Arbitration and Mediation Legislation (Third Party Funding)(Amendment) Bill 2016

Comments of the Hong Kong Bar Association

1. Pursuant to a letter dated 24 March 2017 from The Hon Dennis Kwok, Chairman to the Bills Committee of the Hong Kong Legislative Council ("Invitation for Submissions"), the Hong Kong Bar Association ("the HKBA") is invited to comment on the deletion of Section 98G(2) of the proposed Committee stage amendment of the Arbitration and Mediation Legislation (Third Party Funding)(Amendment) Bill 2016. Section 98G(2), if deleted, would have the effect that third party funding of arbitration will include the provision of arbitration funding directly or indirectly by a person practicing law or providing legal services, whether in Hong Kong or elsewhere.

2. The HKBA appreciates that the policy rationale behind the proposed removal of Section 98G(2) is so that Hong Kong can be better placed to compete with other international commercial arbitration centres, like London where legal practitioners (save in class actions) are now allowed to practice on contingency basis. The same is allowable in the US and Mainland China.

3. The HKBA, at this stage, has two essential comments. First, as a general principle, as far as lawyers who like to invest into arbitration funds or participate in funding arbitrations to which he and/or his firm is not a party to the relevant case or unless conflicts of interest arise, the HKBA does not have any objection to the same. Lawyers should not be the only category of individuals and/or firms that are prohibited from such commercial activities.

4. However, critically, in relation to the removal of the entire Section 98(G)(2), the HKBA, whilst understands that there are commercial and competitive policy

considerations involved, as a professional body, would also like to point out that there are other equally, if not more important considerations involved, like the cardinal cab-rank rule, issues involving conflicts of interest etc. Hence, the HKBA considers that the issue of contingency fee arrangement has to be considered with wider and deeper considerations. Such consideration should not hold up the passing of the Bill in question.

General Views

5. The HKBA notes that the HKSAR Government, with the objective of maintaining and consolidating its premier position as an international dispute resolution centre, proposed the reform of the current arbitration legislation regime by expressly allowing third party funding. Such an amendment[1] would override the current prohibitions placed on such practices by the common law doctrines of maintenance[2] and champerty.[3]

6. The HKBA takes note that the proposed deletion of Section 98G(2) of the Bill would be contrary to the recommendation made by HKLRC Subcommittee on Third Party Funding in its Final Report dated 12 October 2016.[4] The HKBA also notices that there is no discernible trend internationally by allowing contingency fee arrangements by lawyers, various jurisdictions have taken positions based on a case by case basis.

[1] Sections 98L and M of the Bill. In *Unruh v Seeberger* (2007) 10 HKCFAR 31, the Hong Kong Court of Final Appeal confirmed that the principles of maintenance and champerty continue to apply in Hong Kong and to prohibit third party funding of litigation, both as a tort and as a criminal offence, save in three exceptional areas:
(i) where a third party has a legitimate interest in the outcome of the litigation;
(ii) where a party should be permitted to obtain third party funding, so as to enable him/her to have access to justice; and
(iii) in miscellaneous recognised category of proceedings including insolvency proceedings.
The Court of Final Appeal expressly left open the question of whether these doctrines apply to arbitration.

[2] In *Winnie Lo v HKSAR* (2012) 15 HKCFAR 16, 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*."

[3] In *Winnie Lo v HKSAR* (2012) 15 HKCFAR 16, 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*."

[4] 2.8 [5] of the Final Report

Specific Views

7. The HKBA believes it is appropriate to analyze the reasons for the deletion of Section 98G(2) of the Bill by considering the aspects, namely, the public interest in:

(a) increasing the access to justice and legal services;

(b) the integrity of the legal process; guaranteeing fairness and sufficient standard of lawyers' competence and conduct;

(c) judicial economy, ensuring the efficiency of the judicial system, including ADR.

8. One of the main advantages of contingency fee arrangements by lawyers in arbitration is that it allows litigants with insufficient means to finance the full costs of the arbitration in bringing their meritorious claims. In dealing with this access to justice point, one of the major problems attributed to this is the increase in unrepresented litigants and their inability to engage lawyers.

9. The HKBA does not dispute that this arrangement may have the effect of broadening the access to justice. However, other factors must also be considered. In so far it is suggested that an increase in unrepresented litigants demonstrates the breakdown in the current legal system thus justifying the introduction of contingency fees by lawyers, the HKBA has reservations about this.

10. Statistically speaking, there may be an increase in unrepresented litigants, yet there is no documented report in Hong Kong indicating how many of these litigants are using arbitration to resolve their disputes and what percentage has a lack of access to arbitration due to low financial means.

11. HKBA has no doubt that some litigants cannot afford private lawyers but the pertinent question is how serious of an issue is this in Hong Kong in the field of arbitration. In addition, there may be other reasons parties choose to avoid

arbitrating – parties may choose to represent themselves, better access to the court system and tactical considerations.

