

**THE LAW REFORM COMMISSION OF HONG KONG
THIRD PARTY FUNDING FOR ARBITRATION SUB-COMMITTEE**

**CONSULTATION PAPER ON
THIRD PARTY FUNDING FOR ARBITRATION**

EXECUTIVE SUMMARY

PART I: OVERVIEW

Terms of reference (see Preface of Consultation Paper)

1. Third Party Funding has become increasingly common over the last decade in numerous jurisdictions including Australia, England and Wales, various European jurisdictions and the United States. Third Party Funding arrangements are usually motivated by a party's lack of financial resources to pursue its own claims in arbitration or litigation. A Third Party Funding contract commonly provides that the Third Party Funder will pay for the Funded Party's costs of arbitration or litigation proceedings in return for a percentage of the judgment or Award or some other financial benefit from any proceeds recovered by the Funded Party from such funded proceedings. If there is no recovery from the proceedings, the Third Party Funder will not receive any repayment or return on the Funds it has advanced to the Funded Party.

2. Hong Kong is one of the major centres of international arbitration. 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 permitted by Hong Kong law to do so.

3. The legal doctrines of maintenance and champerty, developed some 700 years ago in England, have been held by the Hong Kong courts to prohibit Third Party Funding of litigation both as a tort (civil wrong) and as a criminal offence, save in three exceptional areas: (1) where a third party can prove that it has a legitimate interest in the outcome of the litigation; (2) where a party can persuade the court that it should be permitted to obtain Third Party Funding to enable it to have access to justice; and (3) in a miscellaneous category of proceedings including insolvency proceedings.

4. It is unclear whether the doctrines of maintenance and champerty also apply to Third Party Funding for arbitrations taking place in Hong Kong, as appears from the Court of Final Appeal decision in *Unruh v Seeberger*¹ where the Court expressly left open this question.

¹ (2007) 10 HKCFAR 31, at para 123.

5. In June 2013, the Chief Justice and the Secretary for Justice asked the Law Reform Commission of Hong Kong to review this subject. The terms of reference are:

"To review the current position relating to Third Party Funding for arbitration for the purposes of considering whether reform is needed, and if so, to make such recommendations for reform as appropriate."

Membership of the Sub-committee

6. In June 2013, a sub-committee was appointed to review the subject. The members of the Sub-committee are:

Ms Kim M Rooney (Chair)	Barrister Gilt Chambers
Ms Teresa Y W Cheng, SC	Senior Counsel Des Voeux Chambers
Mr Justin D'Agostino	Global Head of Dispute Resolution Practice Herbert Smith Freehills
Mr Victor Dawes, SC	Barrister Temple Chambers
Mr Jason Karas	Principal and Solicitor Advocate Lipman Karas
Mr Robert Y H Pang, SC	Senior Counsel Bernacchi Chambers

7. Ms Kitty Fung, Senior Government Counsel in the Law Reform Commission Secretariat, is the secretary to the Sub-committee.

8. Since its formation, the Sub-committee has met on a regular basis to discuss and consider the matters within the Terms of Reference. The recommendations in this paper are the result of those discussions. They represent the Sub-committee's preliminary views, presented for consideration by the community including the general public, arbitration users, arbitration service providers, Third Party Funders' regulators and those with an interest in this subject generally.

9. After conducting a review of current Hong Kong law and practice and analysing the legal regime for Third Party Funding for arbitration in a number of overseas jurisdictions, including whether or not it is permitted, and if so, on what terms, the Sub-committee is issuing this Consultation Paper to seek the public's view and comments on (a) whether reform is needed of the current position relating to Third Party Funding for arbitration in Hong Kong and, (b) if so, what kind of reform is appropriate.

Recommendations

10. The Sub-committee's recommendations are:

Recommendation 1

We recommend that the Arbitration Ordinance should be amended to provide that Third Party Funding for arbitration taking place in Hong Kong is permitted under Hong Kong law.

Recommendation 2

We recommend that clear ethical and financial standards for Third Party Funders providing Third Party Funding to parties to arbitrations taking place in Hong Kong should be developed.

Recommendation 3

We invite submissions as to:

- (1) Whether the development and supervision of the applicable ethical and financial standards should be conducted by: (a) a statutory or governmental body, whether existing or to be established, and if so, what type of body; or (b) a self-regulatory body, whether for a trial period or permanently and how any ethical and financial standards should be enforced.
- (2) How the applicable ethical or financial standards should address any of the following matters or any additional matters:
 - (a) capital adequacy;
 - (b) conflicts of interest;
 - (c) confidentiality and privilege;
 - (d) extent of extra-territorial application;
 - (e) control of the arbitration by the Third Party Funder;
 - (f) disclosure of Third Party Funding to the Tribunal and other party/parties to the arbitration;
 - (g) grounds for termination of Third Party Funding; and
 - (h) a complaint procedure and enforcement.

Recommendation 4

We invite submissions as to:

- (a) Whether or not a Third Party Funder should be directly liable for adverse costs orders in a matter it has funded;
- (b) If the answer to sub-paragraph (a) is "yes", how such liability could be imposed as a matter of Hong Kong law, and for the purposes of recognition and enforcement under the Convention for Recognition and Enforcement of Foreign Arbitral Awards 1958;
- (c) Whether there is a need to amend the Arbitration Ordinance to provide for the Tribunal's power to order Third Party Funders to provide Security for Costs; and

- (d) If the answer to sub-paragraph (c) is "yes", the basis for such power as a matter of Hong Kong law, and for the purposes of recognition and enforcement under the Convention for Recognition and Enforcement of Foreign Arbitral Awards 1958.

Consultation period

11. The consultation period will end on Monday, 18 January 2016. The Sub-committee welcomes any views, comments and suggestions on the issues presented in this Consultation Paper. These will greatly assist the Sub-committee to reach its final conclusions.

**THE LAW REFORM COMMISSION OF HONG KONG
THIRD PARTY FUNDING FOR ARBITRATION SUB-COMMITTEE**

**CONSULTATION PAPER ON
THIRD PARTY FUNDING FOR ARBITRATION
EXECUTIVE SUMMARY - PART II: IN DETAIL**

Chapter 1: Introduction

1. Hong Kong is one of Asia's major commercial, financial and arbitration centres. It was one of the first jurisdictions in the world (and the first in Asia) to adopt the UNCITRAL Model Law on International Commercial Arbitration of 21 June 1985 into its arbitration law. Hong Kong has regularly reviewed and reformed its law to maintain a pro-arbitration regime, incorporating best international standards while accommodating the needs of Hong Kong arbitration users and incorporating provisions arising from its constitutional status.

2. Hong Kong's common law system has continued to apply the doctrines of maintenance and champerty which originated in England in medieval times with the intention of preventing unnecessary litigation proceedings being promoted or financed by powerful individuals for the sole purpose of furthering their own interests.

3. International arbitration is increasingly used to resolve investment and commercial disputes involving parties and assets from different countries and jurisdictions. Separately, around the world a specialised source of Third Party Funding for arbitration and litigation is developing, to enable parties involved in dispute resolution to pay for the cost of their Proceedings in exchange for a portion of any amounts that they recover in such Proceedings.

4. In *Winnie Lo v HKSAR*¹ and *Unruh v Seeberger*,² the Court of Final Appeal observed that the scope of what constitutes maintenance and champerty in Hong Kong has been narrowed over the years reflecting the changed public policy considerations to allow recognised exceptions in litigation (with the leave of the court) where third party funding of litigation will be permitted, such as cases involving third parties with a legitimate interest in the outcome of the litigation, or where "*access to justice considerations*" apply, or in a miscellaneous category including insolvency litigation. As the Court of Final Appeal observed in *Unruh v Seeberger*, such developments demonstrate that the Hong Kong courts have been prepared to adapt a law with ancient origins to cope with modern requirements and conditions.

¹ (2012) 15 HKCFAR 15.

² *Unruh v Seeberger* (2007) 10 HKCFAR 31, at para 77 (*per* Ribeiro PJ).

5. The current position as to third party funding of arbitration in Hong Kong, however, is not clear. While the Hong Kong courts do not object, in principle, to Third Party Funding for arbitration, as may be seen from the Hong Kong Court of Final Appeal decision in *Unruh v Seeberger*,³ the Court of Final Appeal has left open the question of whether or not Third Party Funding for arbitration is permitted.⁴

6. The uncertainty in Hong Kong law as to whether Third Party Funding for arbitration taking place in Hong Kong is permitted, is leading to the general view that it is not permitted, potentially making Hong Kong less attractive as a place to conduct arbitration and damaging its competitiveness as an arbitration centre whether for international, Mainland Chinese or Hong Kong disputes.

7. This Consultation Paper reviews and discusses whether Hong Kong law should be amended to expressly state and clarify that the doctrines of maintenance and champerty do not prohibit Third Party Funding for arbitrations taking place in Hong Kong, and if so, whether ethical and financial safeguards are needed, in what areas and in what form.

What is Third Party Funding?

8. Third Party Funding has been described as "*the funding of claims by commercial bodies in return for a share of the proceeds.*"⁵ It involves a "*third person*" to the Proceedings providing financial "*assistance or support to a party to*" the Proceedings.⁶

9. A Third Party Funding arrangement for arbitration commonly provides that the Third Party Funder will pay the Funded Party's legal and other costs of the arbitration in return for a percentage of the Award or some other financial benefit from any financial recoveries in the arbitration.

10. A feature of Third Party Funding that distinguishes it from other forms of financing of Proceedings is that the Third Party Funder will be compensated only from the Funded Party's net recoveries from the Proceedings (after deduction of agreed costs and expenses). A Funded Party will not have to pay any amount to the Third Party Funder if the Proceedings are unsuccessful (as determined by the definition of "*success*" or similar expression in the relevant Third Party Funding agreement).

³ *Unruh v Seeberger* (2007) 10 HKCFAR 31.

⁴ *Unruh v Seeberger* (2007) 10 HKCFAR 31, at para 123 (*per* Ribeiro PJ).

