



The A, B, Cs of Third-Party Funding

Third party funding for mediation and arbitration is a relatively new development in Hong Kong whereby an external third party who does not have an interest in a dispute, steps-in on behalf of one of the parties, either the plaintiff or defendant, to fund its dispute against another party, in exchange for a financial benefit.

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Although third-party funding for mediation, arbitration and even litigation has been in existence in other jurisdictions for some time, Hong Kong has only recently permitted third-party funding, through the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 and The Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017.

Previously, this type of funding had been prohibited due to the common law doctrines of Maintenance and Champerty, which have not been abolished in Hong Kong.

In simple terms, Maintenance may be considered as meddling in disputes by a third-party to encourage a dispute and Champerty is the provision of financial support, by a third-party, which facilitates a party to take a matter to dispute on the provision that if their action is successful, the third party will take a share of the proceeds.

A commonly used example is 'ambulance chasers', where third-parties who have no connection to a victim or an accident, seek to entice the victims to make a claim, in return for a cut of the damages recovered.

What does it mean for the Construction Industry?

Access to funds – Parties may find themselves in a situation where they may not have the financial means to pursue a claim, or alternatively may wish to manage the risk and expense associated with pursuing a claim by seeking another party to assist with the funding in return for a financial benefit, i.e. a pre-agreed portion of any recovery.

Like any financial investment, funders will seek opportunities which fit into their own risk profile and offer a good rate of return. Funders will undertake their own independent analysis of the claims to validate the potential for success, which will preferably involve damages or counterclaims, given the funders returns are based on the amount of recovery.

As this market has grown, so too has the number of providers seeking to offer such funding services, who range from specialised third party funders, to banks and law firms. Such funding, which may be in the form of money or other assistance in relation to costs, typically legal fees and expenses, is provided in return for a financial benefit, should the arbitration be successful, as more fully detailed within the funding agreement.

However, lawyers may not act as funders in arbitration proceedings in which they are participating and third-party funders are subject to the Code of Practice of Third-Party Funding of Arbitration, which is a self-regulating code rather than legislation.

Such involvement may inadvertently assist the party seeking the funding to review its own strategy in presenting its claim and may even prompt a settlement, once the opposing party becomes aware that the claim is supported by a funder.

Beware of the disadvantages – As with any investment, a good rate of return will be expected by the investing party, so it is likely that a significant proportion of any damages recovered will be due to the funder.

There is no statutory limit to the amount of funding, where such funding is permitted, however, Contingency Fee arrangements are currently prohibited in Hong Kong, as the Law Reform Commission's consultation on conditional fees in 2005, concluded that it was against public interest to have contingency arrangements.

Additionally, while funders may bring in expertise and validation of a claim, they may also bring in complexities in that they seek to have some control and/or influence in proceedings and possibly the settlement, where the funders reserve the right to approve any settlement.

Further, the initial preparation, presentation and arrangement of a funding can be a costly exercise particularly should a party fail to succeed in obtaining a funder and even where a funder is onboard, such costs may not be covered by the funding agreement.

Consideration:

The party must carefully consider the advantages and disadvantages of third-party funding dependent upon their own circumstances and should also carefully consider the funder that they intend to bring onboard and the terms and conditions of the proposed funding agreement.

As a minimum, the party must ensure that any potential funder has sufficient financial means to meet any potential financial liabilities that may arise, e.g. security for costs, and any terms and conditions relevant to the intended funding.

The Funding Agreement between the parties must be in writing and detail terms, conditions, requirements and procedures related to the funding itself.

HONG KONG CONSTRUCTION INDUSTRY STATISTICS...

Census & Statistics Department's construction output statistics for the third quarter ('Q3') of 2021 show:

- The gross value of construction works performed by main contractors in Q3 of 2021 increased 2.4% from a year earlier to **HK\$58.6 billion**. In real terms there was a **0.2%** increase for Q3 of 2021 after removing the effect of price changes.
- Private sector sites were up **7.4%** for Q3 of 2021 from a year earlier at **HK\$15.4 billion**.
- Public sector sites increased by **4.3%** for Q3 of 2021 to **HK\$18.7 billion**.
- Gross value of construction works at locations other than construction sites (maintenance, decoration, repair, electrical installations, etc.) was down **1.7%** for Q3 of 2021 at **HK\$24.5 billion**.
- Residential Building projects accounted for the largest share in gross value for Q3 of 2021 at **HK\$11.6 billion** (down 13.6%) with transport projects coming in second at **HK\$8.7 billion**, up **8.1%** from Q3 of 2020.

PROJECT NEWS...

Build King Civil Engineering Ltd. have been awarded a **HK\$1.2 billion** contract for the **Tung Chung New Town Extension – Tai Ho Interchange**. The works include:

- a) construction of Tai Ho Interchange connecting North Lantau Highway, Road P1 and Cheung Tung Road;
- b) construction of a section of dual two-lane Road P1 between Tung Chung East and Tai Ho Interchange;
- c) laying of fresh water, salt water and sewage rising mains; and
- d) associated civil, geotechnical, slope, structural, drainage, electrical and mechanical and landscaping works.

Works were to commence in **late 2021** and scheduled to take **51 months to complete**.

STAFF NEWS...

We are pleased to welcome **Joel Keen, Roger Liu, Steve Lam** and **Carrie Zhang** to our team.

Joel is an experienced planning engineer who has joined us as a Managing Consultant to provide a full range of construction planning & programming services, including pre-contract and post-contract services, forensic delay analysis.

Roger is a Senior E&M QS and **Steve** is a Senior Contract Management Specialist. Both are providing services on the Third Runway System at Hong Kong International Airport, including contracts administration services, claims and QS management and on various contracts.

