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A detailed comparison of third-party funding regulations in Hong Kong and Singapore

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ABSTRACT

Third-party funding (TPF) has played a major role in international arbitration over the last decade. Despite uncertainties and continuing discussions on whether TPF should be regulated, Singapore and Hong Kong successively passed laws to legalize and regulate TPF, and both jurisdictions have become leading pioneers globally. This can be largely attributed to their competition with each other to be Asia's leading arbitration centre, and by regulating the use of TPF, they have moved closer to this goal. However, even though both wish to ensure the legality of TPF in international arbitration, their laws and the consequences of non-compliance differ dramatically in each jurisdiction. Moreover, although these two jurisdictions are leading arbitration centres, their laws on TPF have not yet been analysed thoroughly in the existing scholarship. This article aims to fill the gap, following the comparative law methodology and analysing the rules on TPF in Hong Kong and Singapore. It also aims to investigate the advantages and disadvantages of the laws adopted differently by the two jurisdictions and answer two important questions: (i) What laws could create better conditions for funders? and (ii) What can be done to improve those conditions?

KEYWORDS

Third-party funding; Hong Kong; Singapore; international arbitration; mediation

I. International arbitration and the role of third-party funding

International arbitration is a default mechanism for settling international disputes. Despite its growing presence in the world, it also has many problems,[1] one being the high cost of international arbitration. According to the Queen Mary and White & Case 2018 International Arbitration Survey, high costs are the worst characteristic of international arbitration.[2] In investment arbitration, this situation is so clear that in the paper submitted by the European Union to the United Nations Commission on

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[1]For various problems of international arbitration, see Stephen M Schwebel, Luke Sobota, and Ryan Manton, *International Arbitration: Three Salient Problems* (Cambridge University Press 2020); Emmanuel Gaillard, 'Three Philosophies of International Arbitration' in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009,* vol 3 (Brill 2010) 305; A F M Maniruzzaman, 'Conflict of Laws Issues in International Arbitration: Practice and Trends' (1993) 9(4) Arbitration International 371. See also Kimberly Chen Nobles, 'Emerging Issues and Trends in International Arbitration' (2012) 43(1) California Western International Law Journal 77.

[2]In this survey, 67% of the participants chose cost as the worst characteristic of international arbitration. Queen Mary University and White & Case, '2018 International Arbitration Survey: The Evolution of International Arbitration' 8 <https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration> accessed 25 September 2020.

International Trade Law (UNCITRAL) Working Group III, it is stressed that high costs have a 'prohibitive' effect that discourages a high number of investors from arbitration.[3] This means that while international arbitration is a readily available dispute settlement mechanism, it is not considered a viable option for many potential users due to their financial incapacity. This creates an accessibility problem for international arbitration.

Third-party funding (TPF) is a financial tool that seeks to solve this problem, among others, and satisfies the needs of certain users of international arbitration.[4] However, there is no uniform regulation or guidance for funders or funded parties. Moreover, TPF is even illegal in some common law jurisdictions because of the ancient doctrines of maintenance and champerty. Hong Kong and Singapore were such jurisdictions. However, both passed laws in 2017 to make TPF legal in international arbitration,[5] thus making TPF an available financial tool for parties in both jurisdictions. This article examines the laws passed there on TPF and analyses their advantages and disadvantages.

A. The reason for choosing Hong Kong and Singapore

This article compares Hong Kong and Singapore. The reason for choosing these jurisdictions is that they are the only ones where TPF has recently been legalized. Before explicit laws were set in place, in Singapore, TPF was illegal, while in Hong Kong, it was not clear whether TPF was legal in arbitration. The two jurisdictions have adopted a similar approach to TPF. Thus the main reason for comparing Hong Kong and Singapore in this article is the similar development of TPF in both jurisdictions. Therefore, their need for specific laws on TPF was the same: to stress that TPF is legal in international arbitration.[6] Another reason is that TPF laws give Hong Kong and Singapore, both common law jurisdictions, an edge in their competition with each other to attract more arbitration cases. Unlike other common law jurisdictions, however, they did not abolish the ancient champerty and maintenance doctrines, and therefore TPF was illegal.[7] Hong Kong and Singapore, as explained in the following paragraphs, have now followed other common law jurisdictions by abolishing those ancient doctrines, and have passed specific laws on TPF and made TPF legal and available to parties in arbitration. Thus both jurisdictions embraced the opportunity to legitimize this innovative financial tool.

[3]United Nations Commission on International Trade Law Working Group III (Investor–State Dispute Settlement Reform), 35th Session in New York, 23–27 April 2018, 'Possible Reform of Investor–State Dispute Settlement (ISDS) Submission from the European Union' 11. For further discussions on issues in investment arbitration, see <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers> accessed 2 October 2020. Here, cost is one of the issues identified, among others. For further discussion on cost, see Gabriel Bottini and others, 'Excessive Costs and Recoverability of Cost Awards in Investment Arbitration' (2020) 21(2–3) Journal of World Investment and Trade 251.

[4]TPF offers opportunities to 'companies of all sizes', as stressed on Burford's website. See <https://www.burfordcapital.com/how-we-work/with-companies> accessed 2 October 2020.

[5]Related laws and case law are explained in the following sections of this article.

[6]With the new laws: TPF is now legal in Hong Kong for arbitration, both domestic and international; in Singapore, TPF is legal only for international arbitration. Therefore, all references herein to the legality of TPF in arbitration mean for international arbitration in Singapore, and for both domestic and international arbitration in Hong Kong. Hong Kong's TPF regulations also include TPF for mediation.

[7]On the subject of the abolition of the common law offences of maintenance and champerty: in England, see the Criminal Law Act 1967; in Canada, see Section 9 of the Criminal Code; in Australia, see the Maintenance, Champerty and Barratry Abolition Act 1993. In the United States (US), depending on the state, those doctrines are either never applied or applied with different levels of scrutiny. For further explanations on champerty and maintenance in the US states, see Marie Stoyanov and Olga Owczarek, 'Third-Party Funding in International Arbitration: Is It Time for Some Soft Rules?' (2015) 2(1) BCDR International Arbitration Review, 171.

Those similar motivations and developments in Hong Kong and Singapore constitute excellent reasons to analyse their laws with a comparative law methodology.

Since the last decade, there has been strong demand for TPF in international arbitration. Hong Kong and Singapore thus legalized TPF so as not to fall behind in the race to become leading international arbitration jurisdictions. The TPF laws boost these cities' leading roles and increase their chances of being selected as an arbitration seat. Hong Kong and Singapore are unique in how they experienced this dramatic change while regulating TPF with specific laws. They passed laws in the same year, 2017, in March in Singapore,[8] and June in Hong Kong.[9] However, while both jurisdictions were motivated by the same goals and their laws share many similarities, a closer look also shows that each has added distinctive features to its laws. In particular, the consequences of non-compliance with their rules differ dramatically in these jurisdictions.

In the next section, TPF rules in the two jurisdictions are analysed. The advantages and disadvantages of their laws are compared to show their possible benefits and drawbacks. While doing so, the experience of other common law jurisdictions where TPF has enjoyed a long history in the market is used to achieve a more solid assessment.

B. History

The status quo of TPF in Hong Kong and Singapore, respectively, was similar before 2017, in light of the decisions of their highest courts. In *Unruh v Seeberger*, Justice Ribeiro PJ of the Hong Kong Court of Final Appeal expressly left open the question of 'whether maintenance and champerty apply to agreements concerning arbitrations taking place in Hong Kong'.[10] Thus, in Hong Kong, practitioners were uncertain as to whether champerty and maintenance were applicable to arbitration proceedings. This did not give any chance for TPF to develop in Hong Kong. Perhaps even more stringent was the requirement outlined in Singapore, where the Court of Appeal had expressly concluded that the doctrines of champerty and maintenance were as applicable to arbitration as they were to litigation.[11] Therefore, TPF was very clearly prohibited in Singapore due to these two doctrines.

