A Comparison of Singapore and Hong Kong's Third-Party Funding Regimes to England and Australia

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Singapore and Hong Kong have both recently reformed their international arbitration statutes to permit third-party funding of international arbitration, albeit subject to regulation. Meanwhile, the United Kingdom and Australia have operated as mature third-party litigation funding markets for many years with little regulation. This article considers the historical objections to third-party funding and compares the regulatory framework for third-party funding in England and Australia to Hong Kong and Singapore. It also examines relevant provisions in the rules of the major arbitral institutions in each of these jurisdictions. It concludes that Singapore and Hong Kong have proceeded cautiously, preferring greater regulation for third-party funding than England and Australia. This is a welcome development for an industry often thought to profit too generously at the expense of funded clients.

Keywords: Arbitration, Third Party Funding, Costs, Hong Kong, Singapore, Australia, England

1 INTRODUCTION

Singapore and Hong Kong are leading seats of international arbitration in Asia.[1] In the 2018 Queen Mary International Arbitration Survey, the two jurisdictions were ranked among the five most preferred and widely-used,[2] and the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC) were considered to be among the top five most-preferred arbitral institutions.[3] International arbitration is set to continue to grow

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1 Jaclyn Masters & Jonathan Makojc, *The Race in the East and Its Challenges: Third Party Arbitration Funding in Singapore & Hong Kong* (15 June 2017), http://www.corrs.com.au/thinking/insights/the-race-in-the-east-and-its-challenges-third-party-arbitration-funding-in-singapore-and-hong-kong/ (accessed 20 Jun. 2019).

2 White & Case, Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration* 9 (2018), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf (accessed 20 Jun. 2019).

3 *Ibid*.

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in these seats and their respective institutions, with SIAC experiencing an upward trend in caseload over the last decade[4] and HKIAC handling hundreds of arbitrations annually.[5] To compete against other arbitral seats, both jurisdictions introduced legislation in 2017 [6] to allow for third-party funding of international arbitration. The new funding regulations reflect the desire of both Singapore and Hong Kong to remain leading seats for dispute resolution and international commercial arbitration by recognizing the rapid increase in third-party funding in recent years, and the corresponding benefit to clients and funders alike.[7]

2 WHAT IS THIRD-PARTY FUNDING?

Third-party funding arrangements vary enormously.[8] The traditional notion of a third-party funding agreement involves a funder that is unrelated to a dispute providing financial assistance to a claimant in return for a share in the claim proceeds, where a claimant otherwise lacks the financial resources to pursue the claim. However, third-party funding can also be used as a risk management tool. In particular, the third-party funder might agree to indemnify the claimant against all adverse costs orders, even orders to pay the costs of the respondent. In such an arrangement, the third-party funder 'shares the pain of the funded party when it loses its case'.[9] Some third-party funding agreements focus exclusively on insuring against the risk of adverse costs orders, others provide funding in the absence of such insurance. Others still address both concerns simultaneously. It is now also common for funding arrangements to cover the potential windfalls and losses of a portfolio of cases.[10]

Third-party funding arguably enhances the efficiency of dispute resolution proceedings through the introduction of commercial considerations that aim to

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4 Singapore International Arbitration Centre, *Statistics* (31 Mar. 2017), https://www.siac.org.sg/2014-11-03-13-33-43/facts-figures/statistics (accessed 21 Jun. 2019).

5 Hong Kong International Arbitration Centre, *Statistics* (2019), https://www.hkiac.org/about-us/statistics (accessed 21 Jun. 2019).

6 The legislation came into effect in Singapore on 1 Mar. 2017, and in Hong Kong on 14 June 2017.

7 *See* Hong Kong Law Reform Commission, *Third Party Funding for Arbitration* 13 (1.31) (Consultation Paper, Oct. 2015); *Public Consultation on the Draft Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016* Singapore Ministry of Law 4 (30 June 2016), https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/public-consultation-on-the-draft-civil-law–amendment–bill-2016.html (accessed 30 Jun. 2019); Sherina Petit, James Rogers & Cara Dowling, *International Arbitration Report* 3 (Report No 7 Sept. 2016); Khushboo Shahdadpuri, *Third-party Funding in International Arbitration: Regulating the Treacherous Trajectory*, 12 Asian Int'l Arb. J. 77, 80 (2016).