⁵ Lord Justice Jackson, "Third Party Funding or Litigation Funding" (Speech delivered at the Sixth Lecture in the Civil Litigation Costs Review Implementation Programme, The Royal Courts of Justice, 2011).

<<http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Sixth-Lecture-by-Lord-Justice-Jackson-in-the-Civil-Litigation-Costs-Review-.pdf>>, at para 2.1.

⁶ *Unruh v Seeberger* (2007) 10 HKCFAR 31, at para 118 (*per* Ribeiro PJ).

11. While Third Party Funding arrangements are usually motivated by a party's lack of financial resources to pursue its own claims, Third Party Funding may also be used by a party to manage the risks of litigation or arbitration by sharing the risk of non-recovery with the Third Party Funder in return for sharing the funds recovered out of such Proceedings by the Funded Party, if any.

How is Third Party Funding relevant to arbitration?

12. A party conducting an arbitration must pay upfront the costs and expenses associated with it including the costs of the arbitrators, any arbitral institution, their lawyers, expert witnesses, translators, court reporters, hearing venues and similar expenses. These can be high. The party may not have the financial resources itself to pay these costs and expenses and so may want to obtain Third Party Funding.

How is Third Party Funding relevant to arbitration in Hong Kong?

13. Hong Kong is an international arbitration centre with a growing number of arbitrations. A party conducting an arbitration in Hong Kong may wish to obtain Third Party Funding to enable it to pay upfront for costs and expenses of conducting the Proceedings. The party in question either may not have the funds itself to pay for these costs, or may wish to obtain Third Party Funding as a form of financing for the efficient allocation and management of their financial resources.

14. The users of arbitrations taking place in Hong Kong are overwhelmingly corporations, partnerships, government departments and similar entities. Sovereign countries may also participate in international arbitration, generally either as a party to an arbitration brought under an investment treaty by an investor in that country, or in an arbitration brought by another sovereign country under a treaty or trade agreement between those two countries. Hearings for such arbitrations may take place in Hong Kong.

15. Individuals are rarely parties to arbitrations taking place in Hong Kong. Where individuals are involved in arbitrations, the dispute also generally involves commercial, contractual or similar issues. Also, some disputes are not permitted to be arbitrated, such as those involving matrimonial, probate and taxation issues. Criminal matters cannot be arbitrated in Hong Kong.

What are the doctrines of maintenance and champerty under Hong Kong law?

16. The doctrines of maintenance and champerty originated in England in medieval times and were intended to prevent unnecessary litigation

proceedings being promoted or financed by powerful individuals for the sole purpose of furthering their own interests.⁷

17. "Maintenance" has been defined as:

*"the giving of assistance or encouragement to one of the parties to an action by a person who has neither an interest in the action nor any other motive recognised by the law as justifying his interference."*⁸

18. "Champerty" has been defined as:

"a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give to the maintainer a share of the subject matter or proceeds thereof, if the action succeeds".⁹

How does Third Party Funding fall under the doctrines of maintenance and champerty?

19. Third Party Funding falls within the scope of maintenance and champerty because the Third Party Funder does not have an interest in the funded arbitration, save for its commercial interest arising from the Third Party Funding it provides to the Funded Party. Thus Third Party Funding falls within the scope of the expression "*giving of assistance*" referred to in the definition of "*Maintenance*" above.

20. As the Third Party Funder may receive a share of the proceeds, or some other financial benefit from the Proceedings it funds, if there is a recovery, its share of the proceeds from the arbitration falls within the scope of the expression "*share of the subject matter or proceeds thereof*", referred to in the definition of "*Champerty*" above.

Is Third Party Funding of litigation permitted in Hong Kong?

21. Third Party Funding of litigation is only permitted in Hong Kong in limited circumstances, where the three exceptional areas apply: (a) in cases involving third parties with a legitimate interest in the outcome of the litigation;

⁷ *Unruh v Seeberger* [2007] 10 HKCFAR 31.

⁸ *Massai Aviation Services v Attorney General* [2007] UKPC 12, quoted in *Winnie Lo v HKSAR* (2012) 15 HKCFAR 16, at para 10 (*per* Bokhary PJ). Champerty has also been defined as "*the procurement, by direct or indirect financial assistance, of another person to institute, or carry on or defend civil proceedings without lawful justification*" by the Law Commission for England and Wales, *Proposals for the Reform of the Law Relating to Maintenance and Champerty*, Report No 7 (1966), at para 4; see *Hill v Archbold* [1968] 1 QB 686 (CA).

⁹ Quoted in *Winnie Lo v HKSAR* (2012) 15 HKCFAR 16, at para 10 (*per* Bokhary PJ).

(b) where "access to justice considerations" apply; or (c) in a miscellaneous category including insolvency litigation.¹⁰

Is Third Party Funding for arbitration permitted in Hong Kong?

22. It is undecided in Hong Kong whether or not the application of the doctrines of maintenance and champerty prohibit Third Party Funding for arbitration. In *Unruh v Seeberger*,¹¹ the Court of Final Appeal upheld the validity of a Third Party Funding agreement for an arbitration conducted in a foreign jurisdiction. The Court expressly left open the question of whether the doctrines of maintenance and champerty apply to Third Party Funding agreements concerning arbitrations taking place in Hong Kong, as the issue did not arise in that case. As Ribeiro PJ stated in that case:

"The Hong Kong court should not strike down an agreement on the grounds of maintenance or champerty where it is to be performed in relation to judicial or arbitral proceedings in a jurisdiction where no such public policy objections exist¹² ... I leave open the question whether maintenance and champerty apply to agreements concerning arbitrations taking place in Hong Kong since it does not arise in the present case."¹³

What is the issue that this Sub-committee is addressing and what is its role?

23. As the application of the doctrines of maintenance and champerty to funding for arbitration is unclear, and as this issue is relevant to maintaining and further promoting the competitiveness of Hong Kong as an international arbitration centre, in June 2013, the Secretary for Justice and the Chief Justice asked the Law Reform Commission of Hong Kong to establish this Sub-committee. The Terms of Reference of this Sub-committee are:

"To review the current position relating to Third Party Funding for arbitration for the purposes of considering whether reform is needed, and if so, to make such recommendations for reform as appropriate."

¹⁰ (1) Where a third party can prove that it has a legitimate interest in the outcome of the litigation; (2) where a party can persuade the court that it should be permitted to obtain Third Party Funding to enable it to have access to justice; and (3) in insolvency and a miscellaneous category of proceedings.

¹¹ (2007) 10 HKCFAR 31.

¹² *Unruh v Seeberger* (2007) 10 HKCFAR 31, at para 122 (*per* Ribeiro PJ).

¹³ *Unruh v Seeberger* (2007) 10 HKCFAR 31, at para 123 (*per* Ribeiro PJ).

Scope of the Sub-committee's review

24. The Sub-committee has focused in its review on the issues raised by Third Party Funders of commercial, commodities, contractual, construction, financial, investment, trade and similar disputes.

25. Litigation associated with arbitration is outside the scope of our review as it is not referred to in our terms of reference.

26. Mediation and other alternative forms of dispute resolution, such as adjudication, are also outside the scope of our review referred to in our terms of reference.

Recommendations

27. The Sub-committee has unanimously concluded that reform of Hong Kong law is needed to make it clear that Third Party Funding for arbitrations taking place in Hong Kong is permitted under Hong Kong law provided that appropriate financial and ethical safeguards are complied with. We consider that this reform is necessary to enhance Hong Kong's competitive position as an international arbitration centre and to avoid Hong Kong being overtaken by its competitors. Our research shows that nearly all major international arbitration centres now allow Third Party Funding.

28. We consider that such reform would be in the interests of the arbitration users and the Hong Kong public and consistent with the relevant principles that the Court of Final Appeal has formulated.

29. We also consider that a party with a good case in law should not be deprived of the financial support it needs to pursue that case via arbitration. Without the ability to obtain Third Party Funding, a party with a good case may be deprived of its right to pursue its claim or counterclaim if it cannot afford to do so.

30. We consider that ethical and financial safeguards can be placed on Third Party Funding in Hong Kong to protect against potential abuse. Compliance with these safeguards should enable Third Party Funding of arbitrations to take place in Hong Kong with all the benefits such funding can provide, while minimising the risk of possible adverse consequences.

31. Third party funding of arbitration taking place in Hong Kong is not clearly permitted under Hong Kong law. In our view, Third Party Funding of arbitration raises rather different issues to those raised by litigation. For example, a fundamental difference between litigation and arbitration is that the source of the power of the judiciary is from the Basic Law; and a judgment of a superior court has effect as a precedent and is a source of law which binds all in Hong Kong. By contrast, Hong Kong arbitration is a voluntary and consensual process conducted under a specialised regime provided under the Arbitration Ordinance that is based on the Model Law. Arbitration awards

made by Tribunals do not bind non-Parties to the arbitration and do not create a precedent that must be followed in later cases involving the same principles. Also by contrast to Hong Kong litigation, Hong Kong users of arbitration are overwhelmingly corporations engaged in commercial, financial, investment and trading disputes who must self-fund their disputes. We consider that any reform of the Hong Kong law of Maintenance and Champerty as it relates to arbitration should take these differences into account.

32. The fact that Hong Kong law does not clearly permit third party funding of arbitration in any circumstances, is, in the Sub-committee's view, a situation that is damaging to Hong Kong's competitiveness internationally as an arbitration centre.

33. Reform of the Hong Kong law to clearly permit Third Party Funding for arbitration within the appropriate ethical and regulatory framework should not adversely affect members of the public and indeed could benefit the general public in a number of ways, including by:

- (1) supporting the competitiveness of Hong Kong as an international arbitration centre, which can bring more arbitration related employment, skills enhancement and financial benefits, among other benefits; and
- (2) diverting more commercial, construction, finance, trade and similar disputes from the Hong Kong courts to arbitration, relieving the pressure on the Hong Kong courts' resources and thereby providing more resources for litigation of issues and disputes involving the public.