In Hong Kong, because of the uncertainty, Hong Kong's Law Reform Commission created a subcommittee on TPF in 2013 to clarify the law and make the necessary amendments. It published a consultation paper on TPF after a little longer than 2 years of study between June 2013 and October 2015.[12] Since the purpose of this article is to analyse the current situation in the two jurisdictions, the *Unruh* case and the working progress of the Third-Party Funding for Arbitration Sub-Committee of the Law Reform Commission of Hong Kong between 2013 and 2016 are not discussed in detail. Furthermore, it is important to note that the global trend had been moving in the direction of funding and

[8]Civil Law (Third-Party Funding) Regulations 2017 <https://sso.agc.gov.sg/SL-Supp/S68-2017/Published/20170224?DocDate=20170224> accessed 18 April 2020.

[9]Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 <https://www.gld.gov.hk/egazette/pdf/20172125/es1201721256.pdf> accessed 18 April 2020 (hereinafter 'Ordinance').

[10]*Unruh v Seeberger* (2007) 10 HKCFAR 31 <https://www.hklii.hk/eng/hk/cases/hkcfa/2007/10.html> accessed 18 April 2020 (hereinafter '*Unruh*').

[11]*Otech Pakistan Pvt Ltd v Clough Engineering Ltd and Anor* (2006) SGCA 46 <https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/2006-sgca-46.pdf> (hereinafter '*Otech*').

[12]The Law Reform Commission of Hong Kong, *Third Party Funding for Arbitration Sub-Committee Consultation Paper* <https://www.hkreform.gov.hk/en/docs/tpf_e.pdf> accessed 13 January 2020.

abolition of the two doctrines long before Hong Kong and Singapore. For example, in the United Kingdom, with the Criminal Law Act 1967, maintenance and champerty were abolished as crimes. When awards are conferred by International Centre for Settlement of Investment Disputes (ICSID) tribunals, TPF has been conspicuously mentioned as an acceptable and well-established financial tool.[13] The international legal community has had much more to rave about when it comes to TPF; however, the details will not be elaborated here since the purpose of this article is to analyse the current situation in the two jurisdictions. Currently, the common law doctrines of champerty and maintenance have ceased to affect TPF in international arbitration in Singapore and Hong Kong.

Similarly, to allow TPF, after preparing the draft TPF law, Singapore's Ministry of Law (hereinafter 'Ministry') had sought public comments before passing the Bill.[14] Additionally, Singapore has been seeking further public comments on the current framework of TPF after passing the Bill.[15] This shows that Singapore might pass more laws in the coming years according to the needs of practice, depending upon the comments the Ministry receives. The case in Hong Kong is similar. Thus we can conclude that the two jurisdictions shared a parallel process to pass TPF laws. Hong Kong's and Singapore's lawmaking procedures are nearly identical, as both include extensive public consultation, during which working groups create interim reports based on comments from the public. In view of public support, Hong Kong and Singapore passed their laws and made TPF legal in their jurisdictions.

The purpose of presenting the above brief history about the status quo of TPF before the laws, and how both jurisdictions prepared their TPF laws, is to demonstrate why TPF laws were needed in the first place. Now, the article continues with its main objective, which is presenting a comprehensive analysis of the laws in the two jurisdictions.

II. Third-party funding laws in Hong Kong and Singapore

Singapore passed its TPF law before Hong Kong. The Civil Law (Amendment) Act 2017 was passed by the Parliament on 10 January 2017, while the Civil Law (Third-Party Funding) Regulations 2017 were published on 24 February 2017 and came into force on 1 March 2017,[16] making TPF legal for international arbitration in Singapore. In Hong Kong, the Arbitration and Mediation Legislation (Third-Party Funding) (Amendment) Ordinance 2017 was enacted by the Legislative Council on 23 June 2017. The bill was published in the Gazette on 30 December 2016 and passed on 14 June 2017.[17] However, specific sections abolishing maintenance and champerty and making TPF explicitly legal in Hong Kong, namely Divisions 3 and 5 of the Ordinance, only came into force on 1 February 2019, together with the Code of Practice for Third-Party Funding of

[13] *Giovanni Alemanni and Ors v Argentine Republic*, ICSID Case No ARB/07/8, 278.

[14] 'Public Consultation on the Draft Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016' <https://www.mlaw.gov.sg/news/public-consultations/public-consultation-on-the-draft-civil-law--amendment--bill-2016> accessed 22 September 2020. One of the missions of Singapore's Ministry of Law is to advance access to justice. For further details about Singapore's Ministry of Justice, see <https://www.mlaw.gov.sg/about-us/what-we-do> accessed 2 October 2020.

[15] 'Public Consultation to Seek Feedback on the Third-Party Funding Framework' <https://www.mlaw.gov.sg/news/public-consultation-third-party-funding> accessed 15 December 2019.

[16] Singapore Civil Law (Third-Party Funding) Regulations 2017 (hereinafter 'Singapore Regulations'), S 1.

[17] 'Bills Committee on Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016' <https://www.legco.gov.hk/yr16-17/english/bc/bc102/general/bc102.htm> accessed 26 April 2019.

Arbitration.[18] Thus, even though the law was passed in Hong Kong in 2017, TPF only became legal in arbitration starting from 1 February 2019.

TPF has now been made legal for its users in the two leading arbitration centres in Asia. In the following paragraphs of this article, the TPF laws in the two jurisdictions are analysed. First, the article summarizes the laws in the two jurisdictions; then, it continues with a comparison of the relevant laws.

A. TPF regulation in Singapore

Singapore and Hong Kong are the first jurisdictions in the world where TPF in international arbitration is explicitly regulated by legislation.[19] In terms of the timing of the legislation, Singapore is ahead of Hong Kong.[20] As Singapore's relevant legislation is examined, one might be under the impression that the law brings only a few regulations on TPF. Now, what the law brings into the Singapore legal market will be analysed further.

1. Civil Law (Amendment) Act 2017

In Singapore, the Civil Law (Amendment) Act 2017 (hereinafter 'the CLAA') came into force on 1 March 2017.[21] The CLAA contains only three articles and says little about TPF. This is consistent with the light-touch approach adopted by both Singapore and Hong Kong, as neither wishes to regulate the practice strictly. Indeed, Singapore has gone to great lengths to foster their deregulation efforts: the CLAA is considerably shorter, and there is no code published by the Legislative Council of Singapore. Instead, reputable institutions for arbitrators, lawyers and funders have taken it upon themselves to develop and publish their guidelines. It can be concluded that secondary legislation has much more to say on TPF in Singapore.

The CLAA adds Sections 5A and 5B to the Civil Law Act. With these two new sections, most importantly, the maintenance and champerty doctrines are abolished as regards dispute resolution proceedings starting from 1 March 2017. Definitions of dispute resolution proceedings are effectively parameterized by the Third-Party Funding Regulations 2017, which came into force on the same day as the CLAA.

Apart from this, the CLAA sets a very clear background for the operation of TPF. First of all, TPF is now clearly allowed in Singapore. Section 5B of the CLAA indicates that when a qualified third-party funder funds a case regarding dispute resolution proceedings, this cannot be 'contrary to public policy or otherwise illegal by reason that it is a contract for maintenance and champerty'.[22] Every qualifying third-party funder must ensure

[18]'Code of Practice for Third Party Funding of Arbitration' <https://www.info.gov.hk/gia/general/201812/07/P2018120700601.htm> accessed 8 May 2019.

