

Proposed Code of Practice for Third Party Funding of Mediation

Preamble

The authorized body is empowered under Part 10A of the Arbitration Ordinance (Cap. 609) and section 7A of the Mediation Ordinance (Cap. 620)¹, to issue a code of practice setting out the practices and standards with which third party funders of mediation under Cap. 620, are ordinarily expected to comply in carrying on activities in connection with third party funding of mediation in Hong Kong. The code is now issued and named the Code of Practice for Third Party Funding of Mediation (“Code”).

The Code of Practice for Third Party Funding of Arbitration has been issued on 7 December 2018 by the authorized body in exercise of the power conferred by Part 10A of Cap. 609. It sets out the practices and standards with which third party funders of arbitration (including emergency arbitrator proceedings, mediation and court proceedings) under Cap. 609, are ordinarily expected to comply in carrying on activities in connection with third party funding of arbitration in Hong Kong.

Relationship with the Arbitration Ordinance and the Mediation Ordinance

This Code should be read in conjunction with Cap. 609 and Cap. 620 (“the Ordinances”), which the Ordinances shall prevail in the event of uncertainty or inconsistency with this Code. The terms used in this Code, where they are defined in Cap. 609 (including for the purposes of Part 10A of Cap. 609), are intended to carry the same meanings as for Cap. 609 or Part 10A as the case maybe. The terms used in this Code, where they are defined in Cap. 620 (including for the purposes of section 7A of Cap. 620), are intended to carry the same meanings as for Cap. 620 or section 7A as the case

¹ Section 7A of Cap. 620 expressly provides that in the context of third party funding of mediation, Part 10A of the Arbitration Ordinance (Cap. 609) applies as if – in that Part, (i) a reference to arbitration were a reference to mediation; and (ii) a reference to an arbitration body were a reference to a mediator, and in section 98F of that Ordinance, the definitions of arbitration, arbitration body, emergency arbitrator and mediation proceedings were omitted.

may be.

Application

Except in the circumstances specified in section 98O(1) of Cap. 609 and Schedule 1 to Cap. 620,² this Code applies to all third party funders within the meaning of section 7A of Cap. 620,³ save and except paragraph 2.20 which specifically applies to third party funders of mediation in personal injuries claims. Processes to which Cap. 620 does not apply, including mediation within arbitration proceedings, shall be governed by the Code of Practice for Third Party Funding of Arbitration.⁴

Purpose

The purpose of this Code is to set out the practices and standards that third party funders are ordinarily expected to comply with in carrying on activities in connection with third party funding of mediation in Hong Kong.

The Code

1. Introduction

Interpretation

² Schedule 1 to Cap. 620 specifies the processes to which the Ordinance does not apply, including mediation proceedings referred to under sections 32(3) and 33 of Cap. 609.

³ For the purpose of this Code, a third party funder includes each of the third party funder's subsidiaries and associated entities and to investment advisors acting as its agents.

For reference only: Under the Code of Conduct for Litigation Funders issued by the Association of Litigation Funders of England & Wales in January 2018 a third party funder having access to funds immediately within its control, including within a corporate parent or subsidiary is known as 'Funder's Subsidiary' and a third party funder acting as the exclusive investment advisor to an entity or entities having access to funds immediately within its or their control, including within a corporate parent or subsidiary is known as 'Associated Entity'.

⁴ The Code of Practice for Third Party Funding of Arbitration specifies in its preamble that it sets out practices and standards for regulating third party funders of arbitration under Cap. 609, including mediation proceedings. Under section 98F of Cap. 609, arbitration includes court proceedings, proceedings before an emergency arbitration and mediation proceedings. "Mediation proceedings" under Cap. 609 are referred to under section 32(3) and 33, i.e. where it arises from an arbitration agreement which provides for the appointment of a mediator, and/or when an arbitrator is subsequently appointed as a mediator after the arbitral proceedings have commenced.

- 1.1 The terms defined in Cap. 609 (in particular in its Part 10A) and the terms defined in Cap. 620, are incorporated by reference into this Code.
- 1.2 References in the Code to Part 10A of Cap. 609 or individual provisions of Part 10A also include Part 10A or the relevant provisions as applied to mediation within the meaning of Cap. 620.

Scope of this Code

- 1.3 This Code applies to any funding agreement commenced or entered into on or after the date of commencement of the Code between a third party funder and a funded party (including a potential funded party) for third party funding of mediation.

Consequences of non-compliance with this Code

- 1.4 Section 98S, Part 10A of Cap. 609 sets out the consequences of failing to comply with this Code.⁵

2. Standards and practices in third party funding of mediation

Responsibility for Subsidiaries and Associated Entities

- 2.1 A third party funder shall accept responsibility for compliance with this Code by its subsidiaries and associated entities and any investment advisors acting as its agent.