Chapter 2: Overview of litigation and arbitration in Hong Kong

34. The two primary ways of finally determining civil (ie, non-criminal) disputes in Hong Kong are by:

- (1) litigation in the Hong Kong courts; and
- (2) arbitration before one or three arbitrator(s).

In Hong Kong, there are also specialist tribunals and other bodies that resolve specific types of disputes, such as consumer disputes, employment disputes and tax disputes.

35. Under the Basic Law (which is Hong Kong's constitutional document)¹⁴ and the Arbitration Ordinance for the purposes of arbitration, Mainland China and Hong Kong treat each other as separate jurisdictions.

¹⁴ Article 19 of the Basic Law provides that the HKSAR, "*shall be vested with independent judicial power*". In addition, section 2 of the Arbitration Ordinance defines the "*the Mainland*" as "*any part of China other than Hong Kong, Macao and Taiwan*".

Litigation in Hong Kong

36. The majority of civil (including commercial) disputes in Hong Kong are litigated either in the District Court or the High Court.

37. Many types of disputes that may be litigated may also be arbitrated. However, some categories of disputes may only be litigated as they are non-arbitrable.

38. In litigation, the judge hearing a case is assigned by the Court administration. He or she is not agreed upon by the parties. An unsuccessful party to litigation has the right to appeal against the first court's decision to a higher court and ask the appeal court to review and reconsider the earlier decision. Litigation proceedings are held in public, except for specific types of proceedings that are held in private in judges' or other court officials' chambers, including proceedings relating to arbitration (where certain exceptions apply).¹⁵ Litigation proceedings follow the rules of the particular court in which they are held (for instance, the Rules of the High Court (Cap 4A)). The Hong Kong courts have power to order third parties to pay costs, known as Adverse Costs Orders.¹⁶ They do not have power to order third parties to provide Security for Costs.¹⁷ Judges are generally bound by rules of evidence.¹⁸ As Hong Kong is a common law jurisdiction, the doctrine of precedent applies. This means that the *ratio decidendi* (being the essential principle or statement of law on which the decision of a superior court is based) is binding on a lower court. The doctrine of *stare decisis* also applies, which involves a superior court being bound by its own previous decision.¹⁹

Arbitration in Hong Kong

39. Arbitration is the process by which the parties voluntarily agree²⁰ to submit a dispute or difference that they have (or may have in the future) as to their legal rights and liabilities arising from a legal relationship between them,

¹⁵ Section 16 of the Arbitration Ordinance.

¹⁶ Order 62, Rule 6A of the Rules of the High Court (Cap 4A) and sections 52A and 52B of the High Court Ordinance (Cap 4).

¹⁷ In Hong Kong, Order 23, Rule 1 of the Rules of the High Court (Cap 4A) provides that the court can order security for costs against the plaintiff only. The rule also provides: "*The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim.*"

¹⁸ Evidence Ordinance (Cap 8); *Halsbury's Laws of Hong Kong*, Vol 27, at [175.001].

¹⁹ *A Solicitor v the Law Society of Hong Kong* (2008) 11 HKCFAR 117. As to *stare decisis* the Court referred to Cross and Harris, *Precedent in English Law* (4th ed. 1991) at 72, where it was stated: "*The ratio decidendi of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, ...*". See Sir Anthony Mason, "The Use and Abuse of Precedent" (1988) 4 *Australian Bar Review* 93, at 95 and 98. In "The Use and Abuse of Precedent" at 103, Sir Anthony Mason referred to the *ratio* as: "*the principle or statement of law on which the previous decision is based to the extent to which it is essential to the decision, it being recognised that there may be more than one ratio when the court assigns more than one ground for its decision.*"

²⁰ In Hong Kong, the arbitration agreement must be in writing. Section 19 of the Arbitration Ordinance adopting Article 7 of the UNICTRAL Model Law on International Commercial Arbitration 1985 – option 1.

to a Tribunal. The tribunal will consist of a private individual or multiple individuals, usually one or three in number, who will issue a final and binding determination of the disputes referred to it.²¹ There is no right to appeal against the Tribunal's Award (save where transitional provisions for domestic arbitrations apply,²² or where the parties have agreed to opt in to greater court supervision).²³

40. An arbitration may be administered by an arbitral institution, such as HKIAC, the China International Economic and Trade Arbitration Commission ("CIETAC") or the ICC, all of which have offices in Hong Kong. This form of administered arbitration is known as "*institutional arbitration*."

41. The parties may agree to an arbitration that is not administered by any arbitral institution, in which case they will make the administrative and financial arrangements for the arbitration themselves – this is known as "*ad hoc arbitration*."

Sources of Hong Kong's arbitration law

42. The sources of Hong Kong's arbitration law are:

- (1) Hong Kong legislation (statutes) including the Arbitration Ordinance and the High Court Ordinance (Cap 4);
- (2) principles of common law; and
- (3) international law.

43. The Arbitration Ordinance, which came into force on 1 June 2011, is the main statute providing the legal framework for arbitration in Hong Kong. It is based on the Model Law as amended on 7 July 2005.²⁴

44. The Arbitration Ordinance governs all arbitrations conducted in Hong Kong under a unified system that consolidates provisions for domestic and international arbitrations.²⁵ It applies to all arbitrations under an arbitration agreement (wherever it was made) provided that Hong Kong is the place of arbitration. Only some of the Arbitration Ordinance's provisions are stated to apply to arbitrations where Hong Kong is not the place of arbitration.²⁶

²¹ Section 73(1) of the Arbitration Ordinance.

²² Section 99 and Schedule 2 of the Arbitration Ordinance.

²³ Section 100 and Schedule 2 of the Arbitration Ordinance.

²⁴ The full text of the Model Law is set out in Schedule 1 of the Arbitration Ordinance. UNCITRAL is the United Nations Commission on International Trade Law.

²⁵ The Arbitration Ordinance replaced the former arbitration framework, which consisted of separate regimes for domestic and international arbitration.

²⁶ Section 5(2), referring to sections 20, 21, 45, 60, 61 and Part 1, Part 3A as well as Part 10 of the Arbitration Ordinance.

The Tribunal's jurisdiction

45. By contrast to the Hong Kong courts (who derive their jurisdiction from legislation and their inherent powers), the jurisdiction of a Tribunal generally comes from the parties' written agreement to arbitrate. The Tribunal can only determine the disputes that the parties submit to it in writing and which are arbitrable.

46. This arbitration agreement is usually found as a term in the contract between the parties and is commonly called the "*dispute resolution clause*" or "*arbitration agreement*." It may also be contained in related documents, or communicated in an exchange of documents, including electronic communications.²⁷

Arbitrability

47. In addition, for the Tribunal to have power to finally determine a dispute by arbitration, the dispute must concern a matter that Hong Kong law allows to be arbitrated. Section 81 of the Arbitration Ordinance provides that an Award can be set aside by the Court on the ground that the subject-matter of the disputes is "*not capable of settlement by arbitration under the law of this state*."²⁸ Examples of categories of disputes that may not be referred to arbitration in Hong Kong are:²⁹

- (1) criminal charges;
- (2) disputes relating to intellectual property (except where enforcement rights are sought against a particular person);
- (3) competition and anti-trust;
- (4) marriage and divorce;
- (5) relations between parents and children;
- (6) personal status;
- (7) actions *in rem* against vessels; and
- (8) matters reserved for resolution by state agencies and tribunals, such as taxation, development control, immigration, nationality and social welfare entitlements.

Arbitral jurisdiction under investment protection and promotion agreements

48. The Tribunal's jurisdiction may also come from an investment treaty such as a bilateral investment treaty or multi-lateral investment treaties or an Investment Protection and Promotion Agreement (IPPA), which are

²⁷ Section 19 of the Arbitration Ordinance.

²⁸ Section 81 of the Arbitration Ordinance incorporates Article 34(2)(b)(i) of the Model Law.

²⁹ *Halsbury's Laws of Hong Kong*, Vol 2, 2nd Ed, at para 25.003.

international agreements between two or more governments for the promotion and protection of investments made by investors of one contracting party in the area of the other contracting party. As of the date of this Consultation Paper, Hong Kong has signed treaties or IPPAs with 17 economies.³⁰

Parties' powers in arbitration

49. Parties to an arbitration generally have a great deal of choice as to the way in which their arbitration will be conducted including:

- (1) the number of arbitrators;³¹
- (2) the procedure of appointing the arbitrator(s);³²
- (3) the procedural rules to be followed by the Tribunal in conducting the arbitration, subject to provisions of the Arbitration Ordinance;³³
- (4) the legal place (the "seat") of their arbitration;³⁴
- (5) the law applicable to the arbitration;
- (6) the geographical place where hearings may be heard (which may be different from the seat of their arbitration);³⁵ and
- (7) the language in which the arbitration should be conducted.

50. The Tribunal must apply the law agreed upon by the parties (or failing such agreement, the law which it determines applies) to determine the case.³⁶

51. Unless otherwise agreed by the parties, the Tribunal is not bound by strict rules of evidence.³⁷

52. In Hong Kong, unless otherwise agreed by the parties, arbitral proceedings (and court proceedings related to arbitration) are held in private.³⁸

³⁰ Trade and Industry Department, Government of HKSAR, "Investment Promotion and Protection Agreement (IPPA)", (2014), <http://www.tid.gov.hk/english/trade_relations/ippa/index.html>. Under Article 13 of the Basic Law, the Central People's Government is responsible for foreign affairs relating to the HKSAR, but it authorises the HKSAR to conduct the relevant external affairs in accordance with the Basic Law. Article 151 of the Basic Law provides that the HKSAR, using the name "*Hong Kong, China*" may maintain and develop relations and conclude and implement agreements on its own, with foreign states and regions and international organisations in such matters as economic affairs, trade, finance and monetary affairs, shipping, communications, tourism, culture and sports. Under Article 152(2) of the Basic Law, the HKSAR may, using the name "*Hong Kong, China*", participate in international organisations and conferences not limited to states.