[19]Oliver Gayner and Susanna Khouri, 'Singapore and Hong Kong: International Arbitration Meets Third Party Funding' (2017) 40(3) Fordham International Law Journal 1033, 1046. Rebecca Mulder and Marc Krestin, 'Third-Party Funding in International Arbitration: To Regulate or Not to Regulate?' *Young ICCA Arbitration Blog* <https://www.youngicca-blog.com/third-party-funding-in-international-arbitration-to-regulate-or-not-to-regulate> accessed 28 September 2020.

[20]Singapore's parliament passed the legislation in January 2017 <https://www.mondaq.com/civil-law/672342/spotlight-on-third-party-funding-in-singapore-and-hong-kong> accessed 25 September 2020. The Legislative Council of Hong Kong passed the legislation in June 2017 <https://www.legco.gov.hk/yr16-17/english/bc/bc102/general/bc102.htm> accessed 19 November 2020.

[21]Singapore Civil Law (Amendment) Act 2017 <https://sso.agc.gov.sg/Acts-supp/2-2017> accessed 20 November 2020 (hereinafter 'CLAA').

[22]Ibid, S 5B(2).

that the requirements prescribed are complied with. The Ministry can prescribe the requirements related to the qualifications of third-party funders, the scope of application of Section 5B, and the requirements that the third-party funder and the funded party must comply with.[23] Giving the authority to the Ministry to regulate such requirements gives the CLAA more flexibility and versatility.

The sanction for a funder for non-compliance with the prescribed requirements is important. The CLAA provides severe sanctions for third-party funders who do not comply with the prescribed requirements. According to the relevant section, 'if a Third-Party Funder ceases to be a qualifying Third-Party Funder or does not comply with the prescribed requirement … the rights of the Third-Party Funder … are not enforceable'.[24] Then, any third-party funder who wants to operate in Singapore must closely follow these requirements as prescribed by the CLAA and the Ministry, so that the funder will not lose its rights under or arising out of a TPF contract.

However, Section 5B(5) of the CLAA states that third-party funders can apply to a court or arbitral tribunal for relief from this sanction brought by the law. This shows that even if funders breach the prescribed requirements, there is still a relief opportunity for them. However, non-compliance with the prescribed requirements is serious, since funders' rights under the funding agreements become unenforceable by default.

Lastly, there is also an amendment regarding the Legal Profession Act — the addition of subsections 3A and 3B to Section 107 — brought by the CLAA. This amendment will be examined under subsection 3 below, together with other existing rules in the Legal Profession Act.

2. Civil Law (Third Party Funding) Regulations 2017

More rules have come into force with secondary legislation in Singapore. The Minister for Law issued the Third-Party Funding Regulations 2017 (hereinafter 'Regulations'), which also came into force along with the CLAA on 1 March 2017. First of all, in the Regulations, dispute resolution proceedings are described as not only international arbitration proceedings but also as court and mediation proceedings in any way connected with international arbitration proceedings, as application for a stay of proceedings under the International Arbitration Act and any other application for the enforcement of an arbitration agreement, and as any proceedings in connection with the enforcement of an award under the International Arbitration Act.[25]

The most important feature of Section 3 of the Regulations is that TPF is available as long as it is related to international arbitration proceedings. Thus this shows that Singapore officially abolished the maintenance and champerty doctrines for international arbitration, and every proceeding related to international arbitration, as indicated in the Regulations. The Regulations also brought some standards for the qualification of third-party funders. According to the relevant section, third-party funders must carry on the principal business of the funding of the dispute resolution proceedings to which the third-party funder is not a party, and must have not less than SGD5 million, or the equivalent amount in foreign currency, in paid-up share capital, or the same amount in

[23]Ibid, S 5B(8).
[24]Ibid, S 5B(4).
[25]Singapore Regulations (n 16), S 3.

managed assets.[26] Importantly, there is no requirement here for a third-party funder to carry on the principal business of funding in Singapore, and the funder can carry on its principal business elsewhere.

In the same section, in paragraph 2, 'managed assets' are defined as:

(a) moneys and assets contracted to, drawn down by or under the discretionary authority granted by investors to the Third-Party Funder and in respect of which it is carrying out fund management;
(b) moneys and assets contracted to the Third-Party Funder and under the non-discretionary authority granted by investors to the Third-Party Funder, and in respect of which the Third-Party Funder is carrying out fund management;
(c) moneys and assets contracted to the Third-Party Funder, but which have been subcontracted to another party and for which the other party is carrying out fund management, whether on a discretionary authority granted by investors or otherwise.[27]

In terms of 'moneys and assets', these are contracted to the third-party funder under the discretionary or non-discretionary authority granted by investors to the third-party funders.[28] Moneys and assets are important because for a third-party funder to be qualified under the Regulations, they must hold no less than SGD5 million in assets.

3. Legal Profession Act

Paragraph 10 of Section 5B of the CLAA outlines the definitions of 'arbitral tribunal', 'dispute resolution proceedings', 'funded party', 'qualifying Third-Party Funder', 'Third-Party Funder' and 'third-party funding contract'. There is also a related amendment to Section 107 of the Legal Profession Act in Singapore, brought by the CLAA. This amendment is important because it clarifies the lawyer's position in terms of the funding process or helping the client to find a suitable funder. According to this amendment, a solicitor is not prevented from:

(a) introducing or referring a Third-Party Funder to the solicitor's client, so long as the solicitor does not receive any direct financial benefit from the introduction or referral;
(b) advising on or drafting a third-party funding contract for the solicitor's client or negotiating the contract on behalf of the client; and
(c) acting on behalf of the solicitor's client in any dispute arising out of the third-party funding contract.[29]

Subsection 3B of the same section indicates that:

> in subsection (3A) … 'direct financial benefit' does not include any fee, disbursement or expense payable by the solicitor's client for the provision of legal services by the solicitor to the client; 'Third-Party Funder' and 'third-party funding contract' have the same meanings as in section 5B of the Civil Law Act (Cap 43).[30]

[26]Ibid, S 4(1).
[27]Ibid, S 4(2).
[28]Ibid, S 4(3).
[29]Singapore Legal Profession Act (Ch 161), S 107(3A).
[30]Ibid, S 107(3B).

So, now there is consistency between different acts in Singapore. The Legal Profession Act also has further rules regarding funding by lawyers apart from the provisions added by the CLAA. Section 107 of the Legal Profession Act prohibits certain conducts: no solicitor shall purchase any interest of his or her client, or enter into any agreement by which he or she is retained or employed which stipulates or contemplates payment only in the event of success.[31] Thus solicitors are banned from obtaining interest from their client's case and they cannot enter into contingency fee agreements with their clients. This prohibition is strengthened by Subsection 2 of the same section. According to this subsection, nothing in the Legal Profession Act shall be construed to give validity to any purchase or agreement prohibited by Subsection 1.[32]

Subsection 4 of the same section indicates that the section shall apply to a law corporation or a limited liability law partnership accordingly.[33] This section clearly sets the rules for the funding market in Singapore. According to this, lawyers are not allowed to fund, but they might, and perhaps should, help clients with funding options. This kind of help is now allowed subject to certain conditions as indicated in Section 107(3) of the Legal Profession Act. Most importantly, lawyers will not claim any direct benefits for introducing or referring their clients to a funder.

4. Other guidelines in Singapore

The rules in Singapore on TPF can be summarized as follows. Apart from the CLAA and the Regulations, Singapore does not have one specific TPF code issued by the Minister for Law that is comparable with the Code of Practice issued by the Secretary for Justice in Hong Kong. However, three institutions have published their guidelines in Singapore and set standards for TPF proceedings for lawyers, arbitrators and funders.

