THE THIRD PARTY LITIGATION FUNDING LAW REVIEW

Fourth Edition

Editor
Simon Latham

THE LAWREVIEWS

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PREFACE

As a law graduate whose first steps in the legal profession were encumbered by the impact of the previous global financial crisis, I faced a fairly bleak outlook. By happenstance (sheer bloody-mindedness), I found myself at the doors of the London branch of a US plaintiffs' firm, little known on these shores at the time (I still recall the firm's name was spelled incorrectly by the court on most documents in those days). The firm's proactive, and innovative, culture naturally meant it was an early adopter of third party funding (TPF). As such, I had the great fortune to be inducted into the world of TPF from my very first day as a trainee solicitor. I witnessed, first-hand, how TPF catalysed both the firm's growth and its clients' paths to a healthier balance sheet, notwithstanding the burdens that the financial crisis had left in its wake. A spark was lit.

As an investment manager, now immersed within the TPF sector in the face of what has been described as the worst global economic crisis since the Great Depression, I face the challenge of translating my experience into reasons for optimism. Like many of my industry peers, I understand and appreciate the role that TPF plays in providing access to justice for those who could otherwise not afford to pursue their claims. Similarly, in a time when cash is king, TPF has a role to play in enabling corporates to resolve their disputes without depleting resources that could be invested profitably elsewhere within the business. With ever increasing funds under management both by members of the Association of Litigation Funders (ALF) and by the broader TPF fraternity, there are significant resources available for litigants and law firms to utilise. Yet despite the sector's expansion since the previous global financial crisis, TPF still remains a little-known, or little-understood, solution for businesses. Even among lawyers, there are few who are fully aware of the TPF options available to their own businesses, let alone to their clients.

So what exactly is there for law firms and litigants to know about TPF? Well, just as the list of legal remedies available to litigants varies between jurisdictions, so too does the menu of TPF options. The past year alone has seen both shifts in and endorsements of the various regulatory frameworks that underpin the sector across the globe. In Australia, the industry found itself on the receiving end of stringent new regulations, notably without industry consultation. Partly in response to those developments, a number of funders and finance firms have sought to create a global lobbying voice for the TPF sector, by establishing the International Legal Finance Association, chaired by my editorial predecessor, Leslie Perrin. By contrast, there have been notable judicial endorsements of TPF in other jurisdictions over the past 12 months. The English courts, for example, have endorsed not only TPF, but also the ALF itself.

With government support for businesses during the current crisis coming to an end and legal developments such as the forthcoming EU directive on representative actions on the horizon, could 2021 become a milestone year for TPF? I hope this publication provides a useful guide for litigants, lawyers and investors alike as we take on the challenges the new year brings.

Simon Latham
Augusta Ventures
London
November 2020

Chapter 6

HONG KONG

Melody Chan[1]

I MARKET OVERVIEW

While other common law systems have for years abolished the common law doctrines of champerty and maintenance, Hong Kong has, to date, held on to these two doctrines and, as a result, has arguably lagged behind in its development of a third party funding regime. It was only in 2017 that Hong Kong opened up arbitration and mediation to third party funding, legalising actions that would previously have attracted the tortious or criminal liability of champerty or maintenance. Apart from some narrow exceptions, the rules for court litigation, which might be able to benefit from third party funding, have largely remained unchanged: any third party funding in court proceedings may still attract the potential tortious, or even criminal, liability of champerty or maintenance.

The Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance Order No. 6 of 2017 (the Amendment Ordinance)[2] was passed by the Legislative Council on 14 June 2017. Most parts of the legislation came into force on 23 June 2017, legalising third party funding in arbitration and mediation in Hong Kong. The remaining parts of the Amendment Ordinance (apart from Section 4 of the Amendment Ordinance) came into effect on 1 February 2019[3] and, on the same date, the Hong Kong Government published the Code of Practice of Third Party Funding of Arbitration (the Code).[4]

To facilitate these welcome developments, the Hong Kong International Arbitration Centre published a new version of its Administered Arbitration Rules in 2018 (the HKIAC Rules). These amended Rules came into force on 1 November 2018, expressly recognising third party funders and funding agreements.

