



CONSULTATION ON THIRD PARTY FUNDING FOR ARBITRATION

SUBMISSIONS

I. Introduction

1. In October 2015, the Third Party Funding for Arbitration Sub-committee of the Law Reform Commission of Hong Kong (“the Sub-committee”) issued a consultation paper (“Consultation paper”) on third party funding for arbitration in Hong Kong and seeks comments on its recommendations relating to the reform for and supervision on third party funding for arbitration in Hong Kong.
2. The Law Society of Hong Kong provides comments on those consultation questions in the following.

II. Comments

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.

Law Society’s Response:

3. The Law Society supports this recommendation.
4. The amendment to the Arbitration Ordinance (Cap 609) (“the Ordinance”) should be simple, e.g. a short amendment to s.3 of the Ordinance to provide for third party funding for arbitration and any court applications under the Ordinance.
5. Hong Kong controlling case law is clear, that third party funding for arbitration is legitimate. Thus this is a codification of that case law not an “amendment”.

6. In any event, the amendment, or the codification, should not affect the existing rights of the parties to legitimate funding arrangements for arbitration in Hong Kong.

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.

Law Society's Response:

7. The Law Society supports this recommendation. It is a necessary component of third party funding.
8. The standards could be modeled on similar guidelines and requirements on arbitration funding in comparable overseas jurisdictions.

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.

Law Society's Response:

9. The Law Society considers that third party funding arrangements should be supervised by a statutory or governmental body.
10. We do not consider a self-regulatory body is appropriate because, among other things:
 - (a) there tends to be a lack of certainty with a self-regulatory body;
 - (b) a self-regulatory body might have less regulatory or disciplinary powers when compared to a statutory body;
 - (c) there is a trend moving away from self-regulatory bodies, as noted in the insurance sector (with the establishment of the Independent Insurance Authority) that seeks supervision independent from the industry per se; and

- (d) the costs of establishing the self-regulatory body, managing membership, and maintaining the relevant standards would be borne by the industry itself. Financing for this self-regulatory body could be a cause of concern.

(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.**

Law Society's Response:

The Law Society considers that:

(a) Capital adequacy

11. All Third Party Funders should provide fortified¹ security for the respondent's costs for references seated in Hong Kong. That being the case, capital adequacy will not be relevant.

(b) Conflicts of interest

12. Appropriate rules and guidelines on conflicts of interest should be adopted (or localized from foreign jurisdictions) in order to dispose of issues arising from conflicts of interest, potential or otherwise, to the Third Party Funders and other relevant parties to arbitration. The Orange List of the IBA Guideline on Conflicts of Interests in International Arbitration, for instance, could be a source of reference.

(c) Confidentiality and privilege

- (i) Confidentiality*

¹ i.e. by payment into Court / arbitral institution or provision of an evergreen letter of credit from a first class bank in Hong Kong.

13. Appropriate rules and guidelines should be developed in order to permit information to be disclosed to the Third Party Funders and to protect the confidentiality of the respective arbitral proceedings.

(ii) *Privilege*

14. The doctrine of common interest privilege should be expressly extended to cover the communications between the Third Party Funders and the funded parties in order to safeguard the legitimate rights of the funded parties.

(d) Extent of extra-territorial application

15. Since the proposed amendments to the Ordinance only apply to arbitrations where the seat of arbitration is Hong Kong, consideration on extra-territorial application is not relevant.

(e) Control of the arbitration by the Third Party Funder

16. The statutory body, as averred to in paragraph 9 above, should formulate and develop appropriate rules on control of the arbitration by third party funders.

(f) Disclosure of Third Party Funding to the Tribunal and other party/parties to the arbitration

17. Yes, the Law Society considers that the arbitral tribunal and the relevant parties to the arbitration should be informed of the involvement of third party funding as soon as practicable. Transparency is important.

(g) Grounds for termination of Third Party Funding

18. The statutory body, as averred to in paragraph 9 above, should formulate and develop appropriate rules on grounds for termination of third party funding.

(h) A complaint procedure and enforcement

19. The statutory body, as averred to in paragraph 9 above, should formulate and develop appropriate complaint procedures 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.

Law Society's Response:

20. The Law Society considers that:

(a) Yes.

(b) Appropriate amendments to the Ordinance should be made to allow a court or an arbitral tribunal to make such adverse costs order. Alternatively, the government may consider encouraging major stakeholders (e.g. the HKIAC) to amend their own arbitration rules to allow for the making of the above order against the Third Party Funder.

(c) Yes. See above.

(d) Appropriate provisions should be incorporated to the Ordinance to provide the arbitral tribunal's power to order the Third Party Funder to provide security for costs.

III. Conclusion

21. The Law Society supports third funding for arbitration in principle. To assist further consideration of this matter, we have highlighted a few issues in the above.

22. Third party funding for arbitration is already legitimate in Hong Kong. The fact that these principles have not formally been put into statutes or have not been codified has to a certain extent led to misconceptions that arbitration funding is not allowed in Hong Kong, thereby making Hong Kong less attractive and competitive for the position of legal hub in the Asian region. These

misconceptions should be dispelled. The Law Society calls for an expeditious review of this matter, with the view to implementing any necessary law reform in good time.

23. Finally, the Law Society wishes to point out that arbitration funding is related to but is different from litigation funding, the latter of which is equally important, and that merits a careful study and a thorough review. The Law Society notes the remit of the Sub-committee, and looks forward to be engaged in the discussion of the other submission on litigation funding that has already been sent to the Department of Justice.

The Law Society of Hong Kong
5 January 2016