³¹ Section 23 of the Arbitration Ordinance.

³² Section 24 of the Arbitration Ordinance.

³³ Section 47 of the Arbitration Ordinance.

³⁴ Section 20 of the Arbitration Ordinance.

³⁵ Section 48(2) of the Arbitration Ordinance.

³⁶ Section 64 of the Arbitration Ordinance.

³⁷ Section 47(3) of the Arbitration Ordinance.

³⁸ Section 16 of the Arbitration Ordinance.

The content of an arbitration (and in some cases even its existence) is confidential, except for a limited set of circumstances under which disclosure is allowed.³⁹

53. Unless otherwise agreed by the parties, a Tribunal's Award is final and binding on the parties to the agreement, and upon others claiming through them.⁴⁰ The Hong Kong courts have supervisory jurisdiction over an arbitration seated in Hong Kong.

54. In contrast to a judgment of a court, an Award is not binding on third parties. Correspondingly, there is not an authority or precedent that binds courts in later cases as it binds only the parties to the Award or their successors.⁴¹

55. Under the Arbitration Ordinance, a Tribunal only has power to award costs against the parties to the Arbitration.⁴² Similarly it only has the power to order Security for Costs against a party to proceedings under the Arbitration Ordinance.⁴³

56. Awards that are made in Hong Kong are eligible to be enforced in more than 150 states around the world that have ratified and implemented the terms of the New York Convention. This is an international treaty which binds Hong Kong.⁴⁴ Similarly, Awards made in any other New York Convention state may be enforced in Hong Kong pursuant to the New York Convention as implemented by the Arbitration Ordinance.

The role of courts in arbitration

57. Pursuant to the Arbitration Ordinance, the Hong Kong courts only have supervisory powers in aid of arbitration.⁴⁵ The Hong Kong courts' powers are generally limited to proceedings which determine substantive rights to promote the efficient conduct of arbitrations such as:

- (1) the jurisdiction of a Tribunal;⁴⁶
- (2) stays of litigation proceedings in favour of arbitration where the parties have agreed to arbitrate and their dispute is arbitrable;⁴⁷
- (3) the appointment of arbitrators;⁴⁸
- (4) the procedure to challenge an arbitrator;⁴⁹

³⁹ Sections 16-18 of the Arbitration Ordinance.

⁴⁰ Section 73 of the Arbitration Ordinance.

⁴¹ Section 73 of the Arbitration Ordinance.

⁴² Section 74 of the Arbitration Ordinance.

⁴³ Sections 40 and 56 of the Arbitration Ordinance.

⁴⁴ Upon resumption of the exercise of sovereignty over Hong Kong on 1 July 1997, the PRC Government extended the territorial application of the *New York Convention* to Hong Kong, subject to the statement originally made by China upon accession to the *New York Convention*.

⁴⁵ Section 3 of the Arbitration Ordinance.

⁴⁶ Section 34 of the Arbitration Ordinance.

⁴⁷ Section 20 of the Arbitration Ordinance.

⁴⁸ Section 24 of the Arbitration Ordinance.

- (5) decisions that terminate the mandate of an arbitrator;⁵⁰
- (6) granting of interim measures of relief such as injunctions in aid of arbitration;⁵¹
- (7) applications for setting aside an Award;⁵² and
- (8) applications for recognition and enforcement of a Tribunal's order, direction or Award,⁵³ as discussed further below.

Role of arbitrators

58. The Hong Kong courts have described arbitrators as exercising quasi-judicial functions that are similar to the functions of a judge,⁵⁴ in that arbitrators have the power and duty to finally determine disputes or differences in a judicial manner.⁵⁵ Arbitrators are required to remain independent, impartial and unbiased.

Enforcement of Tribunal's orders and Awards

59. A Tribunal's Award, order or direction is enforceable in the same way as a judgment, order or direction of the court, but only with the leave of the Court following an application for such enforcement.⁵⁶

Enforcement of Awards

60. The enforcement of an Award, where a party does not voluntarily comply with the orders set out in an Award, is through the Hong Kong courts. If a party to an arbitration agreement fails to comply with the Award, the successful party may bring an action to enforce the Award in the Court of First Instance of the High Court of Hong Kong.⁵⁷

61. There are four main types of Awards that may be enforced in Hong Kong:

- (1) Awards which are not New York Convention, Mainland or Macao Awards (division 1 of part 10 of the Arbitration Ordinance), whether made in Hong Kong or outside Hong Kong;
- (2) New York Convention Awards (division 2 of Part 10 of the Arbitration Ordinance) which are Awards made in states or territories that have ratified or acceded to the New York

⁴⁹ Section 26 of the Arbitration Ordinance.

⁵⁰ Section 27 of the Arbitration Ordinance.

⁵¹ Section 45 of the Arbitration Ordinance.

⁵² Section 81 of the Arbitration Ordinance.

⁵³ Sections 82-98 of the Arbitration Ordinance.

⁵⁴ *Lendon v Keen* [1916] 1 KB 994, at 999 (*per* Sankey J); *Arenson v Casson Beckman Rutley & Co* [1977] AC 405 (HL).

⁵⁵ Sharma C & Stirastava D K, *Halbury's Laws of Hong Kong*, Vol 2, 2nd Ed, Butterworth Asia, Hong Kong 2012, at para 25.001.

⁵⁶ Section 61 of the Arbitration Ordinance.

⁵⁷ Sections 2 and 84 of the Arbitration Ordinance.

Convention, other than China or territories of China;

- (3) Mainland China Awards (division 3 of Part 10 of the Arbitration Ordinance), which are awards made in the Mainland by a recognised Mainland arbitral authority in accordance with the PRC Arbitration Law;⁵⁸ and
- (4) Macao Awards (division 4 of Part 10 of the Arbitration Ordinance).

62. The New York Convention does not apply to the enforcement of Awards between Hong Kong, Macao and the Mainland as they are not separate contracting states. To address these issues, the governments of Hong Kong and the Mainland signed the "*Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region*" in 1999, an arrangement to recognise and enforce Awards in their respective jurisdictions. The "*Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards between the Hong Kong Special Administrative Region and the Macao Special Administrative Region*" was signed on 7 January 2013 between the governments of Hong Kong and Macao. These Arrangements are largely based upon the provisions of the New York Convention.⁵⁹

Parties' arbitration in Hong Kong

63. Section 63 of the Arbitration Ordinance expressly permits anyone to appear on behalf of a party in arbitral proceedings in Hong Kong to give advice, prepare documents for the purposes of arbitral proceedings, and to do any other thing in relation to arbitral proceedings (except where it is done in connection with court proceedings (i) arising out of an arbitration agreement, or (ii) arising in the course of, or resulting from, arbitral proceedings).⁶⁰ However, parties are usually represented by lawyers in arbitration proceedings in Hong Kong.

Costs of arbitration

64. The amount of the costs that parties must incur to conduct arbitration varies from case to case. There is no set guidance as to the amount each arbitration will cost each party.

⁵⁸ Section 2 of the Arbitration Ordinance defines the "*the Mainland*" as "*any part of China other than Hong Kong, Macao and Taiwan.*"

⁵⁹ *Halsbury's Laws of Hong Kong*, Vol 2, 2nd Ed, at paras 25.177, 25.179-25.180.

⁶⁰ Section 63 of the Arbitration Ordinance provides:
"*section 44 (Penalty for unlawfully practising as a barrister or notary public), section 45 (Unqualified person not to act as solicitor) and section 47 (Unqualified person not to prepare certain instruments, etc.) of the Legal Practitioners Ordinance (Cap 159) do not apply to –*
(a) *arbitral proceedings;*
(b) *the giving of advice and the preparation of documents for the purposes of arbitral proceedings; or*
(c) *any other thing done in relation to arbitral proceedings, except where it is done in connection with court proceedings –*
(i) *arising out of an arbitration agreement; or*
(ii) *arising in the course of, or resulting from, arbitral proceedings.*"

Stakeholders in arbitration

65. A number of entities may be described as having an interest or stake in an arbitration taking place in Hong Kong (depending upon the nature of the issues concerned and the impact of the outcome of the Award on a party), whether direct or indirect, including:

- (1) the parties to the arbitration;
- (2) the parties' representatives (including lawyers);
- (3) the parties' creditors;
- (4) the parties' shareholders;
- (5) the arbitrators;
- (6) an Arbitral Institution administering an arbitration, such as the HKIAC, CIETAC or ICC; and
- (7) the service providers to an arbitration such as transcription services and translators.

66. In Hong Kong, arbitration is primarily engaged in by commercial entities and governmental and quasi-governmental agencies. Private individuals are rarely a party to arbitral proceedings. However, by reason of the quasi-judicial nature of a Tribunal's role, the public has an interest in the fair, impartial and efficient conduct of arbitrations by arbitrators. In the discussion in this Consultation Paper we have borne in mind the public interest in the fair and efficient conduct of arbitration and access to justice, among other considerations.

Chapter 3: Outline of Third Party Funding and current Hong Kong law

67. A feature of Third Party Funding that distinguishes it from other forms of financing of the Proceedings is that a Funded Party will not have to pay any amount to the Third Party Funder if the Proceedings are unsuccessful (as determined by the definition of "*success*" or similar expression in the relevant Third Party Funding agreement). A Third Party Funder will usually be compensated from the Funded Party's net recoveries from the Proceedings (after deduction of agreed costs and expenses).

68. It appears from our review that, to-date, most Third Party Funding has been of litigation.

A. Third Party Funding

The main methods of Third Party Funding

69. Internationally, the main methods of funding for a party retaining

a direct legal interest in the Proceedings are:⁶¹

- (1) payment of Funds by a Third Party Funder to the Funded Party, or at its direction, to lawyers and others, typically to fund all the Funded Party's costs and expenses of the Proceedings.
- (2) the arrangement by a broker of a loan from a lender other than a Third Party Funder to fund the Funded Party's costs and expenses of the Proceedings (for example, from a bank or other type of financial institution);
- (3) funding by the Funded Party's lawyer of its costs and expenses of the Proceedings; and
- (4) ATE Insurance.