The Singapore Institute of Arbitrators (SIArb) Third-Party Funding Guidelines (18 May 2017) and the accompanying notes to the Guidelines are available on the Institution's website. Thirteen funders have already pledged their support for the Guidelines.[34] The second guideline, issued by the Singapore International Arbitration Centre (SIAC), is not for funders but for arbitrators, and sets out the standards for cases administered by the SIAC under SIAC Rules.[35] The SIAC has also published investment arbitration rules which contains rules related to TPF.[36] Articles 24(1L), 33(1) and 35 of the SIAC Investment Arbitration Rules 2017 have provisions related to TPF. Apart from the two institutions, the Law Society of Singapore has promulgated a guideline for lawyers for best practice.[37] Those guidelines are not mandatory; however, they help to create a uniform practice for the funding market in Singapore. Thus we can conclude that apart from the law that has come into force recently, there are also guidelines in Singapore for funders,

[31]Ibid, S 107(1).
[32]Ibid, S 107(2).
[33]Ibid, S 107(4).
[34]SIArb Third Party Funding Guidelines (18 May 2017) <https://siarb.org.sg/index.php/resources/third-party-funding> accessed 5 November 2020 (hereinafter 'SIArb Guidelines').
[35]Singapore International Arbitration Centre (SIAC) Practice Note (31 March 2017) <http://www.siac.org.sg/images/stories/articles/rules/Third%20Party%20Funding%20Practice%20Note%2031%20March%202017.pdf> accessed 21 September 2020.
[36]SIAC, Investment Arbitration Rules of the SIAC, SIAC Investment Rules (1st edn, 1 January 2017) <http://www.siac.org.sg/our-rules/rules/siac-investment-arbitration-rules> accessed 21 September 2020.
[37]The Law Society of Singapore Guidance Note 10.1.1 Third-Party Funding <https://www.lawsociety.org.sg/wp-content/uploads/2020/03/Third-Party-Funding-GN-10.1.1.pdf> accessed 21 September 2020.

arbitrators and lawyers. With those professional conduct rules, Singapore has set standards for legal practitioners and given them another task: advising clients on funding opportunities. This arguably creates another task for future lawyers, as they are now expected to advise not only on legal merits but also on finance options for their clients. Since funding is becoming more common, and more cases are gaining access to some means of funding, this new role of lawyers might become more important in the future.

B. TPF regulation in Hong Kong

Unlike in Singapore, there are no separate guidelines issued by different institutions in Hong Kong. There is only one code of practice as a guideline for third-party funders: the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, certain provisions of which came into force on 23 June 2017.[38] The important parts of the Ordinance which give TPF its legal and valid status in Hong Kong came into force somewhat later, on 1 February 2019, together with the Code of Practice, which is an annex (namely Division 4) to the Ordinance.[39] Now, this Ordinance is analysed.

1. Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017

TPF of arbitration is legal in Hong Kong, following the amendment brought by Part 10A of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (hereinafter 'Ordinance'). This Ordinance has amended the Hong Kong Arbitration Ordinance and has brought clarity and certainty regarding the legality of TPF in arbitration and mediation in Hong Kong. Part 10A of the Ordinance has six divisions.

Division 1: Purposes. The first division starts with Section 98E and states the purpose of the TPF of arbitration. According to Section 98E, the purposes of this part are to:

(a) ensure that third-party funding of arbitration is not prohibited by particular common law doctrines;
(b) provide for measures and safeguards about third-party funding of arbitration.[40]

The common law offences referred to in the Ordinance are champerty and maintenance. By abolishing them, the Legislative Council of Hong Kong removed the obstacles to TPF. Therefore, it is salient that the main purpose of the amendment is to ensure that TPF is legal for arbitration as well as mediation in Hong Kong. The first purpose of the Ordinance is to emphasize the legality of TPF without leaving any space for doubt. By stating that TPF is not prohibited, the Ordinance achieves this purpose. The second purpose of the amendment is to provide certain safeguards for the TPF of arbitration. Thus, for this purpose, a Code of Practice for Third-Party Funding of Arbitration came into force on 1 February 2019; it is elaborated further in the subsequent sections of this article.

[38]Hong Kong Ordinance (n 9).
[39]Ibid.
[40]Ibid, S 98E.

Division 2: Interpretation. Division 2 follows the interpretation of Part 10A. In this Division, the definition of basic concepts related to TPF has been given. Importantly, arbitration includes the following proceedings under the Ordinance: '(a) court proceedings; (b) proceedings before an emergency arbitrator and (c) mediation proceedings'.[41]

This shows that as long as proceedings are related to arbitration, any ancillary proceeding related to arbitration can also be covered by TPF. For example, if the TPF of a specific arbitration requires enforcement of the award in the court, then these enforcement proceedings can also be financed by a third-party funder. Thus, as long as it is related to arbitration proceedings, funding of all proceedings before courts, emergency arbitrator and mediation are also allowed. For example, TPF is also allowed for the enforcement of the arbitration award in court or mediation proceedings related to that arbitration under this Ordinance. In the same section, many other important terms are also defined. Importantly, costs are defined as the costs and expenses of arbitration and include (a) pre-arbitration costs and expenses and (b) the fees and expenses of the arbitration body.[42]

Another important definition in Section 98 is the definition of a third-party funder. According to this section, a third-party funder is a person:

(a) who is a party to a funding agreement for the provision of arbitration funding for an arbitration to a funded party by the person and
(b) who does not have an interest recognized by law in the arbitration other than under the funding agreement.[43]

This clarifies an important limitation regarding which entities can act as a third-party funder. In this connection, lawyers of the case cannot be a third-party funder in that case because they would have another interest other than under the funding agreement. The funder should be an external party who has no interest in or relation with the case other than the funding agreement. The section further elaborates what a 'person who does not have an interest in an arbitration' means. This includes:

(a) a person who does not have an interest in the matter about which an arbitration is yet to commence and
(b) a person who did not have an interest in an arbitration that has ended.[44]

If at some point before or after the arbitration, a funder has another interest in the matter other than the funding agreement, this person is not entitled to be a funder under this rule. Moreover, the Ordinance gives another important definition, which is the definition of TPF. According to the Ordinance, TPF of arbitration is defined as:

The provision of arbitration funding for an arbitration:

(a) under a funding agreement;
(b) to a funded party;
(c) by a third-party funder and

[41]Ibid, S 98F.
[42]Ibid.
[43]Ibid, S 98J(1).
[44]Ibid, S 98J(2).

(d) in return for the third-party funder receiving a financial benefit only if the arbitration agreement is successful within the meaning of the funding agreement.[45]

This is a rather simple definition describing the process. However, it provides important limitations. Accordingly, if a funder finances a case without any return in the award, simply by donation, this will not constitute TPF of arbitration under this definition. According to another important definition in the section, a funding agreement is an agreement for TPF of arbitration that is:

(a) in writing;
(b) made between a funded party and a third-party funder and
(c) made on or after the commencement date of Division 3.[46]

Apart from these important terms, other terms such as 'funded party', 'potential third-party funder', 'mediation proceedings', 'emergency arbitrator', 'authorized body', 'arbitration funding', 'advisory body', 'arbitration body' and 'arbitration funding' have also been defined in Section 98F.

Division 3: Abolition of the common law offences and tort. Division 3 indicates that the TPF of arbitration is not prohibited by particular common law offences or torts. However, this Division came into force in Hong Kong not in 2017, but on 1 February 2019. Thus, actually, TPF of arbitration became legal in Hong Kong starting from 1 February 2019, even though the Ordinance was passed in 2017.

According to Section 98K in Division 3, the common law offences of maintenance (including the common law offence of champerty) and of being a common barrator do not apply in relation to the TPF of arbitration. Furthermore, according to Section 98L, the tort of maintenance (including the tort of champerty) does not apply to the TPF of arbitration. Section 98M provides a safeguard for these two provisions. Sections 98M, 98K and 98L do not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal. This means that if the contract is against public policy by other means apart from the maintenance and champerty doctrines, the contract will be illegal.

