



Code of Practice for Third Party Funding of Arbitration

On 7 December 2018, the Hong Kong Secretary for Justice, as the authorised body under Part 10A of the Arbitration Ordinance, published a long-awaited Code of Practice for Third Party Funding of Arbitration in Hong Kong (the “Code”). With the Code, relevant provisions of Section 3 of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (Amendment Ordinance) relating to Divisions 3 and 5 of new Part 10A of the Arbitration Ordinance (New Arbitration Ordinance Provisions) came into effect on 1 February 2019. The Amendment Ordinance came into operation upon gazettal on June 23, 2017, except for section 3 in so far as it relates to the New Arbitration Ordinance Provisions, and section 4 in so far as it relates to the new section 7A(c) and (d) of the Mediation Ordinance (New Mediation Ordinance Provisions). The New Arbitration Ordinance Provisions abolish the criminal and tortious offence of champerty and maintenance with respect to third party funding of arbitration, and consequently will remove all doubt as to the permissibility of third-party funding for arbitration in Hong Kong.

The primary object of the Code is to protect funded party and so a funder must:

- ensure its promotional literature is clear and not misleading (paragraph 2.2);
- ensure the funded party knows it is entitled to take independent legal advice (paragraph 2.3(1));
- provide a Hong Kong address for service (unless it has agreed another method of service with the funded party) (paragraph 2.3(2));
- set out and explain in the funding agreement the key features and terms of the proposed funding agreement (paragraph 2.3(3));
- provide contact details for the advisory body (paragraph 2.3(4));
- maintain capacity to pay all its debts and cover its aggregate funding liabilities for a minimum of 36 months (paragraph 2.5(1));
- maintain access to at least HK\$ 20m capital (paragraph 2.5(2));
- furnish audit opinions on its most recent annual financial statements, or reasonable evidence from a qualified third party (preferably an auditor) that the funder satisfies the HK\$ 20m requirement (paragraph 2.5(3));
- to promptly disclose to the funded party relevant changes of circumstance (paragraph 2.5(4)).

The Code is also intended to set out the practices and standards with which such third-party funders are ordinarily expected to comply in carrying on activities relating to third-party funding of arbitration. Other provisions include the following:

- Provisions requiring the funder to maintain written for identifying and managing conflicts of interest, and provisions requiring observing applicable rules regarding confidentiality and legal professional privilege (paragraphs 2.7 and 2.8).
- Duties of the funder to notify the funded party of the funder’s disclosure obligations under the Arbitration Ordinance, particularly the fact that a funding agreement has been made and the name of the third party funder; and if the funded agreement ends (other than because of the end of the arbitration, the fact that a funding agreement has ended and the date the funding agreement ended. However the funded party to an arbitration does not need to disclose the details of the funding agreement unless it is provided by the funding agreement (paragraph 2.10).
- Provisions requiring stipulation in the funding agreement as to the degree of the funders’ liability to the funded party for costs, including adverse costs, premium to obtain costs insurance, security for costs, and other liabilities (paragraph 2.12).
- The funding agreement must state whether (and if so, how) the third-party funder may terminate the funding agreement if the third party funder reasonably ceases to be satisfied about the merits of the arbitration and reasonably believes there has been a material counterparty breach, or adverse change in the prospects of recovery (paragraph 2.13).



- A prohibition on the funder simply terminating the agreement at will, and a requirement that, in the event of termination (other than for material breach) the third party funder is to remain liable for all funding obligations accrued to the date of termination (paragraphs 2.14 and 2.15).
- A stipulation that the funding agreement must provide that the funded party may terminate the agreement if it reasonably believes that the funder has committed a material breach of the Code or the funding agreement that may lead to irreparable damage (paragraph 2.16).

There are also requirements as to the contents of the funding agreement (paragraph 2.9). The agreement must state that the funder:

- will not seek to influence the funded party or its lawyers to cede control of the arbitration to the funder, except to the extent allowed by law;
- will not take any steps that cause, or are likely to cause, the funded party's lawyers to breach their professional duties;
- will not seek to influence the arbitration body or arbitral institution.

The Code does not have the power of law and so a failure to comply with the Code will not result in judicial or other proceedings. However any breach of the Code is admissible in evidence before a Hong Kong court or arbitral tribunal, and any failure to comply may be taken into consideration if it is relevant to a question the court or tribunal is deciding (s. 98S Arbitration Ordinance). The Code intends to provide effective regulation of Hong Kong's funding industry which is expected to warmly embraced by the growing arbitration community. At present, the Code does not apply to mediation proceedings.