Typical structures of Third Party Funders of the Proceedings and Sources of Funds

70. Third Party Funders typically adopt a variety of publicly listed and private corporate organisational structures.

Sources of Funds of Third Party Funders

71. Potential providers of capital to Third Party Funds include high-net-worth individuals, corporate investors, university endowment funds and pension funds investing as part of the higher-risk end of their investment activities.

Types of cases attracting Third Party Funding

72. Third Party Funders have stated that they are most attracted to high value cases with a high chance of success as these provide the greatest chance of profit. Third Party Funding is mainly available to plaintiffs/claimants in the Proceedings, but may also be available to fund a defendant's/respondent's counter-claim. It is rarely available to defend a claim (given the difficulties in agreeing upon the formulation of the success fee).

73. Proceedings that may be considered to be suitable for Third Party Funding are predominantly commercial cases, including those involving shareholder disputes, contractual interpretation and general commercial disputes. Third Party Funding is also often sought in insolvency proceedings.

74. Third Party Funding is also utilized in arbitration cases involving states or state owned enterprises, although this appears to represent a small segment of the funding market.

⁶¹ Subrogation and assignment of claims are outside the scope of this Consultation Paper.

Criteria for funding

75. For Third Party Funders, as commercial entities, the decision to fund arbitration is an investment decision. The manner in which the above criteria are applied is part of the commercial model of each Third Party Funder and, accordingly, this information is often not widely publicised.

Likelihood of success

76. As to the likelihood of success of a case funded by Third Party Funders, an estimation in a 2012 report into the UK market states, "*funders would want to see chances of success of at least 60%*."⁶² An alternative estimation in the *Review of Civil Litigation Costs: Preliminary Report* (2009), known as the Jackson Review, suggests that litigation funders in the UK generally require a 70% prospect of success of the Proceedings before they will invest.⁶³

Quantum of the claim

77. With respect to the quantum of the claim, the UK Third Party Funders interviewed for a 2012 report indicated that, "*The threshold of viability for a claim value is currently not less than £100,000.*"⁶⁴ The report also considered funding in Australia, the USA, Canada, Ireland, Germany, Austria and the Netherlands and found nothing to indicate any lower minimum values in these jurisdictions, with the exception of Germany, "*where [litigation] costs are lower (and more predictable).*"⁶⁵

The Third Party Funding compensation structure

78. It appears that the typical basis of compensation for the Third Party Funder is to receive a percentage of net recoveries in successful Proceedings, as illustrated by a review of nine reported cases involving litigation funding in Australia, the US and the UK, which was conducted for this Consultation Paper. This identified entitlements for Third Party Funders of between 8% and 55% of the proceeds of a case.⁶⁶ In a 2014 comparative

⁶² Christopher Hodges, John Peysner and Angus Nurse, *Litigation Funding: Status and Issues* (Research Report, University of Oxford, 2012), at 69.

⁶³ Lord Justice Jackson, *Review of Civil Litigation Costs*, Preliminary Report (2009), Vol 1, at 161, at para 2.3.

⁶⁴ Equivalent to approximately HK\$1.25 million; Christopher Hodges, John Peysner and Angus Nurse, *Litigation Funding: Status and Issues* (Research Report, University of Oxford, 2012), at 53.

⁶⁵ Christopher Hodges, John Peysner and Angus Nurse, *Litigation Funding: Status and Issues* (Research Report, University of Oxford, 2012), at 104, 153.

⁶⁶ *Stoczina Gdanska SA v Latreefers Inc* [2001] CLC 1267 (CA) (55% entitlement); *Hall v Poolman* [2007] NSWSC 1330 (50% entitlement); *Groewood Holdings plc v James Capel & Co Ltd* [1995] Ch 80 (50% entitlement); *Farmer v Mosely (Holdings) Ltd* [2001] 2 BCLC 572 (40% and 50% entitlements); *ANC Ltd v Clark Goldring & Page Ltd* [2001] BCC 479(CA) (50% entitlement); *Clairs Keeley (a firm) v Treacy* (2003) 28 WAR 139 (35% on success at trial, 45% on successful settlement); *Arkin v Bochart Lines Ltd* [2005] 1 WLR 3055 (CA) (25% entitlement for first £5m damages and 23% thereafter); *QPSX Ltd v Ericsson Australia Pty Ltd* (2005) 219

table of the Third Party Funders in the *Litigation Funding* publication, the range most commonly stated by the Third Party Funders was 20% to 45%.⁶⁷ In international arbitration claims, a range of 15% to 50% of an Award has been suggested as typical, with a median figure of around 33%.⁶⁸

Typical terms of agreement

79. The terms of a Third Party Funding agreement will usually be the result of negotiations between the Funded Party and the Third Party Funder and will be drafted to reflect the specific circumstances of each set of Proceedings.

Order of payments

80. A Third Party Funding agreement will generally set out the order of payments among the Third Party Funder, the Funded Party and others, in the event of a successful recovery in the Proceedings, where the Third Party Funder is to be compensated by a payment of funds.

Liability for costs, including Adverse Costs Orders and Security for Costs

81. The terms of a Third Party Funding agreement will generally address whether the Third Party Funder bears responsibility for an Adverse Costs Order.

82. The position in arbitration is less clear as a Tribunal will not generally have the power to award costs against a third party under the applicable statute.⁶⁹ The jurisdiction of a Tribunal comes from the arbitration agreement between the parties. As a Third Party Funder is not party to the arbitration agreement, the Tribunal will not have jurisdiction over the Third Party Funder.

ATE insurance and Third Party Funding

83. In some jurisdictions such as England and Wales, ATE Insurance may be available to cover the eventuality of adverse costs.

ALR 1 (17% entitlement on resolution pretrial, 24% on resolution after trial begins); *Regina (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2003] QB 381 (CA) (8% entitlement).

⁶⁷ Council of the Law Society of England and Wales, *Litigation Funding*, Issue 93 (2014). See also Lord Justice Jackson, *Review of Civil Litigation Costs*, Final Report (2009), Vol 1, at 24-25.

⁶⁸ Susanna Khouri, Kate Hurford and Clive Bowman, "Third Party Funding in International Commercial and Treaty Arbitration – A Panacea or a Plague? A Discussion of the Risks and Benefits of Third Party Funding" 8(4) *Transnational Dispute Management* (2011), at 3; Eric De Brabandere and Julia Lepeltak, *Third Party Funding in International Investment Arbitration* (Working Paper No 1, Grotius Centre for International Legal Studies, 2012), at 5.

⁶⁹ William Kirtley and Koralie Wietrzykowski, "Should a Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third Party Funding?" (2013) 30(1) *Journal of International Arbitration* 17.

Termination and withdrawal of funding

84. Third Party Funding agreements will generally provide for the circumstances in which termination of an agreement and withdrawal of Third Party Funding will occur. Grounds for termination may include the Funded Party's material breach of a contractual term and a material change of prospects of the Funded Party's success in the Proceedings. Dispute resolution clauses may be included to resolve situations potentially leading to or giving grounds for termination.⁷⁰

Control over the conduct of proceedings

85. Third Party Funding agreements typically address the extent to which a Third Party Funder may exercise control over the conduct of Proceedings.⁷¹

Party conflict management and dispute resolution

86. Third Party Funding agreements generally specify what is to happen when there is a conflict of interest between the Third Party Funder and the Funded Party. Conflicts that can arise include whether to accept a settlement offer, disclosure of documents (such as the Third Party Funding agreement itself) and decisions to prolong the Proceedings.⁷²

Confidentiality and provision of documents

87. Generally, a Third Party Funding agreement will state that documents provided to the Third Party Funder that are not already in the public domain remain confidential and privileged.

B. The current Hong Kong law on maintenance and champerty and Third Party Funding in Hong Kong

Exceptions to the rule against maintenance and champerty

88. In *Unruh v Seeberger*, the Court of Final Appeal held that the doctrines of maintenance and champerty continued to have effect in Hong Kong, but identified three categories where liability for engaging in maintenance or champerty could be excluded:

⁷⁰ Susanna Khouri and Kate Hurford, *Third Party Funding for International Arbitration Claims: Practical Tips* (Practice Note, Practical Law Company Arbitration, 2012), at 24-25.

⁷¹ Susanna Khouri and Kate Hurford, *Third Party Funding for International Arbitration Claims: Practical Tips* (Practice Note, Practical Law Company Arbitration, 2012), at 25.

⁷² In a recent arbitration between S&T Machinery Ltd and Romania, disagreement between S&T and their funder Juridica over alleged misrepresentations and disclosure of information led to proceedings being discontinued after Juridica declined to pay procedural fees: *S&T Oil Equipment and Machinery Ltd v Romania, Order of Discontinuance of the Proceedings* (ICISD Case No ARB/07/13).

- (1) the "*common interest*" category, whereby persons with a legitimate interest in the outcome of the litigation are justified in supporting the litigation;
- (2) cases involving "*access to justice*" considerations; and
- (3) a miscellaneous category of practices accepted as lawful such as the sale and assignment by a trustee in bankruptcy of an action commenced in the bankruptcy to a purchaser for value.

Tortious claims

89. As stated in *Unruh v Seeberger*, under Hong Kong law, maintenance and champerty can be a tort (which is a civil wrong).⁷³ Thus where a party has proved that an agreement is champertous or constitutes maintenance, the agreement may be held to be void and unenforceable between the parties,⁷⁴ and the successful party can also claim damages for any losses caused (although these may be difficult to establish).⁷⁵

Criminal offences

90. Engaging in maintenance and champerty can constitute criminal offences in Hong Kong. The penalty for such offences is provided under section 101I of the Criminal Procedure Ordinance (Cap 221), a general catch-all provision for indictable offences. Section 101I provides as follows:

"Subject to subsections (2) and (5), where a person is convicted of an offence which is an indictable offence and for which no penalty is otherwise provided by any Ordinance, he shall be liable to imprisonment for 7 years and a fine."