The Ordinance excludes lawyers from funding, meaning that they cannot benefit from the exemption of the maintenance and champerty doctrines in the same way funders benefit. According to Section 98O, a lawyer means:

(a) a person who is enrolled on the role of barristers kept under section 29 of the Legal Practitioners Ordinance (Cap 159);
(b) a person who is enrolled on the role of solicitors kept under section 5 of that Ordinance or
(c) a person who is qualified to practise the law of a jurisdiction other than Hong Kong, including a foreign lawyer as defined by section 2(1) of that Ordinance.[47]

[45]Ibid, S 98G.
[46]Ibid, S 98H.
[47]Ibid, S 98O.

Therefore, if the funder falls within one of those three categories, he or she is a lawyer according to this section, and the exemption of the champerty and maintenance provisions will not cover him or her. This situation puts lawyers in a situation where they can be subject to the maintenance and champerty doctrines, while funders will not be subject to those doctrines when they are financing cases in Hong Kong. It might be argued that, in the future, the strength of champerty and maintenance doctrines will diminish further, and lawyers might be able to fund cases with contingency fee arrangements. Funding might even be possible in litigation as well. However, at the moment, funding is available only in arbitration in Hong Kong, and contingency fee arrangements are still subject to the doctrines of maintenance and champerty.

Division 4: Code of Practice. The Code of Practice for Third-Party Funding of Arbitration (hereinafter 'Code of Practice') is signalled in Division 4 of the Ordinance. Section 98P states that a code of practice may be issued by the authorized body, and that 'authorized body' means the person appointed by the Secretary for Justice. The content of the Code of Practice is indicated broadly in Section 98Q. According to Section 98Q, the code of practice may, in setting out practices and standards, require third-party funders to ensure that any promotional material in connection with third-party funding of arbitration is clear and not misleading; funding agreements set out their key features, risks and terms' as prescribed.[48] Thus we understand that the Code of Practice sets the standards for the practice of third-party funding in Hong Kong, including how a TPF agreement should be written, which terms must be laid out in the agreement, and complaint procedures against funders.

As stated, the Code of Practice sets the standards for funders to respect while concluding the TPF of arbitration. Section 98R outlines the process for issuing the Code of Practice, which came into force on 1 February 2019,[49] and was published on 7 December 2019 by the Secretary for Justice, as the authorized body under the Ordinance. The Code of Practice sets standards for third-party funders to follow. More importantly, Section 98S of the Code of Practice sets out the result of non-compliance, providing that:

(1) A failure to comply with a provision of the code of practice does not, of itself, render any person liable to any judicial or other proceedings.
(2) However
    (a) the code of practice is admissible in evidence in proceedings before any court or arbitral tribunal and
    (b) any compliance, or failure to comply, with a provision of the code of practice may be taken into account by any court or arbitral tribunal if it is relevant to a question being decided by the court or arbitral tribunal.[50]

As stated in this section, the Code of Practice is not mandatory; it serves only as guidance for funders. This is clear because non-compliance with the Code of Practice does not render any person liable to any judicial proceedings. However, the Code of Practice

[48]Ibid, S 98Q.
[49]Hong Kong Code of Practice for Third Party Funding of Arbitration <http://gia.info.gov.hk/general/201812/07/P2018120700601_299064_1_1544169372716.pdf> accessed 18 April 2020.
[50]Hong Kong Ordinance (n 9), S 98S.

is admissible evidence, and any compliance or non-compliance may be taken into account. This is an essential provision to indicate the effect of non-compliance with the Code of Practice. From this provision, we can understand that Hong Kong takes a light-touch approach. Instead of dictating mandatory provisions, it gives a guideline to the market to follow and as best practice for funders. Thus the Code of Practice encourages funders to comply. To this end, the Code of Practice operates as a threshold for funders. When they comply with this threshold, they can use this compliance in their favour as admissible evidence and strengthen their positions in a case. Similarly, if funders fail to comply, this non-compliance can be used against them, and they can be in a disadvantaged position. Therefore, in reacting to this guideline, it is to be expected that funders operating in Hong Kong will attempt to ensure the maximum level of compliance possible.

The approach taken in Hong Kong, which is publishing the Code of Practice, is similar to the approach in England and Wales, where the Association of Litigation Funders (ALF) published a Code of Conduct for Litigation Funders (hereinafter 'Code of Conduct') which binds all its members.[51] The difference is that, in Hong Kong, the Code of Practice was issued by the Secretary for Justice, not by an independent association, as in England and Wales. Thus it is a guideline for every funder operating in Hong Kong, not only for members of a certain association, and it is a more inclusive guideline.

Division 5: Other measures and safeguards. Division 5 provides other measures and safeguards. Section 98T provides for the communication of information for TPF. According to this, basically, information can be disclosed or published by a party for the purpose of having or seeking the TPF of arbitration.

Section 98U provides another important provision. Disclosure is a very controversial topic, and it is discussed in academia in various aspects in many articles, reports and book chapters.[52] The Ordinance regulates disclosure in detail. According to Section 98U, 'If a funding agreement is made, the funded party must give written notice of the fact that a funding agreement has been made; and the name of the third-party funder.'[53] Similarly, if the funding ends before the arbitration proceedings are completed, this has to be disclosed as well. Section 98V provides that 'if a funding agreement ends (other than because of the end of the arbitration), the funded party must give written notice of the fact that the funding agreement has ended; and the date the funding agreement ended'.[54]

According to Section 98U, the funded party must disclose the existence of the funding agreement and the name of the funder. However, similar to the result of non-compliance

[51] ALF, Code of Conduct <http://associationoflitigationfunders.com/code-of-conduct> accessed 19 April 2020 (hereinafter 'ALF Code of Conduct').

[52] For discussions on the subject, the following articles, report and book chapter can be referred to as examples: Chiann Bao, 'Third Party Funding in Singapore and Hong Kong: The Next Chapter' (2017) 34(3) Journal of International Arbitration 387; Derric Yeoh, 'Third Party Funding in International Arbitration: A Slippery Slope or Levelling the Playing Field?' (2016) 33(1) Journal of International Arbitration 115; *International Council for Commercial Arbitration (ICCA)–Queen Mary Task Force on Third-Party Funding in International Arbitration* (*The ICCA Reports No 4)* (April 2018) C 4; Gary J Shaw, 'Third-Party Funding in Investment Arbitration: How Non-Disclosure Can Cause Harm for the Sake of Profit' (2017) 33(1) Arbitration International 109. See also Eric De Brabandere, 'Mercantile Adventurers? The Disclosure of Third-Party Funding in Investment Treaty Arbitration' in Willem H van Boom (ed), *Litigation, Costs, Funding and Behaviour: Implications for the Law* (Taylor and Francis 2014).

[53] Hong Kong Ordinance (n 9), S 98U.

[54] Ibid, S 98V.

with the Code of Practice, an important provision is the result of non-compliance with these disclosure requirements. Similarly, non-compliance with Division 5 does not render any person liable. According to Section 98W:

(1) A failure to comply with this Division does not, of itself, render any person liable to any judicial or other proceedings.
(2) However, any compliance, or failure to comply, with this Division may be taken into account by any court or arbitral tribunal if it is relevant to a question being decided by the court or arbitral tribunal.[55]

This shows that disclosure is encouraged by the law in Hong Kong. However, disclosure is not mandatory, and non-disclosure does not render any person liable.

Division 6: Miscellaneous. Lastly, Division 6 sets out the Miscellaneous provisions. Section 98X regulates the appointment of the advisory body and the authorized body.

2. Conclusion

In general, considering the number of sections, the Hong Kong Arbitration Ordinance has brought more detailed rules on TPF compared to Singapore's CLAA and Regulations. In addition to its detailed Ordinance, Hong Kong also published a Code of Practice, which funders are expected to follow. With this Code of Practice, Hong Kong established a detailed guideline for funders operating and funding arbitration in Hong Kong. However, it is not a mandatory Code of Practice, only a guideline. There are many similarities and differences between the Hong Kong and Singapore laws. Now, the article will continue with the comparison.

