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in mainland China**

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Developments of third-party funding in mainland China

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Summary

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IN SUMMARY

The article provides an overview of recent developments in third-party funding (TPF) in mainland China, focusing on updates to arbitration rules and the evolving landscape of TPF in both arbitration and litigation cases. Specifically, it discusses the introduction of TPF into the China International Economic and Trade Arbitration Commission (CIETAC) 2024 Arbitration Rules and the Shanghai International Economic and Trade Arbitration Commission (SHIAC) 2024 Arbitration Rules, highlighting provisions related to TPF disclosure and cost considerations. Additionally, the article examines the growth of TPF in the market and recent litigation cases involving TPF, emphasising the need for comprehensive regulatory frameworks to guide the practice.

DISCUSSION POINTS

- Introduction of TPF into arbitration rules
 - Disclosure requirement regarding TPF
 - Need for further refinement and clarification of TPF provisions
 - Introduction of complementary measures such as security for cost clauses alongside TPF
 - Development in regulations and arbitration rules necessary to guide the practice of TPF in arbitration and litigation cases
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REFERENCED IN THIS ARTICLE

- CIETAC 2024 Arbitration Rules
 - SHIAC 2024 Arbitration Rules
 - *Zhangzhihui v Liuruixia*
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In last year's article, we discussed the growth of third-party funding (TPF) in mainland China during 2022 and 2023 in our article 'The Development of TPF in Mainland China'. Since then, there have been further developments in this area, prompting further attention and reflection.

DEVELOPMENT OF ARBITRATION RULES ADOPTED BY ARBITRATION INSTITUTIONS IN MAINLAND CHINA

CIETAC 2024 Arbitration Rules

The China International Economic and Trade Arbitration Commission (CIETAC) introduced new arbitration rules (the CIETAC 2024 Rules) effective from 1 January 2024. One of the notable features of the CIETAC 2024 Rules, distinguishing them from the previously applicable 2015 Arbitration Rules, is the explicit inclusion of provisions concerning TPF in article 48.

Unlike other arbitration institutions in mainland China, which usually include TPF provisions solely within the 'Disclosure' section under the 'Arbitrators and Arbitral Tribunal' chapter, the CIETAC 2024 Rules stand out by placing these provisions within the 'Hearing' chapter. Article 48, titled 'Third Party Funding',^[1] is specifically outlined alongside clauses addressing interim

awards and early dismissal. The strategic placement underscores CIETAC's deliberate approach to comprehensively regulate TPF.^[2]

Article 48 of the CIETAC 2024 Rules addresses two aspects concerning TPF:

- Disclosure obligations: according to the first clause, parties are obliged to disclose TPF arrangements. The CIETAC 2024 Rules distinguish between proactive and upon-request disclosure, mandating parties to promptly disclose key details, including but not limited to 'the existence of the third-party funding arrangement, the financial interest therein, the name and address of the third-party funder and other relevant information'. Moreover, the arbitral tribunal reserves the right, if deemed necessary, to request parties benefiting from TPF to disclose additional information beyond the aforementioned specified scope.
- Consideration of TPF in cost allocation: the second clause empowers arbitral tribunals to consider TPF when determining arbitration costs and associated expenses, taking into account the existence of TPF and the funded party's adherence to the disclosure obligations.

Upon interpreting its content, several observations can be made. First, the CIETAC 2024 Rules have expanded the scope of disclosure compared to the practices observed in CIETAC arbitration cases involving TPF disclosed last year. As discussed in our previous article, a CIETAC arbitration award entailing TPF underwent judicial review by the Beijing Fourth Intermediate People's Court and Wuxi Intermediate People's Court.^[3] It was noted that parties in these instances only disclosed the existence of TPF arrangements and the name of the third party during the CIETAC arbitration proceeding. At that time, limiting disclosure to merely the existence of third-party funding arrangements and the third party's name appeared acceptable. This indicated a very narrow scope of disclosure required by arbitral tribunals in such cases administered by CIETAC. However, under the CIETAC 2024 Rules, the funded party is now obliged to proactively disclose not just the existence of TPF and the third party's name but also their 'economic interests'. Yet, the precise details of this requirement remain unclear, prompting questions such as whether the funded party needs to disclose proactively the percentage of returns the third party will receive, or whether the funder has agreed to pay adverse costs should the funded claim fail. Regardless, it is evident that the CIETAC 2024 Rules appear to impose a broader scope of disclosure or more stringent disclosure requirements compared to previous practical cases.

