Funding for disputes – "one step forward"

January 2019, Hong Kong

In a significant development in June 2017, the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance was enacted. It provides for a legislative regime for third party funding of arbitration and mediation in Hong Kong. The government has announced that the key provisions of the Ordinance not yet in force will take effect on 1 February 2019. The "Code of Practice for Third Party Funding of Arbitration" has also been published. Third party funders are expected to comply with its provisions.

Background

The development of third party funding in Hong Kong has to a large extent been dependent on case law, which has resulted in a miscellany of exceptions to the general prohibition against third party funding of civil disputes.

While third party funding of civil litigation is generally caught by the common law torts and crimes of maintenance and champerty in Hong Kong, arbitration is thought to be different in that it is conducted in private, by agreement and underpinned by party autonomy. This was the impetus for a Law Reform Commission sub-committee consultation and report in 2015-16, as a result of which third party funding of arbitration in Hong Kong was put on a statutory footing. Without legislation there were doubts in some quarters whether third party funding of arbitration in Hong Kong was lawful.

Given the importance that Hong Kong attaches to being an international disputes resolution centre which, in particular, embraces arbitration, the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance was passed in relatively quick time. Many Law Reform Commission recommendations are not acted upon or, if they are, not as quickly as was the case here.

Recent developments

Although the Ordinance was enacted in June 2017, the key provision formally disapplying maintenance and champerty with respect to third party funding of arbitration did not come into effect until a further notice was published by the government. By a commencement notice published on 3 December 2018, this key provision comes into effect on 1 February 2019[1]. As from then, as a matter of legislation, maintenance and champerty will no longer apply to third party funding of arbitration in Hong Kong.

Another reason for the delay in implementing this key provision was to allow time for consultation on the Code of Practice for third party funding of arbitration. The Code of Practice was formally published on 7 December 2018[2].

Any comments or queries?

Michael Maguiness
Of Counsel
+852 2216 7174
michael.maguiness@rpc.com.hk

David Smyth
Partner
+852 2216 7100
david.smyth@rpc.com.hk

1. See Department of Justice Press Release, 7 December 2018 – "Code of Practice for Third Party Funding of Arbitration issued" and "Commencement Notice", 3 December 2018.
2. Government Notice, 7 December 2018 – "Code of Practice for Third Party Funding of Arbitration".

Comment

These developments mean that third party funding of arbitration in Hong Kong formally comes into force as from 1 February 2019. This will be welcomed by the arbitration community and commercial funders. It is also in keeping with the government's wish to promote Hong Kong as an international and regional disputes resolution hub.

Interestingly, the Ordinance (but not the Code of Practice) also applies to third party funding of mediation and has done since June 2017. It is not entirely clear why mediation was included in the Ordinance given that mediation (in this context) is generally thought of as a non-contentious process to which the prohibition against maintenance and champerty does not apply. Before the passage of the Ordinance, prospective claimants were generally entitled to seek third party funding for mediation of their disputes – albeit, there is no institutional commercial market for mediation funding in Hong Kong given that most mediations are conducted with respect to relatively lower value and non-commercial claims.

Including mediation within the framework of the Ordinance may have attracted certain headlines for Hong Kong's promotion of its disputes offering. However, prior to the passage of the Ordinance, there were already concerns that unscrupulous claims agents and touts were taking advantage of some claimants – particularly, those claimants not able to obtain legal representation. This concern is heightened where mediation is conducted after the commencement of court proceedings. Hong Kong has a high incidence of litigants in person, particularly in the first tier courts. By including mediation in the Ordinance, there is a danger that certain unscrupulous practices may become more prevalent without proper regulation, particularly with respect to personal injury claims and the like[3]. It remains to be seen how the department of justice proposes to deal with this concern – for example, by regulation or a further code of practice[4].

3. For example, see the Law Society of Hong Kong's submission on (among other things) third party funding of mediation with respect to personal injury claims, dated 30 October 2018.
4. See note 1 (press release) which refers to the role of the "Steering Committee on Mediation".

About RPC

RPC is a modern, progressive and commercially focused international law firm. We have 83 partners and over 600 employees based in London, Hong Kong, Singapore and Bristol.

"... the client-centred modern legal services business."

At RPC we put our clients and our people at the heart of what we do:

- **Best Legal Adviser status every year since 2009**
- **Best Legal Employer status every year since 2009**
- **Shortlisted for Law Firm of the Year for two consecutive years**

We have also been shortlisted and won a number of industry awards, including:

- **Winner – Overall Best Legal Adviser – Legal Week Best Legal Adviser 2016-17**
- **Winner – Law Firm of the Year – The British Legal Awards 2015**
- **Winner – Competition and Regulatory Team of the Year – The British Legal Awards 2015**
- **Winner – Law Firm of the Year – The Lawyer Awards 2014**
- **Winner – Law Firm of the Year – Halsbury Legal Awards 2014**
- **Winner – Insurance and Reinsurance Law Firm of the Year, Hong Kong – Finance Monthly Law Awards 2015**
- **Winner – Hong Kong – Leading Litigation Lawyer of the Year – ACQ Global Awards 2015**
- **Nominated – Maritime and Shipping Law Firm of the Year – Hong Kong – Lawyer Monthly Legal Awards 2015**
- **Winner – Commercial Team of the Year – The British Legal Awards 2014**
- **Winner – Competition Team of the Year – Legal Business Awards 2014**

"... they are my firm of choice in Asia." **Chambers Asia Pacific 2015**

Areas of specialism

- Competition
- Construction & Engineering
- Corporate/M&A/ECM/ PE/Funds
- Corporate Insurance
- Dispute Resolution
- Employment
- Finance
- Insurance & Reinsurance
- IP
- Media
- Pensions
- Professional Negligence
- Projects & Outsourcing
- Real Estate
- Regulatory
- Restructuring & Insolvency
- Tax
- Technology

18756

Tower Bridge House
St Katharine's Way
London E1W 1AA
T +44 20 3060 6000

Temple Circus
Temple Way
Bristol BS1 6LW
T +44 20 3060 6000

11/F Three Exchange Square
8 Connaught Place
Central Hong Kong
T +852 2216 7000

12 Marina Boulevard
#38-04 Marina Bay Financial Centre Tower 3
Singapore 018982
T +65 6422 3000