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CIETAC Hong Kong consults on draft guidelines on Third Party Funding

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Introduction

On 23 May 2016, CIETAC's Hong Kong Arbitration Center (CIETAC HKAC) issued for public consultation draft Guidelines for third party funding (the draft Guidelines).

Third party funding (TPF) is a hot topic in Hong Kong. The draft Guidelines come in the wake of recent initiatives to clarify the law on TPF in the territory, including a Law Reform Commission (LRC) consultation paper issued on 19 October 2015.

The LRC consultation paper proposed that the Arbitration Ordinance (Cap 609) be amended to resolve the apparent ambiguity in Hong Kong law surrounding the permissibility of TPF. It also recommended the development of "clear ethical and financial standards for Third Party Funders providing Third Party Funding to parties to arbitrations taking place in Hong Kong".

CIETAC HKAC's draft Guidelines set out "certain principles of practice and conduct which CIETAC HKAC encourages parties and arbitrators to observe in respect of actual or anticipated arbitration proceedings in which there is or may be an element of third party funding" (guideline 1.1).

The draft Guidelines were drafted by a Working Group consisting of 11 arbitration practitioners, including the authors. They comprise three parts: the first sets out general principles, the second applies to parties seeking funding and the third applies to arbitrators in affected cases.

General principles

Guidelines 1.1-1.4 set out the scope and applicability of the Guidelines. Notably, guideline 1.4 establishes that they are non-binding in nature.

Guideline 1.2 adopts the following definition of 'third party funding':

"For the purposes of these Guidelines, third party funding ("Funding") arises when a professional third person or entity ("Funder") contributes funds, or other material support to a party in arbitration ("Funded party") and has a direct economic interest in the award to be rendered in the arbitration."

Guideline 1.3 clarifies that “Funding under these Guidelines does not arise merely because a party arranges financial support from a group company; procures insurance; and/or obtains legal services on a deferred or contingency basis”.

Guidelines for parties

Guidelines 2.1-2.11 are aimed at parties who either seek or have obtained TPF. Under these provisions, such parties should:

- (1) ensure that the terms and conditions of any funding arrangement are set out in a formal arbitration funding agreement (AFA) and obtain legal advice before doing so (guidelines 2.1 and 2.2);
- (2) satisfy themselves as to the capital adequacy of any prospective funder and, if necessary, its incorporation (guidelines 2.3 and 2.4);
- (3) conclude non-disclosure agreements with all prospective funders and generally consider the effects of any applicable confidentiality provisions or laws when applying for or negotiating the terms of funding (guidelines 2.5-2.7);
- (4) consider “whether communications between itself and any prospective Funder may be disclosable in subsequent proceedings” and take early legal advice if necessary (guideline 2.8);
- (5) disclose circumstances arising from any funding that “might give rise to any possible issues of conflict of interest under applicable laws and rules” (guideline 2.9); and
- (6) consider the nature and extent of “the prospective funder’s control over proceedings” and “the termination and withdrawal provisions under the prospective AFA” and take legal advice where necessary (guidelines 2.10 and 2.11).

Guidelines for arbitrators

Under guidelines 3.1-3.4, an arbitral tribunal:

- (1) may, where it considers it appropriate, and in consideration of applicable laws or rules, invite (or in certain cases direct) any funded party to disclose its funding (guidelines 3.1 and 3.2);
- (2) should, upon becoming aware of the existence of TPF in respect of any proceedings, “positively consider its own independence and impartiality in light of this information and take any such steps as are required under applicable laws or rules” (guideline 3.3); and
- (3) may, “to the extent permitted by applicable laws or rules, consider the nature and extent of a parties’ [sic] Funding as a relevant factor when considering any application for security for costs” (guideline 3.4).

The draft Guidelines are available at <https://hkarbitration.files.wordpress.com/2016/05/cietac-draft-guidelines-17-may-16.pdf>. The public consultation period concluded on 19 July 2016.



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