8 Niccolò Landi, *Chapter II: The Arbitrator and Arbitration Procedure: Third Party Funding in International Commercial Arbitration – An Overview*, in *Austrian Yearbook on International Arbitration* 85, 85–86 (Christian Klausegger et al. eds, Manz'sche Verlags- und Universitätsbuchhandlung; Manz'sche Verlags- und Universitätsbuchhandlung 2012).

9 Shahdadpuri, *supra* n. 7, at 79.

10 Petit, Rogers & Dowling, *supra* n. 7, at 3.

reduce costs.[11] In some cases, the impartial opinion of the third-party funder may prove a sobering voice that prevents unmeritorious claims from being brought, to the benefit of both parties.[12]

3 HISTORIC PROHIBITIONS ON THIRD-PARTY FUNDING

Historic prohibitions on third-party funding in each of Australia, Singapore and Hong Kong stem from the English common law offences and torts of maintenance and champerty.[13] These torts and crimes were first recognized in medieval England to prevent abuses of justice by wealthy English nobility who would associate themselves with a fraudulent or vexatious claim to strengthen the credibility of the claims, in exchange for a share of the profits.[14] The tort of maintenance prohibited an unconnected third-party providing financial assistance to maintain proceedings.[15] As a subset of maintenance, the tort of champerty prohibited a third-party paying some or all of the costs associated with a claim in return for a share of the proceeds.

As time progressed, attitudes in England shifted. The 1966 Report of the Law Commission described the crimes of maintenance and champerty as a 'dead letter' in the English law and recommended their abolition.[16] The Law Commission also recommended the torts of maintenance and champerty be abolished to facilitate increasingly important litigation funding by insurers and the Legal Aid Office.[17] Accordingly, the *Criminal Law Act 1967* (UK) abolished both the offences and torts of maintenance and champerty. However, the Act expressly preserved the invalidity of champertous funding or insurance agreements.[18]

The invalidity of third-party funding agreements has been more recently justified in England by concerns that the third-party funder could 'be tempted, for his own personal gain, to inflame the damages, to supress evidence, or even to suborn witnesses'.[19] In 1998, the doctrines of maintenance and champerty were extended to apply to contingency fees in international arbitration.

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11 *QPSX Ltd v. Ericsson Australia Pty Ltd (No 3)* (2005) 219 ALR 1, 13 [54] (French J).

12 Rupert Jackson, *Review of Civil Litigation Costs: Final Report* 117 (Report Dec. 2009), https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf (accessed 9 Jul. 2019).

13 *See* e.g., *Unruh v. Seeberger* (2007) HKCFAR 31 [78]; *Low Chun Song v. Ka Wah Bank Ltd* [1991] 1 HKC 241; *Cannonway Consultants Ltd v Kenworth Engineering Ltd* [1995] 1 HJKC 179, 188–189.

14 *Giles v. Thompson* [1994] 1 AC 142, 153 (Mustill LJ).

15 *Trendtex Trading Corp v. Credit Suisse* [1982] AC 679, 694 (Wilberforce LJ).

16 Law Commission, *Proposals for Reform of the Law Relating to Maintenance and Champerty* 4 (7) (Report Oct. 1966) ('Law Commission Report').

17 *Ibid.*, at 5 15.

18 *Criminal Law Act 1967* (UK) s14(2).

19 *Re Trepca Mines Ltd (No 2)* [1963] Ch. 199, 219–220 (Denning LJ).

Over time, the English Courts and Parliament have slowly moved towards permitting third-party funding. A crucial turning-point was the 2005 English Court of Appeal decision in *Arkin v. Borchard Lines Ltd & Ors* ('*Arkin*'),[20] which described commercial funders as groups 'who provide help to those seeking access to justice which they could not otherwise afford'.[21] Consequently, third-party funding agreements are currently enforceable in the United Kingdom unless the agreement compromises the integrity of the litigation process by the funder, for example, engaging in 'wanton and officious meddling'.[22]

The year following *Arkin*, the majority of the High Court of Australia upheld funding agreements and rejected the torts of maintenance and champerty as an obstacle to them in *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* ('*Fostif*').[23] Gummow, Hayne and Crennan JJ (Gleeson CJ agreeing) held that the primary concerns associated with third-party funding did not justify a blanket rule against such agreements for a number of reasons.[24] First, particularly objectionable agreements could still be held contrary to public policy.[25] Second, it is impossible to measure the fairness of a funding agreement because there is no objective standard against which such agreements can be measured. Third, court rules and lawyers' professional duties to the court were sufficient to allay the historic concerns about abuse of process arising out of third-party funding arrangements.[26]

