

Comparing Hong Kong Code of Practice for Third Party Funding Arbitration with the Code of Conduct in England & Wales

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As 2019 dawns the arbitration community looks forward to the Hong Kong Code of Practice for Third Party Funding in Arbitration coming into force on 1 February 2019. In this article we look at the impact of the Hong Kong Code on Hong Kong seated arbitrations and draw comparisons with the voluntary Code of Conduct for Litigation Funders in England & Wales.

History of third party funding in Hong Kong

Historically in Hong Kong, and many other common law jurisdictions, third party funding in any legal proceeding was strictly prohibited under the doctrines of maintenance (when a person who has no legitimate interest in a litigation gives assistance, encouragement, or support to the litigation) and champerty (when a person supports the litigation in return for a share of the proceeds).

Prior to the introduction of the *Arbitration and Mediation Legislation (Third Party Funding)(Amendment) Ordinance 2017* (the Ordinance), Hong Kong legislation did not address whether the rules of champerty and maintenance applied to arbitration in Hong Kong. There is however no case law to suggest that an arbitral award in favour of a funded party would not be enforced on that ground.

New third party funding legislation in Hong Kong

On 14 June 2017, the Hong Kong Legislative Council passed the *Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017* (the Ordinance). The Ordinance distinguishes arbitration and mediation from traditional litigation, and permits the third party funding of arbitration and mediation in Hong Kong.

Pursuant to the delegated powers in the Ordinance,[fn] Section 98P Arbitration and Mediation

Legislation (Third Party Funding)(Amendment) Ordinance 2017[fn] on 7 December 2018, the Secretary of Justice (SOJ) published the Hong Kong Code of Practice for Third Party Funding in Arbitration (the “**HK Code**”) which comes into effect on 1 February 2019. The mandatory HK Code shares similarities with the voluntary Code of Conduct for Litigation Funders in England & Wales (the “**EW Code**”), and sets out the rules, standards and recommended practices of third party arbitration funding in Hong Kong.

Comparing the HK Code and EW Code

Application

The HK Code applies to:

- all Hong Kong seated arbitrations and
- any arbitration conducted outside Hong Kong to the extent that the costs and expenses of services in relation to the arbitration are provided in Hong Kong[fn] Section 98N Arbitration and Mediation Legislation (Third Party Funding)(Amendment) Ordinance 2017[fn]

that have a written funding agreement (made on or after the commencement date) entered into between a funded party and a funder.[fn] Section 98H Arbitration and Mediation Legislation (Third Party Funding)(Amendment) Ordinance 2017[fn] Both Hong Kong and overseas parties should be aware of the provisions within the HK Code when entering into arbitration funding agreements.

Compliance

The provisions of the HK Code are binding on all parties and “applies to any funding agreement”.[fn] Paragraph 1.2 of HK Code[fn] Failure to comply with the HK Code does not render any person liable to any judicial or other proceedings.[fn] Section 98S(1) Arbitration and Mediation Legislation (Third Party Funding)(Amendment) Ordinance 2017[fn] Any non-compliance would only be used as evidence in subsequent court or tribunal proceedings.[fn] Section 98S(2)(a) Arbitration and Mediation Legislation (Third Party Funding)(Amendment) Ordinance 2017[fn]

By contrast, the EW Code represents the leading practice in England and Wales, but is only to be followed by members of the Association of Litigation Funders. As such, compliance with the EW Code is not mandatory.

Control

One of the concerns for regulators and funded parties is the level of control that a funder exerts over a dispute. There is a perceived risk that the funder may seek to influence and take over proceedings to the funded party’s detriment.

The HK Code requires a funded agreement to set out clearly 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 arbitration to the third party funder.[fn] Paragraph 2.9 of HK Code[fn]

The EW Code states that a funder may provide input to the funded party’s decision in relation to settlements,[fn] Paragraph 2.9 of HK Code[fn] but at the same time, should not seek to influence the funded party’s legal counsel to cede control or conduct of the dispute.[fn] Paragraph 9.3 of EW Code[fn]

On its face, the HK Code appears to provide more protection for the funded party than the EW Code. However, the rule is followed by the exception of: “except to the extent permitted by law.”^[fn] Paragraph 2.9 of HK Code^[fn] This statement is ambiguous as there are no examples or explanation to illustrate the extent of control a funder can have. Neither the HK Code nor the Ordinance set out what controls a funder is permitted to have under the law. It remains to be seen whether the HK Code can adequately protect a funded party’s interest.

Conflict of interest

The HK Code requires a funder to maintain effective procedures for managing any conflicts of interest^[fn] Paragraph 2.6(1) of HK Code^[fn] and further lists out examples of effective procedure.^[fn] Paragraph 2.7 of HK Code^[fn] In doing so, the HK Code states that “the third party funder has effective procedures for managing a conflict of interest...if it can show through documentation that... [Lists out examples effective procedure]”.^[fn] Ibid.^[fn] The use of the word “if” is potentially problematic as it is unclear whether effective procedures can be shown through other means that are not listed in Paragraph 2.7 of the HK Code. The EW Code does not address the issue of conflicts of interest.

In this respect, the HK Code has clearly scrutinized the EW Code and addressed the issues that arose in other jurisdictions. The codification of effective procedures to control the conflict of interest between parties is definitely a welcome addition in safeguarding a funded party’s interest.

Disclosure

The HK Code requires a funded party to disclose in writing the existence of the funding agreement and the name of the third party funder to each other party to the arbitration and the arbitration body.^[fn] Section 98U Arbitration and Mediation Legislation (Third Party Funding)(Amendment) Ordinance 2017^[fn] In addition, the third party funder has a duty to remind the funded party of its duty to disclose.^[fn] Paragraph 2.10 of HK Code^[fn] The Ordinance also clarifies that parties can communicate information relating to the arbitral proceedings to a third person for the purpose of having, or seeking, third party funding of arbitration from the person.

The EW Code is silent on the parties’ disclosure obligations. The inclusion of a disclosure requirement in the HK Code provides a clarity that the EW Code does not.

A bright future for funders, parties and Hong Kong as an arbitral centre

The introduction of the HK Code has already sparked a renewed enthusiasm for Hong Kong’s reputation as a leading international arbitration centre. In certain respects, the HK Code deals with issues differently from that of the EW Code and practitioners would be wise to think about the merits of HK Code’s approach. Despite the uncertainties of a funder’s control as well as effective procedures for managing conflicts of interest, we think the HK Code is likely to encourage funding while provide sufficient protection for funded parties.