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Legal Commentary



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Dispute Resolution

Hong Kong's Recently Passed Ordinance on Third Party Funding and HKIAC's Consultation on Proposed Amendments to the 2013 Rules

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In this June, a long-awaited law was passed and enacted by the Hong Kong Legislative Council, clearing the way for third parties to fund arbitration in Hong Kong.

What Does the New Law Say?

Under the new law, a third party funder is allowed, under a funding agreement in writing, to provide arbitration funding to a funded party, in return for the funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement.

Certain issues are worth noting, amongst other things, that:

- a. the parties will have to define what is a "successful" outcome within the meaning of the funding agreement. Particularly, the parties should specify what would happen in case of negotiation for settlement – it will not be rare that the funder wants to settle sooner whereas the funded party may be inclined to press on with the arbitral proceedings until a better sum is offered;
- b. while the new regime does not preclude the possibility that law firms act as funders, lawyers who act for any party to the arbitration are not allowed to fund those proceedings. In other words, contingency fees arrangement is still not open for arbitration sits in Hong Kong;
- c. The funded party must disclose the existence of the funding agreement, and the funder's name to the other side of the arbitral proceedings and to the tribunal. While failure to comply with this requirement does not render any person liable to judicial or other proceedings, the tribunal can take the failure into account if it is relevant to a question being decided in the arbitration.

Consultation on Proposed Amendments to the 2013 Administered Arbitration Rules

On 29 August, the HKIAC Rules Revision Committee commenced the public consultation process on proposed amendments to the 2013 HKIAC Administered Arbitration Rules¹.

The proposed amendments include, amongst other things:

- a. a new provision on the funded party's duty to disclose information of the funding agreement in the Notice of Arbitration or Answer (where applicable) or within 15 days after the funding agreement is made or terminated, if such agreement is entered into after the arbitration commences (see Proposed Article 44);
- b. an amended confidentiality provision to allow disclosure of arbitration information to a third party funder (see Proposed Article 45.3(e)).

The Committee also seeks views on whether an express provision should be added to allow the arbitral tribunal to award costs of third party funding as part of costs of arbitration. The public can submit their views to HKIAC by Monday, 2 October.

It is expected that HKIAC's proposed amendments to the 2013 Rules in relation to third party funding will be welcomed by the arbitration community. Further, an express provision should be added to allow the tribunal to award costs of third party funding as part of costs of arbitration so as to avoid any doubts. After all, tribunal will have a general power to decide the issue of costs in the arbitral proceedings.

Summary

The new law and HKIAC's proposed amendments are essential for Hong Kong to keep abreast with its common law jurisdiction fellows, such as UK, Australia and Singapore, and maintain itself as a leading arbitration seat in the world.

By removing the obstacle for third party funding in arbitration, many of the professional investment funders will look into the Hong Kong market for potential investment opportunity. This will also provide great assistance to party who has a strong case but limited resources.

As for law firms, it is anticipated that significant activities and instruction opportunities will emerge in this area. Further, law firms may serve as an ideal channel to bridge the investor's and the funded party's needs.

It is therefore believed that the new law will bring various positive impacts on the stakeholders in Hong Kong's arbitration market.

¹ See <http://www.hkiac.org/news/revision-2013-administered-arbitration-rules>

● **Important Announcement**

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