In a concurring judgment, Kirby J approved third-party funding as a means of providing access to justice, which his Honour described as 'a fundamental human right which ought to be readily available to all'.[27] His Honour reasoned that a litigation funder does not invent rights, but merely 'organises those asserting such rights so that they can secure access to a court of justice that will rule on their entitlements one way or the other, according to law'.[28]

There was some doubt whether the principles of champerty and maintenance applied to private dispute resolution procedures, such as arbitration. In *Bevan Ashford v. Yeandle,*[29] the Vice Chancellor, Sir Richard Scott, said the prohibition on contingency fees extended to arbitration, reasoning:

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20 [2005] 1 WLR 3055.
21 *Ibid.,* at 3070 (38).
22 *Giles v. Thompson* [1994] 1 AC 142, 161, 164.
23 (2006) 229 CLR 386.
24 *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* (2006) 229 CLR 386, 434 (91) (Gummow, Hayne, Crennan JJ); 407 (1) (Gleeson CJ agreeing).
25 *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* (2006) 229 CLR 386, 434–435 (92) (Gummow, Hayne, Crennan JJ); 407 (1) (Gleeson CJ agreeing).
26 *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* (2006) 229 CLR 386, 435 (93) (Gummow, Hayne, Crennan JJ); 407 (1) (Gleeson CJ agreeing).
27 *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* (2006) 229 CLR 386, 451 (145) (Kirby J).
28 *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* (2006) 229 CLR 386, 468 (202).
29 *Bevan Ashford v. Geoff Yeandle* [1999] 3 Ch. 239.

> Arbitration proceedings are a form of litigation. The *lis* prosecuted in an arbitration will be a *lis* that could, had the parties preferred, have been prosecuted in court. The law of champerty has its origins in, and must still be based upon, perceptions of the requirements of public policy. I find it quite impossible to discern any difference between court proceedings on the one hand and arbitration proceedings on the other that would cause contingency fee agreements to offend public policy in the former but not in the latter. In principle and on authority, the law of champerty, ought to apply, to arbitration proceedings as it applies to proceedings in court. If it is contrary to public policy to traffic in causes without a sufficient interest to sustain the transaction, what does it matter if the cause of action is to be prosecuted in court or in an arbitration? If it is contrary to public policy for a lawyer engaged to prosecute a cause of action to agree that if the claim fails he will be paid nothing but if the claim succeeds he will receive a higher fee than normal what difference can it make whether the claim is prosecuted in court or in arbitration?

For some years it was not clear whether this approach would also be followed in Hong Kong and Singapore. In *Cannonway Consultants Ltd v. Kenworth Engineering Ltd,*[30] the High Court of Hong Kong held that the laws of champerty and maintenance, which became part of Hong Kong by section 3 of the Application of English Law Ordinance (Cap 88), did not apply to arbitration. The Court said in light of the history of champerty, it was not appropriate to extend the doctrine from public justice to a private consensual system, especially when there was a diminution of the role of the court in relation to arbitration, and the introduction of the UNCITRAL Model Law which gave supremacy to the doctrine of full party autonomy.

The Hong Kong Court of Final Appeal upheld the validity of a third-party funding agreement for an arbitration conducted overseas in *Unruh v. Seeberger*,[31] but said it was not necessary to decide whether this logic extended to funding agreements concerning arbitrations seated in Hong Kong.[32] By contrast, in Singapore, the Court of Appeal in *Otech Pakistan Pvt Ltd v. Clough Engineering Ltd & Anor*[33] held, obiter, that the doctrines of champerty and maintenance apply equally to arbitration because the need to 'protect the purity of justice and the interests of vulnerable litigants are as important in arbitration as they are in litigation'. Neither Singapore nor Hong Kong made statutory modification or repeal of the doctrines of champerty and maintenance before the current reforms.

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30 *Cannonway Consultants Ltd v. Kenworth Engineering Ltd* [1995] 1 HKC 179.
31 (2007) 10 HKCFAR 31.
32 *Unruh v. Seeberger* (2007) 10 HKCFAR 31 (77), (100) (Ribeiro PJ).
33 *Otech Pakistan Pvt Ltd v. Clough Engineering Ltd & Anor* [2007] 1 SLR(R) 989 (38).