Second, the CIETAC 2024 Rules empower arbitral tribunals to request additional disclosure from the funded party when it deems it necessary. However, the specific circumstances triggering such instances and the extent of disclosure required remain subject to practical clarification and refinement. Questions arise regarding what circumstances qualify as 'necessary' for the arbitral tribunal to request additional disclosure beyond the funded party's proactive obligations, as well as how comprehensive this disclosure should be. In this regard, the CIETAC 2024 Rules afford the arbitral tribunal some flexibility in determining the scope of disclosure requested from the funded party, which may also encompass the full text of the funding agreement.

Third, the CIETAC 2024 Rules allow arbitral tribunals to consider TPF when deciding arbitration costs and related expenses. This consideration is discretionary rather than obligatory. In other words, the tribunal is not compelled to consider TPF when deciding

on cost allocation. Furthermore, if the tribunal chooses to consider TPF, the impact of its presence on cost allocation decisions remains uncertain.

In summary, the CIETAC 2024 Rules introduce comprehensive provisions regarding TPF, encompassing proactive disclosure obligations, potential requests for additional disclosure by the arbitral tribunal and discretionary consideration of TPF in cost allocation decisions. However, practical clarification and refinement are needed to fully understand the implications of these provisions in cases administered by CIETAC.

SHIAC 2024 Arbitration Rules

The Shanghai International Economic and Trade Arbitration Commission also known as the Shanghai International Arbitration Centre (SHIAC) also adopted new arbitration rules (the SHIAC 2024 Rules) effective as of 1 January 2024, which include provisions regarding TPF in article 35.

Compared to the CIETAC 2024 Rules, where TPF is addressed in the 'Hearing' chapter and specifically outlined in article 48 as third-party funding, the SHIAC 2024 Rules mentions TPF within one of the provisions under the 'Arbitral Tribunal' chapter's 'Information Disclosure' clause.

From the text,^[4] the SHIAC 2024 Rules solely address TPF from a disclosure perspective, indicating a requirement to disclose the entire funding agreement. Additionally, it remains uncertain whether 'other agreements relating to the arbitration case' might extend to agreements between the funded party's counsel and the funder in certain scenarios other than the one between the funder and the funded party. Furthermore, as this provision focuses exclusively on disclosure, it does not specify whether the arbitration tribunal should consider the TPF agreement when assessing costs or other related matters.

In addition to CIETAC and SHIAC, other arbitration institutions in mainland China have also recognised the importance of addressing TPF in their arbitration rules. For instance, the China Maritime Arbitration Commission included relevant provisions on TPF in its 2021 arbitration rules under the 'Hearing' clauses. Similarly, the Shanghai Arbitration Commission introduced provisions on TPF in its rules effective from July 2022, specifically under the 'Arbitral Tribunal' clauses.

This trend reflects a proactive approach by arbitration institutions in mainland China to adapt to the evolving landscape of dispute resolution and provide guidance in TPF-related matters. As practical experience in handling TPF cases grows, it is expected that more arbitration institutions will amend their arbitration rules to include more comprehensive regulations on TPF.

TPF IN ARBITRATION AND LITIGATION CASES IN MAINLAND CHINA

Over the past year, there has been a notable demand for TPF in the market, indicating significant growth. While specific statistics on TPF cases in mainland China are not publicly available due to confidentiality in arbitration proceedings, several arbitration institutions are discussing their approach to cases involving TPF. Additionally, a litigation case in Guangdong province highlighted the complexities surrounding TPF agreements for litigation, mirroring previous cases that questioned the legality of such agreements in court proceedings.