1 Melody Chan is a partner at White & Case. She was assisted in writing this chapter by Christine Fong, a trainee at White & Case.

2 Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (the Amendment Ordinance).

3 Legal Supplement No. 2, Gazette No. L.N. 260 of 2018, Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (Commencement) Notice 2018 https://www.elegislation.gov.hk/hk/2018/ln260!en.

4 Government Notice No. 9048, Arbitration Ordinance (Chapter 609): (Notice under Section 98P) (the Code) https://www.gld.gov.hk/egazette/pdf/20182249/egn201822499048.pdf.

II LEGAL AND REGULATORY FRAMEWORK

Under Hong Kong's own mini constitution, the Basic Law, all the laws previously in force in Hong Kong before the handover have been maintained unless they contravened the Basic Law or have subsequently been amended by the legislature. Accordingly, Hong Kong inherited the common law principles that existed before the handover, including the maintenance and champerty doctrines.

Maintenance is 'directed against wanton and officious intermeddling with the disputes of others in which the defendant has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse'.[5] Champerty has been described as 'a form of maintenance, and occurs when the person maintaining another takes as his reward a portion of the property in dispute'.[6]

While the United Kingdom has abolished the torts and crimes of maintenance (unless unlawful) and champerty, Hong Kong has chosen to preserve these two doctrines. As a result of which, Hong Kong had a long-standing general ban (with limited exceptions) on third party funding in litigation.

i Third party funding in court litigation

Third party funding in the court litigation context, apart from the three express exceptions mentioned below, will still attract potential tortious or criminal liability. The Amendment Ordinance, discussed further below, only allows for third party funding in arbitration and mediation to be exempted from criminal and tortious liability.

Courts are aware of the cost of litigation and the need to make court access available to all. Cases have developed exceptions to the doctrines of champerty and maintenance, allowing third party funding in litigation in three narrow areas: (1) where the third party has a legitimate common interest in the litigation; (2) where there are access-to-justice considerations; and (3) in insolvency proceedings.[7]

In the first exception, certain relationships already pre-existing between the claimant and the would-be third party funder, where the funder has legitimate interest in the action such as groups or associations funding their members' actions, are open to third party funding. The second exception, access to justice, is one recognised judicially to help claimants who have meritorious claims but do not have the resources to fund litigation services. The Supplementary Legal Aid Scheme in Hong Kong is a major actor in this area, helping potential claimants who lack funds to seek justice. Finally, in insolvency proceedings, there are a handful of cases pushing the boundaries on the ban against third party funding in the insolvency proceedings context. The case of *Akai Holdings Ltd (in compulsory liquidation) & Ors v. Ho Wing On Christopher & Ors*[8] is one of the earlier cases where liquidators received court approval for third party funders to fund the insolvency proceedings. The court of first instance decision in *Re Cyberworks Audio Video Technology Ltd*[9] further confirmed that a party can seek third

5 *Unruh v. Seeway* [2007] 2 HKC 609.

6 *Neville v. London 'Express' Newspaper Ltd* [1919] A C 368, para. 382.

7 Law Reform Commission of Hong Kong, Report: Third Party Funding for Arbitration (October 2016) www.hkreform.gov.hk/en/docs/rtpf_e.pdf (Law Reform Commission Report), para. 1.5.

8 [2009] HKCU 172.

