

15 October 2021

Ms Christina Cheung, JP  
Law Officer (Civil Law)  
Department of Justice  
4/F, Main Wing, Justice Place  
18 Lower Albert Road  
Central, Hong Kong

Dear Ms Cheung,

**Re: Public Consultation on Proposed Code of Practice for  
Third Party Funding of Mediation**

The Hong Kong General Chamber of Commerce welcomes the opportunity to express our views on the subject consultation.

As stated in the attached, there are a number of fundamental issues that will have to be addressed before consideration is given to the issue of whether a Code of Practice for Third Party Funding of Mediation is needed. Should the decision be made to proceed with the implementation of such a code, we suggest that the contents do not simply be a replica of the existing code for arbitration given that there are fundamental differences between mediation and arbitration.

We hope you will give our comments your due consideration.

Yours sincerely,



George Leung  
CEO

*Encl.*

## **Department of Justice Consultation on Proposed Code of Practice for Third Party Funding of Mediation (“the Proposed Code”)**

### **Submission by The Hong Kong General Chamber of Commerce (“HKGCC”)**

1. HKGCC welcomes the opportunity to respond to this consultation.
2. The concept of third party funding (“TPF”) of mediation (and arbitration) has been a controversial one. Now that the decision has been made to implement TPF for both of them, and the Code of Practice for Third Party Funding of Arbitration has already been issued, the next question is whether a Code of Practice for Third Party Funding of Mediation should also be issued, and if so, what its contents should be.
3. The legislation does not *require* the authorised body (i.e., the Secretary for Justice) to issue a code of practice for TPF of mediation (or arbitration): it merely provides a *discretion* for it so. It does not therefore follow that, merely because such a code has been issued for TPF of arbitration, a code should also be issued for TPF of mediation. This is not least because mediation and arbitration are fundamentally different processes. Whereas arbitration is normally chosen as a substitute for court litigation, and results in a decision by an independent person or tribunal which is binding on the parties, mediation is essentially assisted negotiation. Whether there is a demand for TPF for mediation, if so whether there is any need for a code of practice (which is a form of regulation) to be issued for such TPF, and if so what it should contain, may therefore result in different answers in the case of mediation as compared to arbitration. We hope that this consultation will elicit views from experts in the area on these issues.
4. If a code of practice for TPF of mediation is to be issued in Hong Kong, it is important that - as with the one for arbitration- it strikes the right balance between attracting TPF to satisfy any demand for it in Hong Kong, and protecting the interests of all relevant parties. This is particularly so, given that TPF is a relatively new concept in Hong Kong. Moreover, although a failure to comply with a code provision would not in itself result in legal proceedings, it would still carry legal consequences. Article 98S (2) of the Arbitration Ordinance (Cap 609) - which would also apply to a code of practice for TPF of mediation - states that “*the code of practice is admissible in evidence in proceedings before any court or arbitral tribunal*”; and that “*any compliance, or failure to comply, with a provision of the code of practice may be taken into account by any court or arbitral tribunal if it is relevant to a question being decided by the court or arbitral tribunal*”.
5. We note that the proposed code which the DoJ has issued for consultation (“the Proposed Code”) is nearly identical in substance to the one that has already been adopted for arbitration, and which was issued on 7 December 2018. This may be because an earlier code which was published for consultation on 30 August 2018 (“the Earlier Draft Code”) covered both mediation and arbitration, and it was considered appropriate that the same provisions should apply to both. However, as noted above, arbitration and mediation are fundamentally different processes. If it is decided that a code of practice should be issued for TPF of mediation, it does not necessarily follow that the code provisions should be the same. For example, given that the cost of arbitration is typically higher than the cost of mediation, we question whether the

minimum capital requirement of third party funders of mediation (if any) needs to be as high as HKD20 million.<sup>1</sup>

6. We note from the Department of Justice’s Legislative Council Brief in December 2018 that a total of 15 responses on the Earlier Draft Code were received from professional bodies, arbitral, mediation and dispute resolution institutions, academics, practitioners and dispute resolution funders, making various suggestions regarding the Earlier Draft Code. After due consideration of the comments received as a result of the consultation, and presumably because it had been decided to defer the entry into force of certain legislative provisions concerning TPF for mediation, the Secretary for Justice decided to issue the Code of Practice for Third Party Funding of Arbitration as a separate code, prior to the full entry into force of the TPF provisions for arbitration on 1 February 2019.<sup>2</sup> We hope that the DoJ in this consultation will similarly take into account all views received, including whether there is a need to have such a code at all, and if so, what its provisions should be.

7. We have two further comments:

7.1. In its Brief to LegCo in December 2018 referred to above, the DoJ stated that the Secretary for Justice had appointed on 24 August 2018, under the relevant legislation, an advisory body to review the operation of the provisions on third party funding of arbitration and mediation. The Brief stated that “*it is expected that the advisory body will issue a report reviewing the implementation of the code of practice after three years and make recommendations on the way forward*”.<sup>3</sup> We are not aware of whether this report has yet been prepared, and if so, what its recommendations are. If it has not yet been finalised, it is presumably imminent. We would therefore recommend that the issue of the Proposed Code in final form be deferred until the report of the advisory body and its recommendations are considered, in case any recommendations for changes to the TPF code for arbitration are also relevant to the Proposed Code.

7.2. The one substantive difference between the TPF code for arbitration and the Proposed Code is the inclusion in the latter of the additional paragraph 2.20 regarding TPF of mediation in personal injuries claims. This paragraph includes the requirement that “*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*”. We have two comments on this paragraph: (a) If champerty and maintenance are unlawful for personal injury claims, (as this paragraph appears to suggest) this would appear to rule out TPF for mediation in personal injury claims completely (one of the objectives of the legislation being to ensure that the common law rules of champerty and maintenance do not stand in the way of TPF). We are not sure if this is the intention of this paragraph: perhaps this could be clarified, and (b) we are not sure why personal injury claims are being singled out for special treatment in this respect: the introductory paragraphs of the Proposed Code do not make this clear.

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<sup>1</sup> See para 2.5(2) of the Proposed Code.

<sup>2</sup> [https://www.legco.gov.hk/yr18-19/english/subleg/brief/2018ln260\\_brf.pdf](https://www.legco.gov.hk/yr18-19/english/subleg/brief/2018ln260_brf.pdf) at paras 8,9.

<sup>3</sup> Para 6.

8. We hope that the above comments are helpful, and would welcome any clarification you could give us on the points made in 1 and 2 above.

HKGCC Secretariat  
October 2021