Regarding cases involving TPF over the past year:

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We have not identified any new arbitration cases involving TPF subject to judicial review. Nonetheless, several arbitration institutions have discussed their approach to arbitration cases with TPF involved over the past year,^[5] publicly expressing support for TPF arbitration. However, specific cases remain undisclosed due to the confidential nature of arbitration proceedings. In recent years, various arbitration institutions have been publishing annual reports to detail statistics of cases they have handled. We have observed that the Hong Kong International Arbitration Centre discloses the number of cases involving TPF, while mainland arbitration institutions do not provide such information in their annual reports. We expect that as the use of TPF becomes more widespread, mainland arbitration institutions will also share statistics on cases involving TPF and, moreover, post-case experiences within the confines allowed by arbitration confidentiality. These efforts will contribute to the advancement and enhancement of TPF regulations.

- As for litigation cases involving TPF in 2023, we noted a new case in Guangdong province. In this case, individual A and a legal consulting firm entered into an agreement with individual B.^[6] Under this agreement, A agreed to cover B's legal fees, litigation costs and other pre-litigation expenses associated with B's litigation against C. In exchange, B would pay service fees to A proportionally upon successfully recovering money from C through the litigation process. Subsequently, a dispute arose between A and B, leading A to sue B to claim the service fees. [The local court, in its second instance judgment, declared the agreement in valid for impeding the public interest and consequently denied A's request for the service fee payment.](#) The facts of this case closely resemble the one we discussed in our 2023 article, where the Shanghai Second Intermediate People's Court rendered a second instance judgment in 2022.^[7] The decision and outcome in this case also mirror the findings and rulings of the Shanghai Second Intermediate People's Court in 2022, both concluding the invalidity of the litigation funding agreement.

As mentioned in our 2023 article, 'TPF for arbitration is widely accepted, while the legality of TPF for litigation remains contested based on the extant cases'. From the cases we have newly discovered to date, this conclusion remains valid.

THOUGHTS ON TPF IN MAINLAND CHINA

Reflecting on our experience, we have represented clients in certain arbitration cases involving TPF. This includes acting for claimants seeking TPF and defending a respondent in a case where a claimant had secured TPF to commence proceedings. Observing the developments in TPF both in practice and regulations over the past year, we offer the following insights.

TPF in mainland China is still in its early stages, lacking comprehensive regulatory frameworks. Unlike jurisdictions such as Singapore and Hong Kong, where specific rules governing TPF institutions have been established (including capital adequacy requirements for the third party and a code of practice for TPF in arbitration), mainland China lacks similar regulatory frameworks for TPF. There is a pressing need to enhance the regulatory system concerning TPF. Moreover, although some arbitration institutions have begun integrating TPF into their commercial arbitration rules, those provisions in relation to TPF in these rules

remain limited. Further clarification or revisions may be required as TPF practices continue to evolve in practice. For instance, consider the following:

- Existing rules within mainland Chinese arbitration institutions are not sufficiently clear regarding the specific extent and scope of disclosure concerning TPF. It remains ambiguous whether these rules mandate disclosure solely of the existence of the funding agreement or require disclosure of the full agreement text. In cases where full disclosure is not mandated, consideration should be given to disclosing the funding scope, termination clauses and agreements between the funding institution and the represented law firm of the funded party (if applicable). These aspects significantly influence the potential for the respondent to recover costs in the event of success and the allocation of arbitration costs by the arbitral tribunal.
- It is also noted that not all of the above-mentioned aspects necessitate explicit provisions in arbitration rules. Decision-making authority on these matters can be entrusted to the arbitral tribunal within the existing preliminary framework rules. The arbitral tribunal retains the discretion to render decisions tailored to the specific circumstances of each case, after considering the disclosure requests from one party and the opposing party's defence arguments.
- Furthermore, it is necessary to consider the introduction of complementary systems alongside the TPF regime, such as the simultaneous introduction of the security for cost clause alongside TPF. Currently, arbitration institutions' commercial arbitration rules lack provisions regarding the security for cost clause.^[8] While TPF serves to safeguard the claimant's access to relief through arbitration, it is equally vital to acknowledge the respondent's entitlement to reimbursement for arbitration costs (given that registration fees, administrative fees and arbitrator's fees are typically fully advanced by the claimant in arbitration proceedings administered by arbitration institutions in mainland China, the respondent's arbitration costs here mainly refer to their legal fees and other expenses). Introduction of the security for cost would serve to balance the claimant's utilisation of TPF, mitigate the risk of respondents winning cases yet being unable to recover costs, and alleviate the potential for frivolous claims facilitated by TPF.

