

LRC releases consultation paper on third party funding for arbitration

The following is issued on behalf of the Law Reform Commission:

The Third Party Funding for Arbitration Sub-committee of the Law Reform Commission (LRC) released a consultation paper today (October 19) proposing that third party funding for arbitration taking place in Hong Kong should be permitted under Hong Kong law.

The Sub-committee members are unanimously of the view that the current law in Hong Kong needs to be reformed to expressly permit third party funding for arbitration, subject to compliance by third party funders with appropriate ethical and financial standards.

The Sub-committee considers that the reform can bring clear benefits to those interested in arbitration in Hong Kong and enhance Hong Kong's competitive position as an international arbitration centre, after conducting a review of the relevant law and practice in Hong Kong and in a number of other jurisdictions where arbitration is commonly used to resolve disputes.

The legal doctrines of maintenance and champerty have been held by the Hong Kong Courts to continue to apply in the Hong Kong Special Administrative Region ("HKSAR") and to prohibit third party funding of litigation both as a tort and as a criminal offence, save in three exceptional areas: (1) where a third party has a legitimate interest in the outcome of the litigation; (2) where a party should be permitted to obtain third party funding, so as to enable him/her to have access to justice; and (3) in a miscellaneous category of proceedings including insolvency proceedings where third party funding is regularly allowed by the Hong Kong Courts.

However, under the current law of the HKSAR, it is unclear whether the operation of the doctrines of maintenance and champerty in Hong Kong also applies to third party funding for arbitrations taking place in the HKSAR. Indeed, this question was expressly left open by the Court of Final Appeal in 2007 in the case of *Unruh v Seeberger* (2007) 10 HKCFAR 31.

The Chairman of the Third Party Funding for Arbitration Sub-committee, Ms Kim Rooney, noted that the HKSAR is a major international financial and arbitration centre and that parties considering whether to resolve their disputes in the HKSAR by international arbitration are starting to take into account, among others, the potential financing options available to them in conducting such arbitrations. Accordingly, clarity and certainty of the relevant law concerning third party funding for arbitration will be desirable.

One of the Sub-committee's key proposals is that the Arbitration Ordinance (Cap 609) should be amended to expressly provide that third party funding for arbitration taking place in the HKSAR is permitted under Hong Kong law. The Sub-committee also considers that the potential risks arising from third party funding can be minimised by implementing clear ethical and financial standards, and the consultation paper recommends the development of these standards.

The Sub-committee left open the question as to whether the ethical and financial measures to regulate third party funding for arbitrations taking place in Hong Kong should be effected by statute or by self-regulation such as by third party funders agreeing to comply with a code of conduct. It considers that the HKSAR 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.

The Sub-committee therefore invites submissions among other issues 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 relevant ethical and financial matters such as capital adequacy, conflicts of interest, confidentiality and privilege, control of the arbitration by the third party funder, grounds for termination of the third party funding, and complaints and enforcement procedures under the third party funding agreement; and

(3) Whether there should be mandatory disclosure of third party funding to the Tribunal and to the other party/parties to the arbitration.

The Sub-committee also recommends that consideration be given as to whether or not a tribunal should be granted the power to make an adverse costs order against a third party funder in arbitrations taking place in Hong Kong. It invites submissions on specific aspects of adverse costs orders, such as, whether or not a third party funder should be directly liable for adverse costs orders in a matter it has funded, 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 the legal and jurisdictional basis for any such amendments (taking into account existing arbitral theory as to the limitation of a tribunal's jurisdiction in relation to third parties).

Ms Rooney said that the Sub-committee would welcome views, comments and suggestions on any of the issues discussed in the consultation paper on or before January 18, 2016.

All the views should be addressed to: The Secretary, Third Party Funding for Arbitration Sub-committee, LRC (4/F Justice Place, East Wing, 18 Lower Albert Road, Central, Hong Kong) by mail, by fax (3918 4096) or by e-mail (hklrc@hkreform.gov.hk).

The consultation paper can be accessed on the website of the LRC at www.hkreform.gov.hk. Copies of the consultation paper are also available on request from the Secretariat of the LRC at the above address.

Ends/ Monday, October 19, 2015