III. Comparison of the TPF laws of Singapore and Hong Kong

The two laws share some similarities and also have important differences. When the two laws are compared, it is easy to see that they both adopted a light-touch approach. However, to understand where they differ from each other and the extent of their differences, a closer analysis is required. In this section, first similarities and then differences are explained.

A. Similarities in the TPF laws of Singapore and Hong Kong

1. Abolition of the ancient doctrines of maintenance and champerty

The TPF laws of both jurisdictions make it clear that maintenance and champerty provisions cannot affect the legality of TPF in arbitration according to the scope they recognize. This is the most important provision in these TPF laws. Champerty and maintenance doctrines were the traditional obstacles in common law jurisdictions to TPF's development. Once they were abolished, there was no legal provision prohibiting a funder to become involved with a case and finance it. As stated above, other common law jurisdictions had already abolished those ancient doctrines.[56] Following this trend, Hong Kong

[55]Ibid, S 98W.
[56]See n 7 above.

and Singapore have abolished maintenance and champerty to allow TPF in arbitration. This ensures that TPF is legal in both Hong Kong and Singapore, but limited to arbitration proceedings as prescribed in their legislation.

2. The excluded role of lawyers as funders in the TPF process

A lawyer's role in the two jurisdictions is similar. In both jurisdictions, lawyers are excluded from funding under the TPF rules. Both jurisdictions state that the funder should not have any interest in the case apart from the funding agreement. Thus this wording does not include lawyers since their representing the client constitutes an interest in the case. Section 107 of the Singapore Legal Profession Act makes this even clearer and prevents lawyers from receiving any share from the client's case. Also, the Legal Profession Act brings a new role for lawyers. It states in Sections 107(3A) and 107(3B) that lawyers can refer clients to funders on condition that they will not receive any financial benefit from the referral. Thus, in terms of the role of lawyers, the jurisdictions are similar.

B. Differences in the TPF laws of Singapore and Hong Kong

1. Commencement dates

TPF was legalized in Singapore much earlier than in Hong Kong. The CLAA, which made TPF legal in Singapore, came into force on 1 March 2017, while the relevant sections which made TPF legal in Hong Kong came into force on 1 February 2019, nearly 2years later. This timing has two implications. First, the Singapore TPF market started developing earlier than that of Hong Kong. Second, Hong Kong was not in as much of a hurry to welcome TPF as was Singapore. As a result, perhaps, it was this additional time that allowed a detailed Code of Practice to be published in Hong Kong.

2. Non-compliance with the prescribed requirements

This is a very important distinction between the jurisdictions. Even though they both adopted a light-touch approach, there is a significant difference with regard to non-compliance between Hong Kong and Singapore. In Singapore, non-compliance has serious consequences for funders since they would lose their rights under the funding agreement by default,[57] while in Hong Kong, non-compliance does not lead to any serious consequences by default. Moreover, it is explicitly stated that non-compliance with the Code of Practice itself does not render any person liable. Even non-compliance with Division 5 of the Hong Kong Ordinance, which is about the disclosure requirements, does not itself render any person liable. This shows that, in Hong Kong, the Ordinance and the Code of Practice are more flexible and not mandatory. They only act as guidelines for the market. However, any compliance or non-compliance can be taken into account, as explained in the Code of Practice. This means that, even though non-compliance itself does not render any person liable, the Code of Practice encourages funders to comply according to the wording of Section 98S of the Ordinance. Parties in any proceedings can use both the Code of Practice and the compliance or non-compliance of the funder as admissible evidence. Inevitably, the Code of Practice will play an important

[57]Singapore Civil Law Amendment Act 2017 (n 21), S 5B(4).

role in proceedings by providing measures and safeguards concerning the TPF of arbitration, as stated under the purpose of the Code of Practice in Section 98E of the Ordinance.

We might infer that Hong Kong chose to be more flexible and not to dictate any requirement upon the funding market, apart from offering the best practice as a guideline. Its Ordinance brings more detailed rules and a separate Code of Practice. Most of these rules are only a reference for the funding market to consider. Singapore, on the other hand, chose to bring a threshold for funders and some standards for the funding market, and those standards in the Singapore law are mandatory. Nonetheless, Singapore's TPF law is considerably shorter than Hong Kong's. This might be the reason why Singapore did not create a long list of rules and a detailed code of practice, as did Hong Kong. The short law in Singapore sets forth rules on the fundamentals of the funding process. While this is the chosen method in Singapore, it is reasonable for rules in the city–state to be mandatory. Yet, in Singapore, a funder who breaches the CLAA can seek relief against the disability imposed by his or her breach. Therefore, in Singapore, the rules have some flexibility as well. The difference in each jurisdiction lies in the funder's default position. In Hong Kong, a funder who breaches the Code of Practice is not liable by default; in Singapore, failure to comply with the CLAA results in the disability imposed by CLAA Section 5B(4).

3. The scope of the TPF law

Another notable distinction between Singapore and Hong Kong concerns the scope of each jurisdiction's TPF law. The Hong Kong Ordinance covers arbitration in general, while Singapore's CLAA only applies to international arbitration. This is the most salient difference between the two pieces of legislation. The reason for this can be explained by the arbitration laws in the two jurisdictions. Singapore has two different Acts for international and domestic arbitration,[58] while in Hong Kong there is only one Arbitration Ordinance that applies to both domestic and international arbitration.[59] Thus Singapore has a dual system, while Hong Kong has a monist arbitration system. As a result of this difference, TPF in arbitration, both domestic and international, is legal in Hong Kong, while Singapore's CLAA brings regulations only for the TPF of international arbitration.

Apart from this difference, the Hong Kong Ordinance also covers mediation proceedings, while Singapore's CLAA is only for international arbitration and not for mediation. The language used in both jurisdictions is also different. Even though they both allow TPF, the Hong Kong Ordinance allows TPF across a wider spectrum of areas.[60] Therefore, in Hong Kong, the scope of the TPF law is wider than that in Singapore, since the SAR allows TPF in domestic arbitration and mediation proceedings, in addition to international arbitration.

[58]See Singapore Arbitration Act (Ch 10), S 3: 'This Act shall apply to any arbitration where the place of arbitration is Singapore and where Part II of the International Arbitration Act (Cap 143A) does not apply to that arbitration.' See Singapore International Arbitration Act (Ch 143A), S 5(1): 'This Part and the Model Law shall not apply to an arbitration which is not an international arbitration unless the parties agree in writing that this Part or the Model Law shall apply to that arbitration.'

[59]See Hong Kong Arbitration Ordinance (Cap 609). However, Singapore has two different arbitration acts, one for international arbitration and one for domestic arbitration. See Singapore International Arbitration Act (Ch 143A); Singapore Arbitration Act (Ch 10).

[60]For Singapore, it is only international arbitration, not domestic arbitration; for Hong Kong, it is any arbitration, including both domestic and international.

4. The definition of 'third-party funder'

The two jurisdictions define 'third-party funder' differently. According to the CLAA, a third-party funder must possess specific qualifications. That the business place can be outside Singapore, and the capital requirement of at least SGD5 million are the important features of Singapore's rules for third-party funders. If those two conditions are not met, the funder does not have any enforceable right in Singapore, according to Section 5B(3) of the CLAA. In Hong Kong, the Code of Practice brought a capital adequacy requirement of maintaining access to a minimum of HKD20 million. However, this is again not mandatory, but rather a guide for funders operating in Hong Kong.