9 [2010] 2 HKLRD 1137.

party funding to fund proceedings in insolvency cases. There is also case law suggesting that the Hong Kong courts will allow for litigation funding in the insolvency context where there is a 'legitimate commercial purpose' (*Re Po Yuen (To's) Machine Factory Ltd*).[10]

However, apart from the three categories discussed above, there has been no indication at all from the Hong Kong courts that third party funding can be allowed in other areas of court litigation. On the contrary, the Hong Kong Court of First Instance in *Raafat Imam v. Life (China) Co Ltd*[11] refused to expand the exceptions to other areas. The Court stated that since the plaintiff was essentially seeking a declaration of non-criminality from a civil court and failed to show that his case fell into the category of exceptional cases, it would be inappropriate for the Court to approve the plaintiff's third party funding agreement.[12]

ii Third party funding in arbitration

Unlike in litigation, judicial attitudes towards third party funding in arbitration have been and continue to be more open. Prior to the statutory amendment to the Arbitration Ordinance, the courts did not come to a definitive view on whether champerty and maintenance actually apply to arbitration: Kaplan J in *Cannonway Consultants Limited v. Kenworth Engineering Limited*[13] has said that third party funding is allowed in arbitration. However, in *Unruh v. Seeway*, the Court of Final Appeal expressly left open the question on whether maintenance and champerty should be applied to arbitration in Hong Kong,[14] thereby casting doubt as to whether third party funding is appropriate in arbitration. The Court of Final Appeal stated expressly that this is an issue that requires 'serious legislative attention'.[15]

As stated above, legislative attention was first given to this issue when the Commission began its consultation in 2013. Following the consultation, the Commission came up with a set of recommendations for the Legislative Council, and subsequently the Legislative Council passed the Amendment Ordinance to amend various provisions in the Arbitration Ordinance and the Mediation Ordinance on 14 June 2017. Most of the amendments to the Arbitration Ordinance (and the Mediation Ordinance as discussed below) came into operation on 23 June 2017, with the remaining amendments with respect to arbitration coming into effect on 1 February 2019.

The main change ushered in by the Amendment Ordinance is a declaration that third party funding is allowed in arbitration, including proceedings before emergency arbitrators and ancillary court proceedings.[16] The Amendment Ordinance defines third party funding of arbitration to mean a 'provision of arbitration funding for an arbitration (1) under a funding agreement; (2) to a funded party; (3) by a third party funder; and (4) in return for the third party funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement'.[17] A third party funder is someone '(a) who is a party to a funding agreement for the provision of arbitration funding for an arbitration to a funded party by the person; and (b) who does not have an interest recognized by law in the arbitration other than

10 [2012] 2 HKLRD 752.

11 [2018] HKCFI 1852.

12 ibid. [98].

13 [1995] 2 HKLR 475.

14 *Unruh* (n.4) [123].

15 *Unruh* (n.4) [119].

16 Amendment Ordinance, Sections 98K and 98 L.

17 Arbitration Ordinance Cap 609, Sections 98F and 98G (the Arbitration Ordinance).

under the funding agreement'.[18] With the remaining parts of the amendments having come into effect, it is now clear that third party funding of arbitration is not prohibited by the civil and criminal common law doctrines of maintenance and champerty.

To accommodate the legalisation of third party funding for arbitration, the Hong Kong International Arbitration Centre introduced the amendments to the HKIAC Rules on 1 November 2018.[19] The changes were initially proposed on 11 July 2018 for public consultation.[20] The revised HKIAC Rules expressly recognise third party funders and in particular, require a funded party to disclose promptly the existence of a funding agreement, the identity of the funder and any subsequent changes to this information.[21] These requirements supplement the provisions in Division 5 of the Arbitration Ordinance. The HKIAC Rules also expressly permit an arbitral tribunal to consider any third party funding arrangement in fixing and apportioning the costs of arbitration.[22] Importantly, a funded party is allowed to disclose arbitration-related information to its existing and potential funders.[23]

iii Third party funding in mediation

The Commission also recommended that third party funding be allowed in mediation[24] and the Amendment Ordinance amends the Mediation Ordinance to allow for third party funding in mediation.