91. In *Winnie Lo v HKSAR*,⁷⁶ it was asserted that the offence of conspiracy to commit maintenance was "*punishable under section 101I of the Criminal Procedure Ordinance, Cap 221.*"⁷⁷

⁷³ *Unruh v Seeberger* (2007) 10 HKCFAR 31, at 62 (*per* Ribeiro PJ).

⁷⁴ *Hutley v Hutley* (1873) LR 8 QB 112; *Cole v Booker* (1913) 29 TLR 295, at 296.

⁷⁵ *Neville v London Express Newspaper Ltd* [1919] 1 AC 368 (HL).

⁷⁶ *Winnie Lo v HKSAR* (2012) 15 HKCFAR 16.

⁷⁷ The background to *Winnie Lo v HKSAR* (2012) 15 HKCFAR 16 was that in 2009, the District Court had found that a solicitor had conspired with a recovery agent to unlawfully maintain a personal injury action. The recovery agent had entered into an agreement with the plaintiff family to bring a claim on a "*no win, no fee*" basis. The District Court convicted the appellant solicitor of one count of conspiracy to commit maintenance and sentenced her to 15 months' imprisonment. The recovery agent was also convicted of conspiracy to commit maintenance as well as a further charge of champerty and was sentenced to 16 months' imprisonment. The solicitor's conviction and sentence were affirmed by the Court of Appeal but leave was granted to appeal to the Court of Final Appeal.

Do maintenance and champerty apply to arbitration under Hong Kong law?

92. As discussed in *Unruh v Seeberger*⁷⁸, the Court of Final Appeal expressly left open the question whether maintenance and champerty applied to agreements concerning arbitrations taking place in Hong Kong, as it did not arise in the case.

93. Notwithstanding the comments of Ribeiro PJ in *Unruh v Seeberger*, there has been no express abolition of the offences of maintenance and champerty in Hong Kong.

Third Party Funding in Hong Kong and its regulation

94. Third Party Funding in Hong Kong is at a relatively early stage of development, with external funding largely confined to the insolvency context, as this is one of the clear exceptions to application of the doctrines of maintenance and champerty in Hong Kong.

95. The Hong Kong Companies Court, which supervises the winding-up of companies in Hong Kong and the liquidators of those companies, has sanctioned the use of funding by company liquidators in a number of reported cases.

96. To date, Third Party Funding arrangements that have been considered acceptable by the Hong Kong courts have generally involved the Third Party Funder providing Funds at arm's length to the Funded Party in exchange for a share of the net proceeds in the event that the plaintiff is successful in its pursuit of the litigation and in obtaining financial recovery. The Funded Party retains control of the Proceedings, which is a requirement established by English case law and followed in Hong Kong. The Third Party Funder assumes liability for the costs and disbursements of the plaintiff (including costs of solicitors, counsel and experts), Adverse Costs Orders and Security for Costs Orders, if so ordered by the court.

97. There are a number of Hong Kong-based Third Party Funders who are involved in funding cases before the Hong Kong courts. The funding of cases before the Hong Kong courts has also attracted the interest of a number of overseas-based Third Party Funders, principally from England and Australia. They have not formed any industry body or other organised structure in Hong Kong.

98. It seems likely that cases are also being externally funded outside of the insolvency context on the access to justice ground. However, as there is usually no judicial mechanism for a litigant to obtain an advance sanction of a Third Party Funding arrangement from the Hong Kong courts, reported cases are few and the reported cases which do exist usually arise as

⁷⁸ *Unruh v Seeberger* (2007) 10 HKCFAR 31.

a result of an adverse party seeking to challenge the propriety of the funding arrangement or the conduct of one of the parties or their legal advisers.

Relevant regulation of the Hong Kong legal profession

99. In Hong Kong, neither a barrister nor a solicitor may enter into a Conditional or Contingency Fee arrangement to act in contentious business. These restrictions stem from legislation, professional conduct rules, and the common law.

Chapter 4: The current law and regulation of Third Party Funding for arbitration in various common law and civil law jurisdictions and under the Washington Convention

100. This Chapter considers the issues in relation to Third Party Funding in jurisdictions other than Hong Kong and under the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "Washington Convention").⁷⁹

101. In discussing specific jurisdictions, particular attention is given to Australia and England, which provide case studies on the emergence and evolution of Third Party Funding in common law jurisdictions. The discussion canvasses the development of law relating to Third Party Funding of contentious proceedings, possible differences in considerations relevant to Third Party Funding for arbitration as contrasted with litigation, and the contrasting approach of government regulation and industry self-regulation of the Third Party Funding sector.

Australia

102. The current position in Australia is that Third Party Funding of litigation is not prohibited by the common law doctrines of maintenance and champerty. Court rules and procedures are considered sufficiently robust to protect against potential abuses of process arising from such funding arrangements.⁸⁰ Litigation Third Party Funders are not required to provide indemnity for Adverse Costs Orders.⁸¹ Third Party Funding of litigation schemes are exempted from regulations imposed on "*managed investment schemes*" and "*credit facilities*" and Third Party Funders are not required to hold an AFS Licence.⁸² However, Third Party Funders of both litigation and

⁷⁹ The Washington Convention opened for signature on 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966).

⁸⁰ *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, at paras 89-93 (*per* Gummow, Hayne and Crennan JJ).

⁸¹ *Jeffery and Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75, at para 43 (*per* Heydon J).

⁸² Regulations 5C.11.01, 7.1.04N, 7.1.06 and 7.6.01 of the Corporations Regulations 2001 (Cth).

arbitration must ensure that they have in place adequate processes to manage conflicts of interest.⁸³

England and Wales

103. The current position in England and Wales is that the litigation funding industry is self-regulated through the Association of Litigation Funders, known as the ALF. As in Australia, courts consider that Third Party Funding is not contrary to the doctrines of maintenance and champerty, and that the judicial system is strong enough to withstand the potential for abuse of process posed by funding arrangements.⁸⁴ Litigation funding has attracted significant attention from law reform bodies as a means of improving access to justice. So far the Parliament has refrained from introducing statutory regulation, over concern that regulations might inhibit growth of the nascent funding industry. However, the Parliament has indicated that statutory regulations will be revisited, if and when, Third Party Funding of litigation expands.⁸⁵

104. The ALF system of regulation is set out in the ALF Code. Some of the main features of the ALF Code are capital adequacy requirements, limitations on the withdrawal of funding during litigation, and limitations on the Third Party Funder's ability to influence litigation. The ALF has complaint procedures in place, under which sanctions can be imposed. However, the main force of industry self-regulation is intended to come from the market credibility to be gained by Third Party Funders who comply with the code.

France

105. Despite the development in Third Party Funded litigation in France, no legislation governs it, nor is there case law that directly deals with the subject. Third Party Funders of litigation also provide funding for arbitrations.⁸⁶ Professional funders for international arbitration proceedings are said to be increasingly active in France, with two French Third Party Funders recently established.⁸⁷

Germany

106. It appears in Germany that Third Party Funding is an unregulated market that has been active since the late 1990s (primarily in litigation).⁸⁸ On

⁸³ Regulation 7.6.01AB of the Corporations Regulations 2001 (Cth).

⁸⁴ See, for example, *Giles v Thompson* [1994] 1 AC 142, at 153 (*per Lord Mustil*).

⁸⁵ *Parliamentary Debates*, United Kingdom House of Lords, 1 February 2012, Column 1596 (Lord Davies of Stamford).

⁸⁶ See, for example, *Cases we fund*, Alter Litigation <<http://www.alterlitigation.com/#cases-we-fund>>.

⁸⁷ "France - International Arbitration 2014", *International comparative Legal Guides* (2014), <<http://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2014/france>>.

⁸⁸ "Third-party funding: snapshots from around the globe", *Global Arbitration Review* (2011) <http://www.imf.com.au/docs/default-source/site-documents/gar_vol7_iss1>, at 29.

the whole, there are no restrictions on Third Party Funders,⁸⁹ save that a Third Party Funder may not offer legal advice to their client, arising from the general restriction on Contingency Fees found in section 49b(2) of the Federal Lawyer's Act (*Bundesrechtsanwaltsordnung, BGBl. I, 565, 1959*).⁹⁰

The Netherlands

107. Most commentators state that claim funding is allowed under Dutch law and Contingency Fees are legal under Dutch law,⁹¹ although it appears to be a very low uptake of the concept, with few claimants opting for Third Party Funding.⁹² Third Party Funding has been described by some as a "*growing field*", although statistical data was not cited in support of this contention.⁹³

Switzerland

108. The Swiss Attorneys-at-Law Act and the Professional Rules of the Swiss Bar Association prohibit pure "*no win, no fee*", but a modified version of such agreements to "*no win, less fee*" (ie, charging a fixed legal fee on the outset with the promise of an additional fee should the claim succeed) is allowed.⁹⁴ The lawyers are also restricted in terms of the discount they give when arriving at the base fee – they are not allowed to charge a fee that does not even cover the lawyer's own costs.⁹⁵

109. Switzerland has been described as providing a favourable environment for Third Party Funding. Third Party Funding has been successfully utilized in a number of international arbitrations in Switzerland.

⁸⁹ Eckart Brödermann, Tina Denso and York Zieren, "Lexology Navigator Q&A: Arbitration – Germany" (2014)

⁹⁰ <<http://www.lexology.com/library/detail.aspx?g=162711b2-03b9-49b4-801a-a866fff89346>>
Translation and analysis of the German statute by Cornelia Emmert, "Contingency Fees in Germany" *German American Law Journal* <<http://www.amlaw.us/emmert1.shtml>>.

⁹¹ "Netherlands - International Arbitration 2014", *International Comparative Legal Guides* (2014), <<http://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2014/netherlands>>; Lisa Bench Nieuwald and Victoria Shannon, *Third Party Funding in International Arbitration* (Aspen Publishers, 2012), para 8.01 at 177; although a different view is espoused in Peter Taylor, Sara Bradstock and Graham Huntley, "At what cost? A Lovells multi jurisdictional guide to litigation costs" (2010), at 127, para 3.1, to the effect that Third Party Funding for claims is not permitted, but the existence of Third Party Funders operating in the Netherlands such as *Omni Bridgeway*,

<<http://omnibridgeway.com/litigation-arbitration-funding-and-management/>> suggests otherwise.