Promotional Materials

- 2.2 A third party funder must ensure its promotional materials are clear and not misleading.

⁵ Section 98S(1) provides that a failure to comply with a provision of the code of practice does not, of itself, render any person liable to any judicial or other proceedings.

The Funding Agreement

2.3 The third party funder must:

- (1) take reasonable steps to ensure that the funded party is made aware of the right to seek independent legal advice on the funding agreement before entering into it;
- (2) take reasonable steps to ensure that the funded party is advised of the potential availability of legal aid;⁶
- (3) provide a Hong Kong address for service in the funding agreement subject to such mode of service as may be agreed with the funded party;
- (4) set out and explain clearly in the funding agreement all the key features, risks and terms of the proposed funding and the funding agreement including, without limitation, the matters set out in Part 10A of Cap. 609 and in this Code; and
- (5) set out the name and contact details of the advisory body responsible for monitoring and reviewing the operation of third party funding under Part 10A of Cap. 609.

2.4 The obligations under paragraph 2.3(1) and (2) are satisfied if the funded party confirms in writing to the third party funder that the funded party has taken independent legal advice on the funding agreement before entering into it and has been advised of the potential availability of legal aid.

⁶ Pursuant to section 2 of Cap. 91, the scope of a legal aid certificate may cover mediation conducted prior to the issue of, and/or during, legal proceedings, but not arbitration. Hence, such provision was not necessary for the purpose of the Code of Practice for Third Party Funding of Arbitration. It aims to offer protection to those without the benefit of any paid or free legal advice who may be eligible to apply for legal aid.

Capital Adequacy Requirements

2.5 A third party funder must:

- (1) ensure that it maintains the capacity to:
 - (a) pay all debts when they become due and payable; and
 - (b) cover all of its aggregate funding liabilities under all of its funding agreements for a minimum period of 36 months;
- (2) maintain access to a minimum of HK\$20 million of capital;
- (3) provide the advisory body with either:
 - (a) a copy of the audit opinion on the third party funder's most recent annual financial statements (but not the underlying financial statements) within 1 month of receipt of the opinion and in any case within 6 months of the end of each fiscal year; or
 - (b) reasonable evidence from a qualified third party (preferably from an auditor, but alternatively from a third party administrator or bank) that the third party funder satisfies the minimum capital requirement set out in subparagraph (2); and
- (4) accept a continuous disclosure obligation under each funding agreement in respect of its capital adequacy, including:
 - (a) a specific obligation to give timely notice to the funded party if the third party funder believes

that its representations to the funded party in respect of its capital adequacy as required by this Code are no longer valid because of changed circumstances; and

- (b) a specific undertaking that if an audit opinion provided for any audit period is qualified (except as to any emphasis of matters relating to the uncertainty of valuing relevant litigation funding investments) or expresses any question as to the ability of the third party funder, to continue as a going concern:
 - (i) it will promptly inform the funded party; and
 - (ii) the funded party will be entitled to enquire further into the qualification or question expressed and take any further action it deems appropriate.

Conflicts of Interest

2.6 The third party funder must:

- (1) maintain, for the duration of the funding agreement, effective procedures for managing any conflict of interest that may arise in relation to activities undertaken by the third party funder in relation to the funding agreement;
- (2) follow the written procedures mentioned in paragraph 2.7 for the duration of the funding agreement; and
- (3) not take any steps that cause or may cause the funded party's legal representative to act in breach of its professional duties.

2.7 For paragraph 2.6(2), the third party funder has effective procedures for managing a conflict of interest that may arise if it can show through documentation that:

- (1) the third party funder has conducted a review of its business operations that relate to the funding agreement to identify and assess potential conflicting interests;
- (2) the third party funder:
 - (a) has written procedures for identifying and managing conflicts of interest; and
 - (b) has implemented the procedures;
- (3) the written procedures are reviewed at intervals no greater than 12 months;
- (4) the written procedures include procedures about the following:
 - (a) monitoring the third party funder's operations to identify and assess potential conflicting interests;
 - (b) disclosing conflicts of interest to funded parties and potential funded parties;
 - (c) managing situations in which interests may conflict;
 - (d) protecting the interests of funded parties and potential funded parties;
 - (e) dealing with situations in which a lawyer acts for both the third party funder and a funded party or potential funded party;

- (f) dealing with a situation in which there is a pre-existing relationship between any of the third party funder, a lawyer and a funded party or potential funded party;
 - (g) reviewing the terms of a funding agreement to ensure the terms are consistent with Part 10A of Cap. 609 and this Code; and
 - (h) marketing to potential funded parties;
- (5) the terms of the funding agreement are reviewed to ensure the terms are consistent with Part 10A of Cap. 609 and this Code; and
- (6) the matters mentioned in subparagraphs (1) to (5) (including those procedures mentioned in subparagraphs (4)(a) to (h)) are implemented, monitored and managed by:
- (a) if the third party funder is an entity other than an individual – the senior management or partners of the third party funder; or
 - (b) if the third party funder is an individual that represents an entity – the senior management or partners of the entity.

