

Report on Third Party Funding for Arbitration

Comments of the Hong Kong Bar Association

1. The Hong Kong Bar Association (“the HKBA”) is invited to comment on the Report of Third Party Funding for Arbitration published by the Law Reform Commission of Hong Kong in October 2016 (“the Report”), which discusses the responses received to the Consultation Paper on Third Party Funding for Arbitration in Hong Kong published in October 2015 (“the Consultant Paper”).
2. The HKBA is in general in support of the recommendations in the Report and these comments are made further those comments of the on 15 January 2016 to the Consultation Paper.
3. The HKBA sees that many of its comments to the Consultation Paper have been considered / reflected in the Report. The HKBA also looks forward to the early implementation of the recommendations as commented.
4. In particular, as regards the Report, in relation to the constitution of the “Authorized Body” as recommended in Final Recommendation 3 para. 2.10 (3) and the “Advisory Body” as recommended in Final Recommendation 3 para. 2.10 (7), (8) & (10), the HKBA wish to highlight the matters below.
5. In paragraph 2.10(3), page 19 of the Report, it is recommended that:-
“Third Party Funders funding Arbitration should be required to comply with a Third Party Funding for Arbitration Code of Practice (defined earlier as the “Code”) issued by a body authorized under the Arbitration Ordinance (defined earlier as the “Authorized Body”).”

6. In paragraph 2.10(7), (8) & (10), pages 20 and 21 of the Report, it is recommended that:

“(7) the Advisory Committee on the Promotion of Arbitration (established by the Department of Justice in 2014, and chaired by the Secretary of Justice), should be nominated by the Secretary of Justice to be the advisory body to monitor the conduct of third party funding for arbitration following the coming into effect of the proposed AO Amendment in regard to Arbitration (as defined in the Proposed AO Amendment) and the implementation of the Code, and to liaise with stakeholders. We suggest that the Advisory Body (or a sub-committee that it establishes to monitor Third Party Funding for Arbitration) should arrange to meet at least twice a year with representatives of primary stakeholders or interested parties in third party funding to discuss the implementation and operation of Code and any matters arising.”

“(8) After the conclusion of the first three years of operation of the Code, the Advisory Body should issue a report as to the updating of ethical and financial standards set out in it. At this time the Advisory Body should also make recommendations on whether a statutory or other form of body is needed, how it could be set up and as to the criteria for selecting members of such a body. In the meantime, the Advisory Body could at the end of each year review whether or not to speed up the process for regulation by an independent statutory or other form of body. The report should also deal with the effectiveness of the Code and make recommendations as to the way forward.”

“(10) The following measures should be implemented to facilitate the monitoring of Third Party Funding of Arbitration by the Advisory Body:

- (a) *A Third Party Funder must submit an annual return to the Advisory Body of any (a) complaints received, and (b) finding that the Third Party Funder has failed to comply with the Code or any of the provisions of the Proposed AO Amendment.*
- (b) *A Third Party Funder must provide to the Advisory Body any other information the Advisory Body reasonably requires*
- (c) *A Third Party Funder must provide to the Funded Party the name and contact details of the Advisory Body.”*

7. In relation to the “Authorized Body”, the HKBA observes that there are not much details in the recommendations as to the constitution of the “Authorized Body” in the Report and in the proposed Arbitration Ordinance amendments. Since the “Authorized Body” is responsible to prepare the Third Party Funding for Arbitration Code of Practice, the HKBA suggests that the membership of the Authorized Body, or the standing consultation committee to the Authorized Body, should include practitioners from the third party funded arbitration field or those with such experience such that those members could be invited to share their views in international practice, in particular on the implementation of the Code of Practice of other jurisdictions.
8. In relation to the “Advisory Body”, it is recommended that the Advisory Committee on the Promotion of Arbitration should be nominated to be the Advisory Body. The HKBA observes that the members of the Advisory Committee seemingly consist of no representatives from practitioners from the third party funded arbitration field or those with such experience. Since the Advisory Body is responsible to review the development of the new “industry” and subsequently the improvements of the regulation and supervision, the HKBA believes that the membership of the Advisory Body, or at least a sub-committee of the Advisory Body, should include from the third party funded arbitration

field or those with such experience, and those members should be invited to share their views in international practice, in particular on the regulation, supervision and promotion of the new “industry” in other jurisdictions.

9. The HKBA believes that these measures in those memberships could make the policies practical and competitive to those in the international markets.

Dated this the 11th day of November 2016

HONG KONG BAR ASSOCIATION