⁹² Lisa Bench Nieuwald and Victoria Shannon, *Third Party Funding in International Arbitration* (Aspen Publishers, 2012), para 8.01 at 177. Note however, that statistical data was not cited in support of this view.

⁹³ Lisa Bench Nieuwald and Victoria Shannon, *Third Party Funding in International Arbitration* (Aspen Publishers, 2012), para 8.01 at 177.

⁹⁴ "Switzerland - International Arbitration 2014", *International Comparative Legal Guides* (2014) <<http://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2014/switzerland>>.

⁹⁵ Peter Taylor, Sara Bradstock and Graham Huntley, "At what cost? A Lovells multi jurisdictional guide to litigation costs" (2010), at 165, para 3.1.

European Union

110. Given the sometimes multi-jurisdictional nature of these arrangements, the relevance of regulations pertaining to cross-border litigation activities is of relevance. At the level of the European Union, commentators have stated that "*it appears that the European Commission is developing an interest in the use of [Third Party Funding] for litigation proceedings*".⁹⁶

Korea

111. Third Party Funding in arbitration appears to be a new concept in Korea.

112. Whilst there are no prohibitions against Contingency Fees on the outset in Korean law and regulation,⁹⁷ a Contingency Fee of an excessive amount can be reduced by the court to a reasonable level, if the amount is found to violate public policy.⁹⁸ It has been reported that there is no express prohibition against the use of Third Party Funding in Korea⁹⁹; nor is there any prohibition generally against the sharing of proceeds of litigation, save for the one restriction contained in the Attorney At Law Act providing that a lawyer may not be assigned any rights being contested in the litigation.¹⁰⁰

PRC

113. There are no laws or regulations specifically banning Third Party Funding in Mainland China.¹⁰¹ However, Third Party Funding, whether in litigation or arbitration, appears to be unheard of or extremely rare.¹⁰²

⁹⁶ Maxi Scherer and Aren Goldsmith, "Third Party Funding in International Arbitration Proceedings – A View from Europe: Part II: The Legal Debate" (2012) 6 *International Business Law Journal* 649, at 649, 654.

⁹⁷ Lisa Bench Nieuwald and Victoria Shannon, *Third Party Funding in International Arbitration*, at 234, para 12.02 [H] citing Jae Won Kim, "The Ideal and the Reality of the Korean Legal Profession" (2001) 2 *Asian-Pacific Law & Policy Journal* 45, at para 63.

⁹⁸ Yong Suk Yoon, Moon Sung Lee and Sean Sungwoo Lim, "South Korea - Law & Practice", *Legal Practice Guide* (2014),

<<http://www.chambersandpartners.com/guide/practice-guides/location/241/6626/1415-200>>.

⁹⁹ Benjamin Hughes, Seungmin Lee and Suh-Young Claire Shin, Shin & Kim, "Litigation and enforcement in South Korea: Overview" *Practical Law* (2012) <<http://us.practicallaw.com/8-381-3681>>.

¹⁰⁰ Benjamin Hughes, Seungmin Lee and Suh-Young Claire Shin, Shin & Kim, "Litigation and enforcement in South Korea: Overview" *Practical Law* (2012) <<http://us.practicallaw.com/8-381-3681>>.

¹⁰¹ Peter Taylor, Sara Bradstock and Graham Huntley, "At what cost? A Lovells multi jurisdictional guide to litigation costs" (2010), at 53, para 3.1; Lisa Bench Nieuwald and Victoria Shannon, *Third Party Funding in International Arbitration* (Aspen Publishers, 2012), para 12.02 [B] at 227.

¹⁰² Nicholas Song and John G Zadkovich, "Arbitration in China – Lexology Navigator Q & A" (2014), <<http://www.lexology.com/library/detail.aspx?g=3b643fc4-dcfc-4558-bf04-6a47cbad4228>>; 'China - International Arbitration 2014', *International Comparative Legal Guides* (2014),

<<http://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2014/china>> which states that "[there] are no 'professional funders' active in the market, either for litigation or arbitration." See also Peter Taylor, Sara Bradstock and Graham Huntley, "At what cost? A Lovells multi jurisdictional guide to litigation costs" (2010), at 54, para 6.3.

Singapore

114. Singapore law is reported to generally prohibit Third Party Funding.¹⁰³ The doctrines of maintenance and champerty are applicable and can give rise to both tortious and criminal liability.

United States of America

115. The US market for Third Party Funding for litigation and arbitration has expanded rapidly in the last decade and encompasses a broad range of products, including Contingency Fee arrangements, fee advances, legal insurance and traditional loan arrangements.¹⁰⁴

116. Considering the issues that have arisen from Third Party Funding of litigation, the different states have taken widely differing stances on questions of maintenance and champerty, usury and ethical issues. Academics surveying these issues have found that traditional Third Party Funding agreements are considered valid in about two-thirds of the courts in the United States, noting at the same time that the prime considerations for those courts in upholding validity include: whether the proceedings were frivolous; and whether there was any improper motive in pursuing the suit; and whether the Third Party Funder was inappropriately involved, either by way of controlling the legal representation, or by forcing the Funded Party to accept or refuse settlement.¹⁰⁵

Treaty cases under the Washington Convention

117. The Washington Convention¹⁰⁶ provides for a dispute resolution framework for disputes between contracting states and investors of other states. Among other things, it establishes the ICSID.

Chapter 5: The benefits and risks of Third Party Funding for arbitration

Summary table of benefits and risks of Third Party Funding

118. The Sub-committee has identified the following to be the principal benefits and risks of Third Party Funding for Arbitration:

¹⁰³ Ministry of Law, Review of the International Arbitration Act: Proposals for Public Consultation, (2011) 5 para 29,

<<https://www.mlaw.gov.sg/content/dam/minlaw/corp/assets/documents/linkclickf651.pdf>>.

¹⁰⁴ "Third-party funding: snapshots from around the globe" *Global Arbitration Review* (2011)

<http://www.imf.com.au/docs/default-source/site-documents/gar_vol7_iss1> at 31.

¹⁰⁵ Lisa Bench Nieuwald and Victoria Shannon, *Third Party Funding in International Arbitration* (Aspen Publishers, 2012), para 6.10 at 145.

¹⁰⁶ The Washington Convention opened for signature on 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966).

Benefits of Third Party Funding for Arbitration	
1	<p><u>Preserving and promoting Hong Kong's competitiveness as an arbitration centre</u></p> <p>As discussed in Chapter 4, all but one of the major international arbitration centres allow Third Party Funding. Hong Kong's competitiveness as an arbitration centre will be maintained and promoted if it is clear that Hong Kong law permits Third Party Funding for arbitration.</p>
2	<p><u>Benefit to the court system and use of public resources</u></p> <p>By increasing the availability and use of arbitration services, Third Party Funding will assist in reducing the large number of commercial cases that the Hong Kong courts currently handle. This will not only save the taxpayer money by reducing the burden on the Hong Kong courts, but will also allow those resources to be deployed more effectively for disputes that are of greater concern to the public (eg, criminal offences, points of public interest).</p>
3	<p><u>Promotion of use of arbitration</u></p> <p>(A) Enables parties who may not have sufficient financial means to pursue their legal rights and valid claims through arbitration, which is a form of access to justice.</p> <p>(B) Allows a greater range of persons and commercial entities to use arbitration as a dispute resolution method.</p>
4	<p>Allows the Funded Party to mitigate the risks of conducting arbitration proceedings.</p>
5	<p>The due diligence conducted by Third Party Funders against their own investment criteria helps to give parties an objective view of the merits of their own claim.</p>
6	<p>Knowledge that a party has received Third Party Funding (and therefore can pay for the arbitration until an Award is handed down) can help to precipitate a resolution of a dispute by the other side offering to settle it, thereby saving considerable time and expense.</p>
7	<p>Promotion of effective case management, as the Third Party Funder will ensure the arbitration procedure is cost-efficient and focuses on key issues.</p>
8	<p>Can assist resource-poor respondents facing several claims.</p>
9	<p>As Third Party Funders will only fund cases which meet their investment criteria, and in particular having a reasonable to high chance of success, Third Party Funding helps to screen against</p>

Benefits of Third Party Funding for Arbitration	
	unmeritorious claims.

Potential risks of Third Party Funding for Arbitration	
1	Potential for Third Party Funding to promote unnecessary arbitration proceedings.
2	Potential for Third Party Funders to exercise too great a level of control over arbitration proceedings.
3	Costs of Third Party Funding (ie, proportion of awarded amounts which Third Party Funder is entitled to) could be excessive.
4	Potential for breaches of legal professional privilege.
5	Potential for breach of the confidentiality of the arbitration.
6	Scope for conflicts of interest.
7	Disclosure of Third Party Funding may unduly influence the Tribunal / may prevent the proper settlement of a case.
8	Risk of arbitrary termination of the Third Party Funding agreement by Third Party Funders.
9	Risk of insufficient Third Party Funder's capital adequacy.
10	An inadequate complaints procedure may give limited recourse to aggrieved funded parties.
11	Risk of money laundering.

119. Having considered the benefits and risks of Third Party Funding, we consider that the benefits clearly outweigh the risks, and that the risks be managed by appropriate safeguards as discussed in Chapter 6.

Chapter 6: Recommendations

120. The Sub-committee concluded that Hong Kong's competitiveness as an international arbitration centre will likely be reduced if the law is not clarified to make it clear that Third Party Funding for arbitration taking place in Hong Kong is permitted.

121. The Sub-committee is of the unanimous view that the current position relating to Third Party Funding for arbitration in Hong Kong needs reform to clearly permit Third Party Funding for arbitration, subject to compliance with appropriate ethical and financial standards.