Part 3 of the Amendment Ordinance provides that the provisions for third party funding in arbitration apply equally to mediation with some slight amendments, thereby expanding third party funding to both mediation and arbitration equally.

However, while the provisions relating to arbitration under the Amendment Ordinance are now in force, Section 4 of the Amendment Ordinance, which relates to amending the Mediation Ordinance, is not yet in force at the time of writing.[25] This has been postponed and will be brought into force following further deliberation by the Steering Committee on Mediation, on a date to be appointed by the Secretary of Justice.[26]

iv Self-regulation of third party funding

During the consultation process, the Commission indicated that it envisioned a code of practice being issued by a body under the Arbitration Ordinance to promote best practice in the initial three-year period.[27] This is a common approach in Hong Kong to ensure

18 Arbitration Ordinance, Sections 98F and 98J(1)(a) and (b).

19 Hong Kong International Arbitration Centre, Administered Arbitration Rules (1 November 2018) https://www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018 (the HKIAC Rules).

20 Hong Kong International Arbitration Centre, Proposed Amended HKIAC Administered Arbitration Rules (12 July 2018) www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/HKIAC%20AAR%20%28for%20public%20consultation%29%2012.7.2018.pdf.

21 HKIAC Rules, Article 44.

22 HKIAC Rules, Article 34.4.

23 HKIAC Rules, Article 45.3(e).

24 Law Reform Commission Report, para. 3.48.

25 Amendment Ordinance, Section 1(3)(b).

26 The Government of the Hong Kong Special Administrative Region, Press Release: Code of Practice for Third Party Funding of Arbitration issued (7 December 2018) https://www.info.gov.hk/gia/general/201812/07/P2018120700601.htm.

27 Arbitration Ordinance, Section 98P.

accountability among the relevant industries. This also reflects the trend in other common law jurisdictions that a 'light touch'[28] or self-regulating approach towards third party funding in arbitration is often preferred.

On 7 December 2018, the Code was issued, expressly setting out the practices and standards with which third party funders of arbitration are ordinarily expected to comply. Prior to the execution of a funding agreement, the Code requires the third party funder (including each of the third party funder's subsidiaries and associated entities and investment advisers acting as its agents)[29] to ensure its promotional materials are not misleading and to take reasonable steps to ensure that the funded party is made aware of the right to seek independent legal advice before entering into the funding agreement.[30] According to the Code, the third party is subject to duties to maintain capital adequacy requirements (1) to pay all debts when they become due and payable; and (2) to cover aggregate funding liabilities under all its funding agreements for a minimum period of 36 months.[31] The third party must also maintain access to a minimum of HK$20 million of capital.[32]

The Code also states that the third party funder must undertake that (1) the third party funder will not seek to influence the funded party or the funded party's legal representative to give control or conduct of the arbitration or mediation to the third party funder except to the extent permitted by law; and (2) the third party funder will not take any steps that cause or are likely to cause the funded party's legal representative to act in breach of professional duties,[33] addressing the issue mentioned by Stone J in *Akai Holdings Ltd v. Ho Wing On Christopher*.[34]

The Code also includes a dispute resolution mechanism for disputes over the funding agreement, a complaints procedure and a requirement for an annual return.[35]

The Code is not formal legislation and so failure to comply with the Code will not attract any legal consequences.[36] However, the Amendment Ordinance does give the Code some teeth: while failure to comply does not make a person liable to civil or criminal liabilities, it can be used as evidence in court and may be taken into account in court proceedings if it is relevant to the matter at hand.[37] The Code should be read in conjunction with the Arbitration Ordinance.

28 Law Reform Commission Report, para. 4.14.

29 Code, para. 2.1.

30 Code, paras. 2.2 and 2.3.

31 Code, para. 2.5(1).

32 Code, para. 2.5(2).

33 Code, para. 2.9.

34 [2009] HKCU 172. Stone J expressed the criticism that, in practice, funders often appear to exercise more control over proceedings than is proper.