12. Importantly, from the HKBA's perspective, if the litigant trusts the professionalism of legal practitioners, the presence or absence of a financial interest in the outcome of the proceedings should not dictate the performance of the lawyer.

13. The HKBA takes the view that the following key considerations should be taken into account:

(a) public policy considerations;
(b) conflict of interest and duty;
(c) excessive fees; and
(d) adverse impact on settlement.

14. It has generally been the view held in the common law world that contingency fee arrangements are against public policy. In Wallersteiner v Moir (No. 2),[5] Lord Denning M.R. states as follows:

> "It was suggested to us that the only reason why "contingency fees" were not allowed in England was because they offended against the criminal law as to champerty; and that, now that criminal liability is abolished, the courts were free to hold that contingency fees were lawful. I cannot accept this contention. ***The reason why contingency fees are in general unlawful is that they are contrary to public policy*** as we understand it in England. That appears from the judgment of Lord Esher M.R. in *Pittman v Prudential Deposit Bank Ltd.*, 13 T.L.R. 110, 111:
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> ***"In order to preserve the honour and honesty of the profession it was a rule of law which the court had laid down and would always insist upon that a solicitor could not make arrangement of any kind with his client during the litigation he was conducting so as to give him any advantage in respect of the result of that litigation.***" (emphasis added)

[5] [1975] 1 QB 373, 393C-349C

15. On the issue of contingency fees and its connection to public policy, in the same case Buckley L.J. continued that:[6]

> "It may, however, be worthwhile to indicate briefly the nature of the public policy question. It can, I think, be summarized in two statements. First, in litigation a professional lawyer's role is to advise his client with a clear eye and unbiased judgment. Secondly, a solicitor retained to conduct litigation is not merely the agent and adviser to his client, but also an officer of the court with a duty to the court to ensure that his client's case, which he must, of course, present and conduct with the utmost care of his client's interests, is also presented and conducted with scrupulous fairness and integrity. A barrister owes similar obligations. A legal adviser who acquires a personal financial interest in the outcome of the litigation may obviously find himself in a situation in which that interest conflicts with those obligations…"

16. The HKBA notes that the above observations ring true in relation to arbitration claims in Hong Kong. Taking into consideration the policy arguments, the presence of ample third party funding companies in Hong Kong is enough to negate the necessity of contingency fee arrangements by lawyers.

17. In the United Kingdom, concerns over conflicts of interest arising in contingency fee arrangements continues to be a constant concern. A study in England noted that:

> "*(ii) Conflicts of interest and duty*
>
> 35.52 This is not a peril which can be ignored:
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> ..... however strong the regulation of the legal professions may be, the new statutory framework will provide new and greater temptations and inducements to lawyers to allow their own financial interests to prevail over the interests of their clients and to the court.
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> 35.53 The lawyer is expected to place his client's interests ahead of his own, and to be objective in assessment of his client's position, at the same time he must respect the overriding interests of justice itself. But the question arises whether a litigation lawyer's wish to secure a conditional fee might seduce

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him into placing his interests ahead of his client's and the wider interests of justice."[7]

18. Problems that can arise due to a conflict of interest can take many forms. From the HKBA's view, putting aside the potential temptation to overstep in order to achieve victory, having a financial stake in the outcome of the claim may exacerbate other issues of not considering the client's interest, taking into account other factors which are irrelevant to the case but relevant to the financial outcome of the arbitral award, settling cases more quickly in cases involving smaller quantum claims.

19. If third party funding in arbitration is allowed by lawyers, the legal profession has to assume commercial risk and will become a new source of financing for arbitration. The crucial question from the HKBA's view is: why should the legal profession shoulder this responsibility?

20. The Bills Committee or any of the stakeholders seeking to benefit from the deletion of Section 98G(2) should give more mature consideration to this fundamental issue without withholding the passing of the Bill. The HKBA considers that such change have great impact to the legal profession as a whole and should require serious debate and deliberation

21. Excessive fees and settling cases quickly to turn over a profit in arbitrations are lingering concerns for the HKBA.

22. There is no suggestion or evidence to indicate that any lawyer or lawyers in Hong Kong would increase their fees by unethical or illegal means. However, the risk is a live one and cannot be lightly ignored by the HKBA.

[7] Neil Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System*, (OUP), para. 35.52 to 35.54 (pp. 812-813)

20. As a matter of principle, the HKBA does not dispute that having an additional source of finance for bringing an arbitration claim is a good thing. However, one has to consider whether the introduction of a contingency fee arrangement by lawyers in arbitration in Hong Kong will off-set the risks involved in implementing such a regime.

21. The HKBA supports the early enactment of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016.

Dated this the 10th day of April 2017

HONG KONG BAR ASSOCIATION