



30 October 2018

Mr. Wesley W.C. Wong, SC, JP
Solicitor General
Office of the Solicitor-General
Legal Policy Division of the Department of Justice
5/F, Main Wing, Justice Place
18 Lower Albert Road,
Central, Hong Kong

Dear Mr. Wong,

**Re: Consultation on Draft Code of Practice for
Third Party Funding of Arbitration and Mediation**

On behalf of the Academy of International Dispute Resolution & Professional Negotiation (AIDRN), we would like to express our support for the draft Code of Practice for Third Party Funding of Arbitration and Mediation issued by the Department of Justice (DoJ) in August 2018.

AIDRN is an academic institute that offers training, defines competency standards, and conducts researches and data analysis for dispute resolution and negotiation.

We appreciate DoJ's efforts in setting regulatory standards to ensure proper performance of third party funders. By addressing the ethical and procedural concerns, the Code will undoubtedly promote arbitration and mediation services in Hong Kong and add to the strength of Hong Kong in legal services and dispute resolution.

Our additional comments are set out below.

1. The responsibility for Subsidiaries and Associated Entities and regulation relating to the promotional materials of third party funders stated in the Code are good and reasonable.

2. Regarding the funding agreement, we note that paragraph 2.3 (1) requires the funded party to seek independent legal advice prior to receiving funds. However, for the purpose of maintaining substantial feasibility of the third party arrangement, it may be worthwhile to consider protecting the rights of the funded party to legal aid instead of making legal aid mandatory for the funded party. Therefore, we suggest replacing the paragraph with “take reasonable steps to ensure that the funded party is fully aware of its right to seek independent legal advice on the funding agreement before entering into it”.
3. Accordingly, we suggest refining paragraph 2.4 to “... in writing to the third party funder that the funded party is fully aware of its right to take independent legal advice on the funding agreement before entering into it”.
4. It is suggested that there should be separate minimum requirements of capital adequacy for arbitration and mediation. For funders of arbitration, the minimum capital adequacy requirement of HK\$20 million is reasonable and will probably ensure the funder has adequate financing needed for a claim. However, the same requirement of HK\$20 million for funders of mediation may limit the access of parties with unmeritorious claims to third party funding.

From the point of view of a funder with larger sums of money, a claim that has potential damages and/ or a higher chance of success is more likely to result in a return. Provided that the outcome of a dispute directly affects the funder’s financial interest, a funder would focus more on the legal aspects of the claim rather than the common interests of the parties.

We acknowledge that DoJ has put forward an initiative to promote the use of evaluative mediation in addition to facilitative mediation in the latest Policy Address. It is possible that a high capital requirement for funders of mediation will lead to a wide use of evaluative mediation which primarily provides the parties with advice with regard to their legal positions and court outcomes.

Nevertheless, with facilitative mediation being still a mainstream approach, we consider that the capital adequacy requirement of HK\$20 million should be reduced to HK\$10 million to attract different types of funders. Since mediation is generally less costly than arbitration, loosening up on the requirement would allow funders with relatively less but sufficient capital to support the parties who look to reach a settlement in mediation.

5. Given that third party funding could raise concerns about the impartiality and independence of the arbitrator or mediator, we suggest adding as follows:

Control

2.9 “The funding agreement shall set out clearly:

- (2) that the third party funder will not take any steps that cause or are likely to cause the funded party’s legal representative, arbitrator and mediator to act in breach of professional duties.”

6. Since the conversion of a mediated settlement agreement into an arbitral award (consent award) is possible, we consider that paragraph 2.11 should be revised as follows:

Disclosure

“To avoid doubt, the funded party to an arbitration or mediation does not have any obligation to disclose details of the funding agreement except as required by the arbitration body in an arbitration or mediation, or as otherwise required by law.”

We hope the above comments are useful for DoJ in finalizing the Code. Please feel free to contact the undersigned at admin@aidrn.org if we can be of further assistance.

Yours sincerely,



Prof. Dr. Francis LAW

President

Academy of International Dispute Resolution & Negotiation