122. We consider from our review of the law in Hong Kong (Chapters 2 and 3) and in other jurisdictions (Chapter 4), there are obvious benefits to the stakeholders in arbitration (Chapter 5). We also consider that the potential risks arising from Third Party Funding (Chapter 5) are manageable by implementing clear ethical and financial standards which will provide safeguards.

Recommendation 1

We recommend that the Arbitration Ordinance should be amended to provide that Third Party Funding for arbitration taking place in Hong Kong is permitted under Hong Kong law.

123. Having clear ethical and financial standards for Third Party Funders providing Third Party Funding to parties to arbitration is important. Such standards are in place to varying degrees in all of the jurisdictions that permit Third Party Funding that we have reviewed.

124. Our survey of jurisdictions in Chapter 4 shows that while Third Party Funding for arbitration is permitted in all but one of the jurisdictions reviewed, there is little uniformity in the form of regulation of Third Party Funding. The main trend is toward a light touch approach either by including statutory regulation of financial and conflicts issues (eg, Australia) or self-regulation (eg, England and Wales).

125. To varying degrees, different jurisdictions (eg, Australia and some states in the United States) have statutory regulation in place, while in England and Wales there is a system of industry self-regulation. All jurisdictions that we reviewed also impose ethical and professional rules on lawyers, of varying content. We consider that Hong Kong should develop its own model of regulation to suit its culture and needs, which will be informed by the experience and approach of other relevant jurisdictions.

Recommendation 2

We recommend that clear ethical and financial standards for Third Party Funders providing Third Party Funding to parties to arbitrations taking place in Hong Kong should be developed.

126. As to the approach to regulation of Third Party Funding to a party to an arbitration taking place in Hong Kong, we do not have any fixed views to whether this should be by:

- (a) statute, such as a schedule to the Arbitration Ordinance (Cap 609) or by regulation. This could involve challenges,

including that the implementation and any later amendment process could take too long; or,

- (b) a Code of Conduct, such as that of the ALF (albeit the Code was drafted by a Ministry of Justice Working Group consisting of representatives of various stakeholders).

127. We consider that potential challenges to adopting a self-regulatory approach in Hong Kong, by contrast to England and Wales, include that:

- (1) there is no critical mass of Third Party Funders in Hong Kong;
- (2) Third Party Funders are generally not incorporated in Hong Kong, nor do they generally have a place of business in Hong Kong;
- (3) Hong Kong is generally a jurisdiction that promulgates statutory codes or regulations to protect matters in the public interest.

A question may also arise as to how to ensure public confidence in a self-regulatory Code. One alternative could be for the self-regulatory approach to be implemented on a trial basis, for example for a 2 year period. However, the question would then arise as to how to monitor the effectiveness of self-regulation.

128. Among the questions arising, whatever approach to regulation is adopted, are whether Hong Kong would need Third Party Funders to have:

- (1) a Hong Kong registered office; and
- (2) assets in Hong Kong;

and how any ethical and financial standards for Third Party Funders should be enforced.

129. The areas that the regulation of Third Party Funders should address are obviously important. The following areas have been considered in other jurisdictions:

- (1) Capital adequacy requirements
- (2) Conflicts of interest
- (3) Confidentiality
- (4) Privilege
- (5) Extent of extra-territorial application
- (6) Control of the arbitration by Third Party Funders

- (7) Disclosure of Third Party Funding to the Tribunal and to the other party/parties to the arbitration
- (8) Termination of funding
- (9) Complaints and enforcement procedures
- (10) Body issuing regulatory standards

Recommendation 3

We invite submissions as to:

- (1) Whether the development and supervision of the applicable ethical and financial standards should be conducted by: (a) a statutory or governmental body, whether existing or to be established, and if so, what type of body; or (b) a self-regulatory body, whether for a trial period or permanently and how any ethical and financial standards should be enforced.**
- (2) How the applicable ethical or financial standards should address any of the following matters or any additional matters:**
 - (a) capital adequacy;**
 - (b) conflicts of interest;**
 - (c) confidentiality and privilege;**
 - (d) extent of extra-territorial application;**
 - (e) control of the arbitration by the Third Party Funder;**
 - (f) disclosure of Third Party Funding to the Tribunal and other party/parties to the arbitration;**
 - (g) grounds for termination of Third Party Funding; and**
 - (h) a complaint procedure and enforcement.**

130. We recommend that consideration be given as to whether or not a Tribunal should be granted the power to make adverse costs orders against a Third Party Funder in Hong Kong arbitrations.

131. We invite submissions as to whether the Arbitration Ordinance should be amended to allow adverse costs orders against Third Party Funders, and the legal and jurisdictional basis for an amendment (taking into account existing arbitral theory as to the limitation of a Tribunal's jurisdiction in relation

to third parties). This Sub-Committee sees little reason as to why Third Party Funders should be permitted to enjoy the proceeds of a successful claim, but not be liable for costs if they have funded an unmeritorious claim or breached ethical and financial standards. One approach to overcoming the limitations on a Tribunal's jurisdiction would be for the Third Party Funder to contractually submit to the Tribunal's jurisdiction on a case by case basis.

132. This Sub-Committee does not consider that there is a need to legislate to provide for the Tribunal's power to order Third Party Funders to provide Security for Costs, as the parties themselves should be able to seek funding from the Third Party Funder for this purpose. However, we also invite submissions on this issue.

Recommendation 4

We invite submissions as to:

- (a) Whether or not a Third Party Funder should be directly liable for adverse costs orders in a matter it has funded;**
- (b) If the answer to sub-paragraph (a) is "yes", how such liability could be imposed as a matter of Hong Kong law, and for the purposes of recognition and enforcement under the Convention for Recognition and Enforcement of Foreign Arbitral Awards 1958;**
- (c) Whether there is a need to amend the Arbitration Ordinance to provide for the Tribunal's power to order Third Party Funders to provide Security for Costs; and**
- (d) If the answer to sub-paragraph (c) is "yes", the basis for such power as a matter of Hong Kong law, and for the purposes of recognition and enforcement under the Convention for Recognition and Enforcement of Foreign Arbitral Awards 1958.**

Defined Terms

Abbreviation

Definition

Adverse Costs Order	A court order requiring a party to court proceedings to pay all or some of the costs of the other party or parties involved.
AFS Licence	Australian Financial Services Licence.
ALF	The Association of Litigation Funders of England and Wales.
ALF Code	Code of Conduct for Litigation Funders issued by the ALF.
ALFA	American Legal Finance Association.
Arbitrability	Whether the subject matter of the dispute is capable of being resolved by arbitration or must be resolved by the courts or some decision making body other than an arbitral tribunal.
Arbitration Ordinance	Arbitration Ordinance (Cap 609) of the HKSAR.
ATE Insurance	After-the-Event Insurance.
Award	A decision of an arbitral tribunal that finally determines a substantive issue.
Basic Law	The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, promulgated on 4 April 1990 by the Seventh National People's Congress pursuant to the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China.
BO	Banking Ordinance (Cap 155).
Conditional Fee	An arrangement where, in the event of success, the lawyer charges his usual fee plus an agreed flat amount or percentage " <i>uplift</i> " on the usual fee. The additional fee is often referred to as an " <i>Uplift Fee</i> " or a " <i>Success Fee</i> ". ¹⁰⁷
Consultation Paper	The Consultation Paper on Third Party Funding for Arbitration issued by the Third Party Funding for Arbitration Sub-Committee of the Law Reform Commission of Hong Kong.
Contingency Fee	An arrangement between lawyer and client whereby the lawyer receives additional fees or a percentage uplift of a lawyer's usual fees upon the success of litigation.
CPR	Civil Procedure Rules 1998 of the UK commenced on 26 April 1999.
Funded Party	A party to legal proceedings that is being funded by Third Party Funder.
Funds	Monies paid by a Third Party Funder to a Funded Party.
HKIAC	Hong Kong International Arbitration Centre.
HKSAR	Hong Kong Special Administrative Region of the People's Republic of China.

¹⁰⁷ The Law Reform Commission of Hong Kong, *Consultation Paper on Conditional Fees* (2005), at para 7.

ICC	International Chamber of Commerce.
ICSID	International Centre for Settlement of Investment Disputes.
Jackson Report	<i>Review of Civil Litigation Costs: Final Report</i> by the Right Honourable Lord Justice Jackson dated December 2009.
Jackson Review	<i>Review of Civil Litigation Costs: Preliminary Report</i> by the Right Honourable Lord Justice Jackson dated May 2009.
MLO	Money Lenders Ordinance (Cap 163).
Model Law	UNCITRAL Model Law on International Commercial Arbitration of 21 June 1985 as amended on 7 July 2006.
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.
PRC	The People's Republic of China.
Proceedings	Arbitration or litigation proceedings.
Security for Costs	An order made by an arbitral tribunal or a court requiring a claimant or counterclaimant to deposit money into an escrow account (which can be a court or an arbitral institution's account) to secure a costs order in the event the claims/counterclaims are unsuccessful.
SFC	Securities and Futures Commission of the Hong Kong Special Administrative Region.
SFO	Securities and Futures Ordinance (Cap 571).
Speculative Fee	An arrangement where a lawyer is entitled to charge his/her normal fee only in the event of successful litigation. A lawyer will not be entitled to a fee if the action does not succeed. ¹⁰⁸
Sub-committee	Third Party Funding for Arbitration Sub-committee of the Law Reform Commission of Hong Kong formed in June 2013.
Third Party Funder	A provider of Third Party Funding to a party to an arbitration or litigation that does not otherwise have an interest in those Proceedings.
Third Party Funding	The funding of claims in arbitration or litigation by commercial bodies in return for a share of the proceeds recovered in such Proceedings, or some other financial benefit.
Tribunal	The arbitral tribunal, consisting of one or three arbitrator(s), established by the agreement of the parties to finally resolve disputes or differences by arbitration.
Washington Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965.

¹⁰⁸ The Law Reform Commission of Hong Kong, *Consultation Paper on Conditional Fees* (2005), at para 8.