4 CONTEMPORARY FRAMEWORKS OF REGULATING THIRD-PARTY FUNDING

4.1 United Kingdom (England and Wales)

England and Wales adopt a hands-off approach to regulation of the third-party funding industry, preferring self-regulation. The leading funders have adopted a Code of Conduct for Litigation Funders ('2018 ALF Code') which applies to all methods of dispute resolution.[34] The Code provides rules for third-party funding which are a precondition to membership of the Association of Litigation Funders (ALF).[35]

While it may be that the legitimacy and prestige that comes with membership of the ALF is sufficient to encourage compliance with the 2018 ALF Code, concerns such as the reduction of transparency and accountability have been raised about the self-regulatory nature of the industry. For example, Maxima Litigation Funding, a member of the ALF, has described it as 'more of a club than a complaints body'.[36] To date, these concerns have not provoked a governmental response. The UK Ministry of Justice has cited the small size of the industry as the reason behind the decision to defer assessing whether more formal regulation of the industry is required. This claim has been disputed by some commentators, who argue the industry has 'outgrown self-regulation' and now requires governmental regulation, particularly because conduct requirements in the Code do not require public disclosure.[37]

Furthermore, arbitration funding seems to have been excluded from the most recent version of the Code. Whereas the 2016 ALF Code was silent on its applicability to arbitration funding, the 2018 ALF Code defines 'relevant disputes' as I'disputes whose resolution is to be achieved principally through litigation procedures in the Courts of England and Wales'.[38]

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[34] Association of Litigation Funders of England and Wales, *Code of Conduct for Litigation Funders* (2018), https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf (accessed 6 Nov. 2019) ('2018 ALF Code').

[35] *See* Association of Litigation Funders of England and Wales, *Rules of the Association* (July 2018), r 3.1, https://associationoflitigationfunders.com/wp-content/uploads/2016/09/ALF-Rules-finalJuly2016PDF.pdf (accessed 6 Nov.. 2019).

[36] *Regulation of Third Party Litigation Funding*, Maxima Litigation Funding and Risk Solutions (15 Feb. 2017), http://www.maximallp.com/regulation-of-third-party-litigation-funding/ (accessed 8 Nov. 2019).

[37] *See* Justice Not Profit, *Third Party Litigation Funding in the United Kingdom: A Market Analysis* 15 (2015), https://www.justicenotprofit.co.uk/wp-content/uploads/2015/09/Final-TPLF-Paper.pdf (accessed 15 Nov. 2019).

[38] 2018 ALF Code, *supra* n. 35, r 1.

4.2 Australia

Regulation of the funding industry in Australia has been tumultuous. After a number of authorities subjected the third-party funding industry to regulatory oversight under the *Corporations Act 2001* (Cth),[39] the Australian Securities and Investments Commission ('ASIC') and Federal Government intervened to exempt it.[40] This exemption was justified on the basis of protecting funded class actions, which were considered a key avenue for parties to access justice.[41] Consequently, in Australia, until the *Corporations Amendment (Litigation Funding) Regulations 2020* was introduced there was no formal regulation of third-party funders beyond an obligation for funders to have adequate mechanisms in place to manage conflicts of interest.[42] Furthermore, whilst the High Court's decision in *Fostif* reserved the possibility that a third-party funding arrangement might breach overarching principles of public policy despite the abolition of champerty and maintenance, it also held that the funder seeking out claimants, controlling the proceedings, instructing counsel, making settlement decisions and intending to profit from the arrangement were all acceptable factors of a valid third-party funding arrangement.[43] The pro-funding attitudes of Australian regulators and courts has led to Australia being described as 'arguably, the most funding-friendly jurisdiction in the world, with … highly sophisticated funders, knowledgeable courts, and relatively liberal regulations'.[44] However, from 22 August 2020 the *Corporations Amendment (Litigation Funding) Regulations 2020* removed an exemption provided by the *Corporations Regulations 2001* so as to require litigation funders to hold an Australian Financial Services Licence and comply with the managed investment scheme regime under the *Corporations Act 2001* (Cth). The amendments apply in