35 Code, paras. 2.17–2.19.

36 Amendment Ordinance, Section 98S(1).

37 Amendment Ordinance, Section 98S(2).

v Contingency fee rules

Unlike other jurisdictions, Hong Kong law does not permit Hong Kong solicitors or barristers to charge conditional or contingency fees.[38] While the Commission conducted a consultation on conditional fees in 2005, it concluded that reform in this area was unnecessary, as the Commission was of the view that it would be against the public interest to allow Hong Kong lawyers to charge conditional fees and contingency fees.

A solicitor, barrister or registered foreign lawyer seeking to be a third party funder in an arbitration where he or she is serving, will serve or has previously served as counsel to a party, may be committing the crime and tort of champerty or maintenance. It leaves open the possibility of Hong Kong law firms that do not represent any party in arbitration being third party funders.

The Amendment Ordinance does make clear that third party funding is not available to lawyers acting for parties in the arbitration but it does not prohibit providers of legal services or persons practising law from being third party funders.[39]

III STRUCTURING THE AGREEMENT

The Amendment Ordinance does not specify any particular requirements as to the funding agreement, but defines a funding agreement to mean 'an agreement for third party funding of arbitration that is (a) in writing; (b) made between a funded party and a third party funder; and (c) made on or after the commencement date of Division 3' (namely 1 February 2019).[40] The Code requires that a third party funder must set out and explain clearly in the funding agreement all the key features, risks and terms of the proposed funding, provide a Hong Kong address for service, and set out the name and contact details of the advisory body responsible for monitoring and reviewing the operation of third party funding.[41] While the inclusion of such terms is not compulsory, it is seen as best practice to include those terms as they are incorporated in the Code. Notably, the Code came into effect prior to Division 3 and applies to any funding agreement commenced or entered into on or after 7 December 2018.

The Code also requires the funding agreement to state whether a third party funder can terminate the funding agreement when it '(1) reasonably ceases to be satisfied about the merits of the arbitration; (2) reasonably believes that there has been a material adverse change of prospects to the funded party's success in the arbitration or recovery on success; or (3) reasonably believes that the funded party has committed a material breach of the funding agreement'.[42] The funding agreement must provide that if the third party funder terminates the funding agreement, the third party funder is to remain liable for all funding obligations accrued to the date of termination, unless the termination is due to a material breach.[43]

38 Law Reform Commission Report, para 3.36; Legal Practitioners Ordinance Cap 159 Section 64(1); Law Society of Hong Kong, *Guide to Professional Conduct* Vol. 1, Rule 4.17; Bar Association, Code of Conduct, para. 124.

39 Amendment Ordinance, Section 98F and Section 98O.

40 Amendment Ordinance, Section 98H.

41 Code, para. 2.3.

42 Code, para. 2.13.

43 Code, para. 2.15.

IV DISCLOSURE

i Disclosure to third party funders

Arbitration proceedings in Hong Kong generally abide by strict confidentiality rules. Section 18 of the Arbitration Ordinance prohibits any disclosure of information relating to the existence of any arbitration proceedings and any subsequent awards made pursuant to the arbitration proceedings. However, with the development of a third party funding regime for arbitration, there is a need to balance the right to confidentiality of the party not seeking third party funding and the need of information for the third party funder. Section 98T of the Amendment Ordinance carves out an exception to the confidentiality obligation and allows disclosure by a party to another person for the purpose of having or seeking third party funding from the person.[44]