Section 98J of the Hong Kong Ordinance states that the funder is any person who is a party to the funding agreement and does not have any other interest apart from the funding agreement. Thus it is a very broad definition of a funder. This means that it is essential in Hong Kong that funders do not have any interest other than under the funding agreement. In Singapore, by contrast, there are certain requirements relating to capital and the principal business of the funder. Therefore, we can conclude that the definition of a third-party funder and the requirements to be qualified as a third-party funder are substantially different as regards the two legislative frameworks.

5. The definition of 'funding agreement'

Comparing the two jurisdictions, the Hong Kong Ordinance brings more definitions of other terms related to TPF. On the other hand, the Singapore Regulations refer to the Singapore International Arbitration Act when defining many terms such as arbitration agreement, award, foreign award and international arbitration proceedings. It seems that there is no major difference in the way these terms are defined in the two jurisdictions; however, even though the differences seem minor, they can have significant consequences. However, one of the important differences presents itself in the definition of 'funding agreement'. The Singapore Regulations state that a funding agreement is a contract between two parties to cover the partial or entire costs of the arbitration in return for remuneration from the award. This definition excludes the possibility of funders funding a party without expecting any financial return, which has happened in some cases. In *Philip Morris v Uruguay*, for example, the Uruguayan government was funded by the Bloomberg Foundation for a good cause: a tobacco-free-kids campaign.[61] Therefore, according to the Singapore definition, this cannot qualify as TPF. Even though it is difficult to imagine that this kind of funding would be illegal, it is still important to determine how TPF is defined and what its scope is.

Apart from the definition of funding agreement, there is also no form requirement in Singapore. However, in Hong Kong, a TPF agreement has to be made in writing and after the commencement date of Division 3, which means after 1 February 2019. Thus it can be accepted as a narrower definition than that of Singapore due to the 'in writing' requirement. We can summarize that the Hong Kong Ordinance has more definitions than the Singapore law, while Singapore refers to the Singapore Arbitration Act for some definitions. Generally speaking, Hong Kong uses more flexible language without limiting the definition of any terms.

[61] *Philip Morris Brands Sàrl, Philip Morris Products SA, and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7.

6. Conclusion

As analysed, even though both Singapore and Hong Kong adopted a light-touch approach to TPF legislation, there are more differences than similarities across the two jurisdictions. The language used in the TPF laws of the two jurisdictions is similar; however, the result of non-compliance as well as the definitions of some important terms are different. Thus the scope and effect of the TPF laws in Singapore and Hong Kong are different, as explained. Despite the fact that the two jurisdictions are alike in their motivations to pass TPF laws, and a public consultation process was carried out in both cases before passing the relevant laws, the rules they adopted are nuanced, with considerable differences. Every lawyer, funder and investor involved in TPF in Hong Kong and Singapore must be aware of those similarities and differences (Table 1).

IV. A short comparison of the guidelines in Singapore and Hong Kong

The purpose of this article is to examine the laws on TPF in the jurisdictions under discussion. In Hong Kong, there is a Code of Practice underpinning the guidelines for funders. In Singapore, on the other hand, there is no such code issued by the Ministry. Instead, there

Table 1. Comparison of the Two Laws*.

	Singapore	Hong Kong
	Similarities	
Legalization of Third-Party Funding	Champerty and maintenance are abolished	
Role of Lawyers	Funding by lawyers is not allowed	
	Differences	
Commencement Date of Law	1 March 2017	1 February 2019
Scope	International arbitration	Arbitration and mediation
Definition of 'Funding Agreement'	- Narrower definition Between (potential) funded party and funder; for the funding of costs; in return for a share	- Wider definition In writing; after 1 February 2019; between funded party and funder
Definition of 'Funder'	- Third Person (no other interest) Access to a minimum of SGD5 million Principal place of business in Singapore or elsewhere	- Third Person (no other interest) Access to a minimum of HKD20 million Provide a Hong Kong address Audit opinion of funder's financial statements Continues disclosure Other Code of Practice obligations
Non-Compliance	- Mandatory; funder loses his or her rights under funding agreement in case of non-compliance	- Not mandatory
Guidelines	- SIAC Practice Note Law Society Guidance SIArb Guidelines	- Code of Practice

*The table is prepared by the author to give a clear comparison of the two laws.

are three different guidelines for lawyers,[62] arbitrators[63] and funders.[64] However, guidelines are important in the two jurisdictions since both adopted a light-touch approach, and guidelines are essential for elucidating best practice. This article would be incomplete without mentioning the importance of the guidelines; thus a short comparison is provided in the following paragraphs.

The guidelines in both jurisdictions have similar roles but some differences. First, the type of authority issuing the guidelines is different. In Hong Kong, the Code of Practice was issued by the Secretary for Justice. However, in Singapore, the Ministry did not issue any such code: as mentioned, three different institutions issued three different guidelines. Second, the audience is different. In Hong Kong, the Code of Practice is for funders. In Singapore, each guideline has a different audience. The Law Society of Singapore issued a guideline for lawyers. The SIArb published guidelines for third-party funders. Lastly, the SIAC in its investment rules provided specific rules for third-party funders, with these rules giving authority and directions to arbitrators.

Regarding the second difference, the Hong Kong Code of Practice sets standards for third-party funders. It does not contain any rules or guidelines for arbitrators or lawyers. It has provisions on the form which a TPF agreement should take, and capital adequacy requirements for third-party funders. The Code of Practice imposes a duty on funders on issues of conflict of interest. There are well-defined rules for confidentiality, control of the funder, and disclosure. It is important to note that, according to Section 2.12 of the Code of Practice, the funding agreement should state whether the funder is liable for adverse costs or security for costs orders. The Code of Practice does not specify whether the funder should pay, but it states that the funding agreement should have a provision on this. Therefore, in Hong Kong, important issues about security for costs orders and adverse costs are left to the funding agreement. The Code of Practice also highlights that the funding agreement should have provisions on termination of contract, disputes regarding the funding agreement and the complaints procedure. Lastly, the Code of Practice requires funders to submit their annual returns to the advisory body in Hong Kong, which is the Secretary for Justice, unless the Secretary appoints another specific body.

Hong Kong's Code of Practice has taken into account lessons learned in other jurisdictions, such as in England and Wales, which have similar guidelines published by the ALF.[65] The important difference between Hong Kong's Code of Practice and the ALF's Code of Conduct is that the ALF Code contains mechanisms for funded parties to complain about their funders if the Code is breached. However, the ALF's Code of Conduct does not apply to non-ALF members. And in England and Wales, to fund a case, a funder does not have to be a member of the ALF. Therefore, the ALF's Code of Conduct is only mandatory for its members and presents a guideline without any sanctions for

[62]See the Law Society of Singapore's guidance note for lawyers <https://app.mlaw.gov.sg/files/Council_GN_Third_Party_Funding.pdf> accessed 20 April 2020.

[63]SIAC, Investment Arbitration Rules of the SIAC (1st edn, 1 January 2017) (hereinafter 'SIAC IA Rules'). Arts 24, 33 and 35 of the SIAC IA Rules bring rules specific to TPF. These rules give power to arbitrators, e.g. Art 24 gives the arbitrator the power to order disclosure <https://siac.org.sg/our-rules/practice-notes/practice-notes-previous-edition/61-our-rules> accessed 28 December 2019.

[64]See the Singapore Institute of Arbitrators' (SIArb) guidelines for third-party funders <https://www.siarb.org.sg/images/SIArb-TPF-Guidelines-2017_final18-May-2017.pdf> accessed 20 April 2020. SIArb also published a note on its website for funders <https://www.siarb.org.sg/images/Accompanying-note-to-Revised-SIArb-Guidelines-for-Third-Party-Funders18-May-2017.pdf> accessed 20 April 2020.

[65]ALF Code of Conduct (n 51).

other funders operating in England and Wales. On the other hand, the Hong Kong Code of Practice, which has no mandatory provision for any funders, is a guide for all funders in Hong Kong. However, importantly, the Code of Practice sets the standards for funders in Hong Kong and can be used as evidence against the funder, if the funder is not following the Code of Practice.

