the Law Commission) in relation to third party funding, which concluded there was a necessity for reforms. Following the review, the Law Commission published a consultation paper in October 2015 and a report in October 2016 recommending that third party funding of arbitration and associated proceedings be permitted, and calling for the development of clear ethical and financial standards in relation to such funding.

The 2016 Bill, once it enters force, will amend the Arbitration Ordinance, Cap. 609 and the Mediation Ordinance, Cap. 620. Under the new law:

- The common law offences and tort of maintenance and champerty are expressly stated not to apply to third party funding of arbitration and mediation, including proceedings before emergency arbitrators and ancillary court proceedings.
- In the case of arbitration outside Hong Kong or arbitration without a seat of arbitration, the new law also applies to the funding of costs and expenses of services provided in Hong Kong in relation to that arbitration.
- A party may disclose information relating to the arbitration or the arbitral award solely for the purpose of having or seeking third party funding. However, it may not make any



disclosure beyond that, save to protect or pursue a legal right or interest, to enforce or challenge the arbitral award, to comply with a legal or regulatory obligation, or to obtain advice from professional advisers in connection with the third party funding.

- The funded party must give written notice to each other party to the arbitration and the relevant arbitration body of: (i) the fact of the funding agreement, (ii) the name of the third party funder, and (iii) the end of the funding agreement.
- Lawyers and law firms providing legal services in Hong Kong or elsewhere are permitted to provide third party funding, provided they are not involved in the arbitration.

In line with the Law Commission's recommendations, the new law adopts a "light touch" approach to the regulation of third party funders, and proposes the drafting and implementation of a code of practice

(the Code) prescribing the practices and standards expected of third party funders when carrying on activities in connection with the funding of arbitrations. In particular, the new law envisages:

- That the Code should cover the key features, risks and terms of funding agreements such as the degree of the funders' control of the arbitration, funders' liabilities and termination of the agreements; and matters relating to conflicts of interest, capital adequacy, confidentiality and privilege and complaints procedures.
- A consultation with the public on the Code before being promulgated.
- That failure to comply with the Code will not, of itself, render a person liable to judicial or other proceedings. However, compliance or non-compliance with the Code may be taken into account by the court or tribunal if it is relevant to a question being decided.

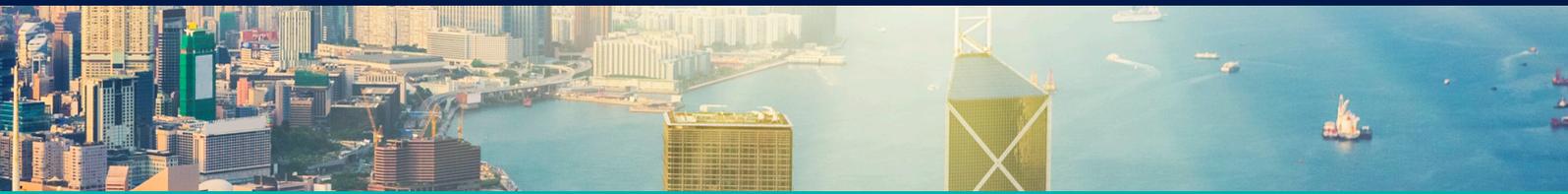
opportunities for third party funders. The timing is also opportune given Hong Kong's position as a "super conductor" in the PRC's rapidly developing Belt and Road initiative, which is anticipated to generate investments, boost trade and increase activity in Hong Kong's dispute resolution market.

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