Carrie has joined us as a Consultant, and is providing the full range of QS duties to our clients, as well as providing support to the Expert Witness in respect of Quantum Expert work.

Merry Christmas!



第三方資助的基本知識

在香港，第三方為調解及仲裁提供資金是一個比較新的發展，這個在爭議上沒有利益關係的第三方，介入代表原告或被告一方，為其爭議提供資金，以此換來經濟利益。

2021年12月

雖然第三方資助調解、仲裁甚至訴訟在其他司法管轄區已經存在一段時間，但香港直到最近才透過《2016年仲裁及調解法例(第三者資助)(修訂)條例草案》及《2017年仲裁及調解法例(第三者資助)(修訂)條例》允許第三方資助。

在此之前，由於香港未廢除普通法的助訟及包攬訴訟法則，這種類型的資助是被禁止的。

簡單來說，助訟可被視為在第三方干預下去鼓勵糾紛，而包攬訴訟則是指第三方提供財政支持，促進一方當事人提出異議，但附帶條件是，如果他們的訴訟成功，第三方將從收益中獲分一杯羹。

一個典例是“慫恿受害人起訴”，即是與受害人或事故無關的第三方通過勸說受害人起訴索償而獲得賠償的一部分。

這對建築業意味著什麼？

獲得資助的機會 - 當事人可能發現自己沒有經濟能力提出索償，或希望透過尋求經濟利益的第三方來管理與索償有關的風險和費用，而第三方亦可獲得補償金額中事先商定的部分。

與任何投資一樣，出資人會尋求符合自己風險狀況並有良好回報率的機會。出資人會自行對索償進行獨立的分析，以驗證成功的可能性，當中可能涉及損害賠償或反訴，因為出資人的回報是基於補償的金額。

隨著市場的發展，尋求提供此類服務的資助人亦越來越多，其中包括專業的第三方資助、銀行及律師事務所。這類型的資金可以是金錢或者其他與費用有關的援助，通常是法律費用和開支。在仲裁成功的前提下，對於資助人的經濟利益回報會在資助協議書中更詳細地說明。

然而，律師不得在其參與的仲裁程序中資助仲裁。第三方資助人亦受到《第三者資助仲裁實務守則》的約束，該守則是一項自我規管的守則，而非法律規定。

這種參與可能會無意中幫助尋求資金的一方審查其索償的策劃，甚至可能促使另一方因為意識到對方索償得到資助而達成和解。

提防不利因素 - 與任何投資一樣，資助一方都期望能夠得到良好的回報，因此，很可能追回賠償金額中比較可觀的部分會由出資人獲得。

在允許的情況下，資助的金額並無法定限制。但香港現時仍禁止根據勝訴收費的安排，法律改革委員會曾在 2005 年就此安排進行諮詢並得出結論認為根據勝訴收費的安排是違反公共利益的。

除此之外，雖然資助一方可以帶來專業意見及對索償的審核，但與此同時也會帶來複雜性，考慮到資助方保留批准和解的權利，他們可能試圖控制或影響訴訟程序及可能的解決方案。

此外，為獲得第三方資助而進行的初步準備、報告和安排可能消耗較多費用，尤其是如果未能成功獲得第三方資助，甚至在成功引進資助時，這些費用也可能不在資助協議的範圍內。

考慮因素:

當事人必須根據自己的實際情況仔細考慮第三方資助的優劣點，還要仔細考慮打算引入的資助者以及協議的條款細節。

當事人至少須確保可能的資助者都有足夠的財政能力來支付任何潛在的金融負債，例如成本擔保，以及與預期資金相關的條款。

雙方之間的資助協議必須採用書面形式，並詳細說明與資助本身有關的條款、條件、要求和程序。

香港建築業統計...

政府統計處2021年第三季（Q3）的建築業產量統計顯示：

- 扣除價格變動的影響後，2021年第三季度主要承建商的建築工程總價值比上年同期上升2.4%至**586億港元**，2021年第三季度的實際價值則上升**0.2%**。
- 2021年第三季度，私營機構工地比上年同期增加**7.4%**，達到**154億港元**。
- 2021年第三季度，公共部門工地增加**4.3%**，至**187億港元**。
- 2021年第三季度除建造工地（保養，裝修，維修，電力裝置等）外的建造工程總值下跌**1.7%**，至**245億港元**。
- 住宅建築項目在2021年第三季度的總價值中所佔份額最大，為**116億港元**（下降13.6%），第二大為交通項目，達**87億港元**，比2020年第三季度上升**8.1%**。

項目信息...

利基土木工程有限公司獲得一份價值**12億港元**的東涌新市鎮擴展 - 大蠔交匯處工程合約。工程包括：

- 興建連接北大嶼山公路、P1公路及翔東路的大蠔交匯處；
- 興建一段東涌東與大蠔交匯處的雙線雙程公路；
- 敷設食水、海水及污水壓力管道；和
- 相關的土木、岩土、斜坡、結構、排水、機電及園境美化工程。

工程將於 **2021 年底** 開始，預計需要 **51個月** 完成。

員工信息...

我們很高興歡迎 **Joel Keen**、**Roger Liu**、**Steve Lam** 和 **Carrie Zhang** 加入我們的團隊。

Joel 是一位經驗豐富的規劃工程師，加入我們為主管顧問，提供全方位的程式和規劃服務，包括合約前後管理服務、鑑證延誤分析。

Roger 是高級 E&M 測量師，**Steve** 是高級合約管理專家。兩位都在香港國際機場的第三跑道系統上提供服務，包括合約管理服務、索償和工料測量管理。

Carrie 加入我們專業顧問，提供全方位的工料測量服務，並在專家工程定量工作方面為專家證人提供協助。

聖誕快樂!