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[39] In *Brookfield Multiplex Limited v. International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11, the Full Court of the Federal Court of Australia held that a third party funding agreement in a class action was a 'managed investment scheme' as defined in s. 9 of the *Corporations Act 2001* (Cth), requiring extensive disclosure and regulation obligations of the funders under Ch. 5C of the *Corporations Act 2001* (Cth). In *Chameleon Mining NL v. International Litigation Partners Pty Ltd* (2011) 276 ALR 138, the NSW Court of Appeal held a funding agreement was a 'financial product' as defined in the *Corporations Act*. This meant that funders were required to hold an Australia Financial Services (AFS) licence and were subject to stringent disclosure requirements and regulation from the Australian Securities and Investment Commission ('ASIC'). On final appeal, the High Court concluded a funding agreement was a 'credit facility', such that it was statutorily excluded from the definition of 'financial product' in the Act: *International Litigation Partners Pte Ltd v. Chameleon Mining NL* (2012) 246 CLR 455.

[40] *Corporations Amendment Regulations 2012 (No. 6)* (Cth). *See also* Lisa Nieuwveld & Victoria Sahani, *Third Party Funding in International Arbitration* 88–91 (2d ed., Kluwer Law International 2017).

[41] Australian Government Productivity Commission, *Access to Justice Arrangements* 22 (Inquiry Report No. 72 5 Sept. 2014).

[42] *Corporations Regulations 2001* (Cth) reg 7.6.01AB(2).

[43] *Fostif* (2006) 229 CLR 386, 433–434 (87)–(91) (Gummow, Hayne, Crennan JJ); 407 (1) (Gleeson CJ agreeing).

[44] Nieuwveld & Sahani, *supra* n. 40, at 75.

relation to schemes or arrangements entered into after 22 August 2020. They give effect to the Government's announcement on 22 May 2020 that the amendments would take effect three months after the Government's announcement. The starting date of the regulations is designed to limit any potential disruption to existing contractual arrangements and litigation proceedings that are on foot on 22 August 2020.[45]

The Association of Litigation Funders of Australia (ALFA) was established in April 2018. ALFA consists of nine leading Australian litigation funders. Although it has not adopted the binding Code of the ALF, in 2019 it produced a set of Best Practice Guidelines for Litigation Funders and Managers ('2019 ALFA Guidelines').[46] The 2019 ALFA Guidelines substantially mirror the terms of the 2018 Code, albeit they expressly apply to any dispute 'whose resolution is to be achieved through a claims resolution process', including arbitration. These guidelines are not mandatory, but members are encouraged to report any deviation to prospective parties.[47]

4.3 Hong Kong

Part 10A of the *Arbitration Ordinance* (Cap 609) ('Hong Kong Ordinance') was enacted on 23 June 2017 with the aim of simultaneously facilitating and regulating third-party funding of arbitration.[48] Sections 98K and L of the Ordinance exclude the common law offences and torts of maintenance and champerty from applying to third-party funding of arbitration.[49] Third-party funding of arbitration is defined as 'the provision of arbitration funding for an arbitration under a funding agreement to a funded party by a third-party funder and in return for the third party funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement'.[50]

Accordingly, the Hong Kong Ordinance permits third-party funding of both domestic and international arbitrations. The Hong Kong Ordinance also permits third-party funding of services that are provided in Hong Kong in respect of arbitrations seated outside Hong Kong, allowing lawyers based in Hong Kong to have their costs met regardless of where the arbitration is seated. [51] Although this is

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45 Explanatory Statement to the *Corporations Amendment (Litigation Funding) Regulations 2020*.
46 Association of Litigation Funders of Australia, *Best Practice Guidelines for Litigation Funders and Managers* (2019), https://www.associationoflitigationfunders.com.au/uploads/5/0/7/2/50720401/alfa_best_practice_guidelines.pdf (accessed 12 Feb. 2020) ('2019 ALFA Guidelines').
47 *Ibid.*, at 2.
48 *Arbitration Ordinance* (Cap 609) (Hong Kong), s. 98E.
49 *Ibid.*, ss 98K, 98L.
50 *Ibid.*, s. 98G.
51 *Ibid.*, s. 98N.

an encouraging development for parties considering seating an arbitration in Hong Kong, the Hong Kong Law Reform Commission report stressed that these changes did not apply to third-party funding of litigation.[52] The prohibition on maintenance and champerty at common law continues to prevent third-party litigation funding, save for limited exceptions relating to insolvency proceedings, proceedings in the interests of justice, and court proceedings specifically relating to arbitrations, such as enforcement of awards and challenges to jurisdiction.