Section 98T provides that despite the restriction under Section 18, a funded party can communicate information relating to the arbitral proceedings to a third party funder and the subsequent awards made for the purpose of having or seeking funding. However, no information may be further communicated unless the information is made 'to protect a legal right or interest and enforce or challenge an arbitration award',[45] 'to any government body, regulatory body, court or tribunal and the person is obliged by law to make the communication'[46] or 'to a professional adviser of the person for the purpose of obtaining advice in connection with the third party funding or arbitration'.[47] The Code reaffirms the duty for the third party funders to observe the confidentiality of the arbitration.[48] Similarly, the HKIAC Rules also allow parties to make necessary publication and disclosure to a person for the purposes of having or seeking third party funding for arbitration.[49]

ii Disclosure to the other party

To protect the party not seeking funding, the funded party must give written notice of the fact that a funding agreement has been made and the identity of the third party funder.[50] The notice must be given on or before the commencement of the arbitration, or, for a funding agreement made after the commencement of the arbitration, within 15 days of the funding agreement being made.[51] Notice must be given to all parties to the arbitration and the arbitral tribunal (or an emergency arbitrator if there is one).[52] Where there is no arbitral tribunal set up at the time the notice is served, the notice must instead be given to the arbitration tribunal immediately after one is set up for the arbitration.[53] There should also be disclosure about the end of third party funding.[54] The Code reaffirms the funded party's duty to disclose information about the third party funding arrangement.[55]

44 Amendment Ordinance, Section 98U.
45 Amendment Ordinance, Section 98T(2)(a).
46 Amendment Ordinance, Section 98T(2)(b).
47 Amendment Ordinance, Section 98T(2)(c).
48 Code, para. 2.8.
49 HKIAC Rules, Article 45.4(e).
50 Amendment Ordinance, Section 98U(1).
51 Amendment Ordinance, Section 98U(2).
52 Amendment Ordinance, Section 98U(3).
53 Amendment Ordinance, Section 98U(4).
54 Amendment Ordinance, Section 98V.
55 Code, paras. 2.10–2.11.

The HKIAC Rules also require parties to disclose (1) the existence of any funding agreement; and (2) the identity of the third party, as soon as practicable after the funding agreement is made, or in the Notice of Arbitration or the Answer to the Notice of Arbitration, whichever event is earlier.[56]

V COSTS

i Adverse costs against third party funders

Adverse costs are generally 'an order of a Tribunal or of a Court requiring a party to an arbitration or court proceedings to pay all or some of the costs of the other party or parties involved'[57] and the Commission has recommended that it was not necessary to put in a power to award adverse costs against third party funders in the draft of the Amendment Ordinance. By contrast, there are already such powers available in the litigation regime.[58]

The Commission has expressed that it thinks in principle an arbitral tribunal should be given power under the Arbitration Ordinance to award costs against a third party funder where the appropriate circumstances arise and after due process is given. However, there are technical issues that need to be overcome, such as how a third party funder can be ordered to pay adverse costs if it is not a party to the arbitration agreement between the parties. Since arbitration agreements operate on the basis of consent from all the relevant parties, it would be difficult to order a third party who is not a party to the arbitration agreement to pay costs. Because of this technical issue, as well as the prematurity of this development in arbitration, the Commission decided not to incorporate any such power in the Amendment Ordinance,[59] but will review this matter after the initial three years of the Amendment Ordinance coming into effect. After the initial three-year period of implementation, the advisory body will consider whether it is appropriate to empower the arbitrator or tribunal to make such orders.[60] It is worth noting that the government responded in agreement with the Commission's view and mentioned that it would look into the developments made by the international arbitration community such as the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration.[61]

Although the Amendment Ordinance does not give arbitral tribunals powers to make adverse costs orders against third party funders, the Code requires that a funding agreement state whether (and if so, to what extent) a third party funder, a subsidiary or an associated entity should be liable to the funded party to: '(1) meet any liability for adverse costs; (2) pay any premium (including insurance premium tax) to obtain costs insurance; (3) provide security for costs; and (4) meet any other financial liability'.[62]

56 HKIAC Rules, Article 44.

57 Law Reform Commission Report, page 1.

58 Rules of the High Court Cap 4A, Ord 62, r 6A; High Court Ordinance Cap 4, Sections 52A and 52B.

59 Law Reform Commission Report, paras. 2.11(1) and 7.31(1).

60 Law Reform Commission Report, paras. 2.11(2) and 7.31(2).

61 Department of Justice, Legislative Council Brief: Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 (File Ref.: LP 19/00/16C), Annex B, Recommendation 4 www.legco.gov.hk/yr16-17/english/bills/brief/b201612301_brf.pdf.