Confidentiality and Legal Professional Privilege

2.8 A third party funder will observe the confidentiality and privilege of all information and documentation relating to the mediation and the subject of the funding agreement to the extent that Hong Kong law, or other applicable law, permits.

Control

2.9 The funding agreement shall set out clearly:

- (1) that 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 mediation to the third party funder except to the extent permitted by law;
- (2) that 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; and
- (3) that the third party funder will not seek to influence the mediator and/or mediation service provider involved.

Disclosure

2.10 The third party funder must remind the funded party of its continual obligation to disclose information about the third party funding of mediation under sections 98U and 98V of Cap. 609.

2.11 To avoid doubt, the funded party to a mediation does not have any obligation to disclose details of the funding agreement except as required by the funding agreement, or as ordered by the mediator or mediation body in a mediation, or as otherwise required by law.

Liability for Costs

2.12 The funding agreement must state whether (and if so to what extent) the third party funder is 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.

Grounds for Termination

2.13 The funding agreement must state whether (and if so, how) the third party funder may terminate the funding agreement in the event that the third party funder:

- (1) reasonably ceases to be satisfied about the merits of conducting the mediation;
- (2) reasonably believes that there has been a material adverse change of prospects to the funded party being able to reach any agreement with the other party(ies) to the mediation to resolve in whole or in part the dispute in question; or
- (3) reasonably believes that the funded party has committed a material breach of the funding agreement.

2.14 The funding agreement must not establish a discretionary right for a third party funder to terminate the funding agreement in the absence of the circumstances described in paragraph 2.13.

2.15 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 as mentioned in paragraph 2.13(3).

2.16 The funding agreement must provide that the funded party may terminate the funding agreement if it reasonably believes that the third party funder has committed a material breach of this Code or the funding agreement which may lead to irreparable damage.

Dispute regarding Funding Agreement

2.17 The funding agreement must provide a neutral, independent and effective dispute resolution mechanism for settlement of any dispute arising under or in connection with the funding agreement between the third party funder and the funded party.

Complaints Procedure

2.18 The third party funder must maintain an effective procedure for addressing complaints against them as follows:

- (1) the third party funder must ensure that complaints from a funded party under or in connection with the funding agreement are handled in a timely and appropriate way;
- (2) steps must be taken to investigate and respond to a complaint in a timely way;
- (3) if a complaint has been received, the subject matter of the complaint must be properly reviewed;
- (4) if a complaint is not remedied promptly, the third party funder must advise the funded party of any further steps which may be available to the funded party under the funding agreement, this Code and the Ordinances; and
- (5) if the subject matter of the complaint raises issues of more general concern, the third party funder must take

steps to investigate and remedy such issues, even if other funded parties may not have complained.

Annual Returns

2.19 The third party funder must:

- (1) submit annual returns to the advisory body of:
 - (a) any complaints against it by funded parties received during the reporting period; and
 - (b) any findings by a court or arbitral tribunal of its failure to comply with this Code or Division 5 of Part 10A of Cap. 609 during the reporting period; and
- (2) respond to any request from the advisory body for further information or clarification concerning any matter.

Third Party Funding of Mediation in Personal Injuries Claims⁷ *(“PI claim(s)”)*

2.20 Without prejudice to the foregoing paragraphs in this Code, this paragraph sets out specific requirements applicable to third party funders of mediation in PI claims:

- (1) Notwithstanding paragraph 2.10, the third party funder must remind the funded party of its continual obligation to disclose information about the third party funding of mediation under sections 98U and 98V of Cap. 609 to the courts (if legal proceedings have been issued), irrespective of whether the funded party is

⁷ Including common law claims for negligence arising from personal injury accidents, as well as those claims brought under the Employees’ Compensation Ordinance (Cap. 282) including claims under the Fatal Accidents Ordinance (Cap. 22), Law Amendment and Reform (Consolidation) Ordinance (Cap. 23), applications brought under Order 80 of the Rules of the High Court (Cap. 4A) and those applications brought under the Employees Compensation Assistance Ordinance (Cap. 365).

legally represented.

- (2) The third party funder must obtain confirmation in writing upon entering the funding agreement that the funded party confirms that the third party funder or the funded party's legal representative (as the case may be) has advised the funded party that any fee arrangement contingent upon the outcome of the underlying legal proceedings and / or champerty and / or maintenance for such legal proceedings is unlawful.