In terms of TPF for litigation, while none of the litigation cases mentioned in our articles from last year and this year are gazette cases from the Supreme People's Court and therefore lack binding force on future cases, the findings and conclusions regarding the invalidity of litigation funding agreements hold certain specific factual relevance in individual cases. However, they undoubtedly exert a significant influence on litigation funding in mainland China. We believe that there exists a demand and necessity for TPF in litigation. Moving forward, appropriate regulations could be introduced through civil procedure rules, lawyer practice standards and self-regulatory standards for TPF institutions to help regulate and guide the development of TPF in litigation.

In summary, in mainland China, while TPF practices have developed, corresponding [regulatory frameworks](#) remain somewhat lacking and require further refinement. We anticipate that as TPF practices progress further and international insights are incorporated, there will be clearer, revised and regulated provisions for TPF across legal and regulatory frameworks. This entails updates to arbitration laws, civil procedure laws, relevant judicial interpretations, arbitration institution rules, industry self-regulation standards and professional practice norms.

Endnotes

^[1] Article 48, Third-Party Funding: ‘1. *Once a third party funding agreement is concluded, the funded party shall communicate to the Arbitration Court, without any delay, the existence of the third party funding arrangement, the financial interest therein, the name and address of the third party funder and other relevant information. The Arbitration Court shall forward such information to the other parties and the arbitral tribunal. The arbitral tribunal may order the funded party to disclose other relevant information of the funding if it deems necessary.* 2. When deciding the costs of arbitration and other fees in the award, the arbitral tribunal may take into account of the existence of the third party funding arrangement and the fact whether the requirements set forth in the preceding Paragraph 1 are complied with by the funded party.’

^[2] *TPF provisions in CIETAC 2024 Rules align with the Guidelines for Third Party Funding for Arbitration issued by the CIETAC Hong Kong Arbitration Centre (the Guidelines) and the content of its own International Investment Arbitration Rules (For Trial Implementation). As early as 1 September 2017, the CIETAC Hong Kong Arbitration Centre issued the Guidelines, aimed at providing certain standards for the application of TPF in arbitration proceedings and the conduct of participants. CIETAC International Investment Arbitration Rules (For Trial Implementation), which have been in effect since 1 October 2017, detail parties’ disclosure obligations regarding TPF, arbitral tribunals’ authority to request disclosure and the consideration of TPF in cost decisions. The provisions regarding TPF in CIETAC 2024 Rules share some similarities with the aforementioned Guidelines and investment arbitration rules, particularly in terms of arrangement, position within the clauses, and content, although they are not entirely identical.*

^[3] *Ruili Airlines Limited Company v Yunnan Jingcheng Group Limited and others.*

^[4] Article 35, Information Disclosure: ‘3. In order to ensure that the arbitrators fulfill their disclosure obligations based on sufficient information of the case, any party shall notify the Secretariat in writing during the arbitral proceedings of any matter that may affect the impartiality and independence of the arbitrators, including but not limited to, agreements with its representatives or agreements with a non-party to finance its arbitration case, or any other agreement relating to the arbitration case, for transmission by the Secretariat to the tribunal and the parties.’

^[5] For instance, SHIAC mentioned in a public speech that they handled several third-party funding cases in the past two years.

^[6] *Zhangzhahui s Liuruixia*, Guangdong Province Qingyuan District Intermediate People’s Court, Case No. (2023) Yue 18 Min Zhong 1259, Civil Judgment.

^[7] *Shanghai Xu Ding Capital Management Limited v Shanghai Weian Internet Technology Limited*, Shanghai Jingan District People’s Court, Case No. (2020) Hu 0106 Min Chu 2583, Civil Judgment; and *Shanghai Xu Ding Capital Management Limited v Shanghai Weian Internet Technology Limited*, Shanghai Second Intermediate People’s Court, Case No. (2021) Hu 02 Min Zhong 10224, Civil Judgment.

^[8] BAC Rules For International Investment Arbitration include provisions on security for cost.



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