62 Code, para. 2.12.

In contrast to the Amendment Ordinance, the HKIAC Rules move further and give arbitral tribunals power to take into account any third party funding arrangement in apportioning all or part of the costs of the arbitration.[63]

ii Security for adverse costs against third party funders

The Commission's view is that a power to make an order awarding security for adverse costs is not necessary for arbitrators. The main reason is that the arbitrator or tribunal already has the power under the existing Arbitration Ordinance regime to make an order for security for costs against a party, thereby offering adequate protection to the respondent.[64] Hong Kong's third party funding regime will therefore place a greater emphasis on the funding agreement, which, as detailed above, should cover the responsibility for adverse costs, as well as security for costs.

VI THE YEAR IN REVIEW

With the legal infrastructure now in place, parties have started to consider and use third party funding in arbitration proceedings in Hong Kong over the past year, although the courts have continued to refuse to expand the existing exceptions to allow third party funding in other areas of court litigation. The regulatory regime for third party funding in arbitration has developed in the direction taken by other leading arbitration seats, such as London and regional rival Singapore.

VII CONCLUSIONS AND OUTLOOK

While third party funding in Hong Kong has seen further developments this year, at present, there is limited guidance on how third party funding has and will continue to affect arbitration in Hong Kong. Guidance from the Commission, the Amendment Ordinance and the Code indicates that Hong Kong envisions its third party funding regime as being similar to that of other arbitration-friendly jurisdictions. The developments in 2018–2019 were important for Hong Kong to maintain its competitiveness as a leading arbitral seat. The intention behind these developments is to see more claims pursued with Hong Kong arbitration as the desired dispute resolution mechanism.

Third party funding is self-regulated, with disclosure requirements imposed on the third party funder and the funded party. There are carve-outs made against normal confidentiality requirements in arbitration. In addition to the statutory amendments and the HKIAC Rules, the best practice set out in the Code will hopefully provide transparency and clarity for funded parties.

Some things, however, will not change, such as the general ban on solicitors and barristers charging contingency or conditional fees. The future of the powers to award adverse costs and security for adverse costs remains to be seen. At present, the Commission does not see a need to empower any arbitrator or tribunal with the ability to award security for adverse costs, but, after the initial trial period, it may empower arbitrators or tribunals to do so.

63 HKIAC Rules, Article 34.4.

64 Law Reform Commission Report, paras. 2.11(3) and 8.15.

The future for arbitration practitioners remains bright, and the future for third party funders, especially for third party funding law firms, is even brighter. While this area is relatively new, there will undoubtedly be many further developments in Hong Kong that will present various new opportunities to local and overseas arbitration professionals. It is hoped that, with the new developments now materialising in the legalisation of third party litigation in arbitration, Hong Kong will be able to capture the increasing demand for arbitration services in Asia.

Appendix 1

ABOUT THE AUTHORS

MELODY CHAN

White & Case

Melody Chan is a partner in White & Case's dispute resolution practice, based in Hong Kong. Her practice focuses on cross-border arbitration and high-stakes multi-jurisdictional litigation. She advises on disputes in the financial services, technology, oil and gas, and power sectors, as well as on matters in connection with joint ventures and insolvency proceedings. Melody has represented clients in international arbitration proceedings under the rules of major arbitral institutions, including ICC and HKIAC. Melody also handles contentious and non-contentious regulatory and employment matters and is qualified in Hong Kong, England and Wales, and Australia.

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