In Singapore, the SIArb has published guidelines for funders, which are equivalent to the Code of Practice in Hong Kong. In Singapore, a funding agreement should specify that the funder authorizes the disclosure of specific information about the funding, such as the existence, the address and the identity of the funder. It states that funders should cooperate with the funded party and their legal counsels in terms of the disclosure obligation of the funded party to the arbitral tribunal. Guidelines from the SIAC also accept that the arbitration tribunal has the power to order disclosure unless otherwise agreed by the parties. Thus the main determiner is the parties, which is in line with the whole concept of arbitration, given that arbitration is an alternative dispute resolution system where the parties have more control. The disclosure should include whether the funder is liable for adverse cost orders.

In Singapore, disclosure is the lawyer's obligation under the Law Society guidelines. Before a court or tribunal, lawyers should disclose whether a funder funds their clients. Lawyers should also advise their clients to have a confidentiality agreement with funders before starting negotiations on funding agreements. In addition, they should advise their clients of the requirement that the funding agreement indicate the funder's liability for adverse costs and security for costs orders. Guidelines from the SIAC also clearly indicate that the involvement of an external funder alone is not enough indication for ordering security for costs orders.

In conclusion, Singapore has three guidelines for lawyers, funders and arbitrators, while Hong Kong has a detailed guide for funders. Eventually, we might expect guidelines for lawyers and arbitrators in Hong Kong as well. Both jurisdictions are following funding market and arbitration practice developments around the world closely. These laws and guidelines demonstrate that Hong Kong and Singapore tend to make the necessary adjustments well. They can also be considered bolder than other jurisdictions, since they changed their laws to welcome the recent innovative financial tool, TPF, and make TPF available for parties in arbitration.

V. Impact of third-party funding regulations in the two jurisdictions

The main purpose of the regulations is to legalize TPF, and to this end, both jurisdictions have been successful. Now, Hong Kong and Singapore have started attracting funders. In Singapore, 13 funders have already indicated their support for the guidelines, showing their interest in city-state's market.[66] A major funder, for example, invested in an arbitration case in Singapore shortly after the CLAA came into effect, and hired a lawyer for its investment team in Hong Kong.[67] Funders now have offices in both Singapore and Hong Kong. It is clear from these developments that funders have already shown great interest in both jurisdictions.

[66]SIArb Guideline (n 34).

[67]Lacey Yong, 'Burford Funds First Singapore Case and Hires in Hong Kong' (*Global Arbitration Review*, 5 July 2017) <https://globalarbitrationreview.com/third-party-funding/burford-funds-first-singapore-case-and-hires-in-hong-kong> accessed 20 April 2020.

Hong Kong and Singapore have both become more attractive arbitration centres through these TPF laws. Since funding is an important consideration for parties, the availability of TPF certainly affects the decision of parties when choosing the seat of arbitration. Moreover, the presence of funders in both jurisdictions will certainly increase. More funders will set up offices in Hong Kong and Singapore to fund arbitration cases. This will increase the popularity of Hong Kong and Singapore as arbitration centres in the world. Thus we can expect both jurisdictions to attract more cases in the coming years through the presence of a strong funding market.

Another impact of the laws in Singapore and Hong Kong is to set a unique and leading example for other jurisdictions. Apart from the English style of self-regulating the funding market, Hong Kong and Singapore offer their Asian style with their laws on TPF. It is another model for other jurisdictions, and Hong Kong and Singapore are heading this model, which regulates TPF by law. However, the law itself is not strictly mandatory. In Hong Kong, the law itself is a guideline; in Singapore, the consequences of TPF rules are binding by default, but relief can be sought. In Singapore, there are different guidelines published by various institutions supporting the law and setting standards for the best practice.

The approach taken in both jurisdictions seems to suggest that the TPF markets are not strictly regulated. Therefore, a light-touch approach is chosen in both jurisdictions. However, subject to demand and developments, both jurisdictions leave the possibility of further developments open. Therefore, we can expect more regulations on TPF in both jurisdictions. Hong Kong and Singapore have used a light-touch approach in the best way. This approach has served two purposes that are worthy directions for other jurisdictions also. First, it has ensured the legality of funding. This can be the best approach for jurisdictions where the common law doctrines of champerty and maintenance are still effective. Second, it protects users by setting certain standards for third-party funders, which is important for all jurisdictions.

The number of funded cases and that of funders will likely increase in the coming years. Considering the growing demand for funding in the world and especially in developing funding markets, regulation of the third-party funding market is likely to increase. Furthermore, the scope of funding might extend from arbitration funding to litigation funding in Hong Kong and Singapore. Moreover, more funding options and contingency fee agreements by lawyers might be legalized in the near future as well. Singapore, for example, has already started a public consultation on conditional fee agreements.[68] Therefore, we can expect a broadening of the funding market as well as funding arrangements, not only by funders that have no interest other than under the funding agreements but also by lawyers on a contingency basis.

VI. Conclusion

While it seems that Singapore and Hong Kong have adopted a similar light-touch approach in regulating TPF, a detailed examination shows these jurisdictions' TPF laws to be quite different in terms of definitions, scopes and consequences. The Singapore CLAA does not touch upon many aspects of TPF. Instead, Singapore institutions took more active roles

[68] 'Public Consultation on Conditional Fee Agreements in Singapore' (27 August 2019) <https://www.mlaw.gov.sg/news/public-consultations/public-consultation-on-conditional-fee-agreements-in-singapore> accessed 20 April 2020.

and published guidelines for lawyers, arbitrators and funders. By contrast, in Hong Kong, the Code of Practice was published by the Legislative Council rather than a professional institution. In addition, the Hong Kong Code of Practice is not mandatory and, in this way, can be compared with England and Wales' ALF Code of Conduct. This creates the impression that Hong Kong, and England and Wales have adopted a similar approach as far as the guideline is concerned, though Hong Kong's Code of Practice applies to all funders, while the ALF's Code of Conduct applies to its members only.

Nonetheless, as has been discussed in this article, the result of non-compliance is completely different in Hong Kong compared with in Singapore, and this difference results in a distinctive feature of the laws in the two jurisdictions. A funder who does not comply with the law in Singapore loses his or her right by default, although he or she may seek relief. In Hong Kong, on the other hand, non-compliance does not render the funder liable, but it can be used as evidence against the funder. Definitions of the same term can differ vastly, and a detailed comparison of the rules reveals further important differences. Remarkably, even though disclosure is required in both jurisdictions, in Singapore lawyers have an obligation to inform the tribunal if their clients are funded, while in Hong Kong lawyers do not have such an obligation; rather, the funded party has the responsibility to disclose the funding agreement. Moreover, in Singapore, the duty of lawyers to inform the tribunal about the existence of a funding agreement is mandatory, since otherwise lawyers might face sanctions under their professional rules. Nevertheless, the Hong Kong Code of Practice advises funded parties to disclose the funding agreement, but it is not mandatory.

Despite these differences between the two jurisdictions, they share one common feature in their laws. Both Singapore's and Hong Kong's laws are tests for further legislation. In the near future, more detailed rules on TPF, and extension of the scope of funding arrangements, can be expected in both jurisdictions. Which jurisdiction offers a better law will be determined in time, depending on the development of the funding market. The advantage of Singapore is that its law took effect much earlier than that of Hong Kong, since the CLAA became effective on 1 March 2017, while Hong Kong's rules abolishing champerty and maintenance came into effect on 1 February 2019, together with the SAR's Code of Practice. This allowed the Singapore funding market to develop earlier than that of Hong Kong. Hong Kong, on the other hand, has the advantage of more flexible rules for funders, which can be more attractive.

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