The Hong Kong Ordinance contemplates regulation of the third-party funding industry. Section 98P provides for the appointment of an advisory body to monitor and review the new legislation, and for an authorised body to create a code of practice designed to outline the compulsory standards of third-party funding.[53] section 98W of the Hong Kong Ordinance provides that a failure to comply with the code of practice does not of itself constitute an offence,[54] although such a failure will be considered if it is relevant to a question before a court or arbitral tribunal.[55]

Hong Kong's *Code of Practice for Third Party Funding of Arbitration* ('Hong Kong Code') was issued on 7 December 2018 by the Secretary for Justice.[56] Contemporaneously, a notice was gazetted appointing 1 February 2019 as the date on which section 3 of the *Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance* 2017 (HK) came into operation, which commenced the remaining provisions of Part 10A of the Hong Kong Ordinance. The Code of Practice applies to a 'third party funder' within the meaning of the Hong Kong Ordinance, its subsidiaries, associated entities and any investment advisors acting as its agents.[57]

4.4 Singapore

Section 5A of the *Civil Law Act* (Cap 43) abolishes the tort of maintenance and champerty altogether,[58] though this abolition 'does not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal'.[59] section 5B(2) provides that contracts for third-party funding of

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52 Law Reform Commission of Hong Kong, *Third Party Funding for Arbitration* 14 (Report Oct. 2016).
53 *Arbitration Ordinance (Cap. 609)* (Hong Kong) s. 98P.
54 *Arbitration Ordinance* (Cap 609) (Hong Kong), s. 98W(1).
55 *Ibid.,* s. 98W(2).
56 *Code of Practice for Third Party Funding of Arbitration 2018* (Hong Kong) G.N. 9048 ('Hong Kong Code').
57 *Ibid.,* at 2.1. This contrasts with the voluntary 2018 ALF Code and the voluntary 2019 ALFA Guidelines.
58 *Civil Law Act (Cap 43)* (Singapore) s. 5A(1).
59 *Ibid.,* s. 5A(2).

'dispute resolution proceedings' are 'not contrary to public policy or otherwise illegal by reason that it is a contract for maintenance or champerty'.[60] 'Dispute resolution proceedings' are defined in section 5B(10) as including international arbitrations and related court and mediation proceedings.[61]

The Singapore legislation operates broadly in the same way as the Hong Kong legislation, by removing the rigid common law torts of maintenance and champerty, providing that third-party funding agreements are not inherently invalid because of public policy, but leaving the door open for other grounds of invalidity. Further, similarly to Hong Kong, the Singapore legislation only alters the position of third-party arbitration funding, not litigation funding more generally.

In place of the former common law torts, the amendments to the *Civil Law Act* also provide for regulation of the third-party funding industry. The *Civil Law (Third-Party Funding) Regulations 2017* ('Singapore Regulations') outline the requirements that a funder must meet to be permitted to fund litigation or arbitration in Singapore. If a third-party funder fails to comply with these requirements, it cannot enforce its rights under a third-party funding agreement,[62] though it can apply for relief where non-compliance was accidental or inadvertent, or where it would be just and equitable to grant relief.[63]

5 REGULATION OF CONTEMPORARY ISSUES IN THIRD-PARTY FUNDING – AUSTRALIA, SINGAPORE, HONG KONG AND THE UNITED KINGDOM COMPARED

Although third-party funding is a broadly permissible and widespread practice, several issues arise in contemporary arbitral practice from the involvement of a third-party funder. In the absence of further regulation, arbitral tribunals struggle to adopt a consistent approach to the disclosure of funding agreements and the funder's liability for adverse costs orders. As a result of a lack of disclosure or privity to the funding agreement, tribunals rarely have an insight into the funder's level of control of proceedings, let alone an inclination to police such control. Some of the contemporary issues which have arisen around third party funding arrangements are examined below.

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60 *Ibid.*, s. 5B(2).
61 *Ibid.*, s. 5B(10).
62 KC Lye & Katie Chung, *Third-Party Funding for International Arbitration in Singapore*, 7 Int'l Arb. Report 8 (2016).
63 *Civil Law Act (Cap 43)* (Singapore) s. 5B(5)-(6).

5.1 Costs

Most national arbitration laws provide tribunals with a discretionary power to award costs as they see fit. Four key issues arise in relation to third party funding and costs. First, can the costs paid by a third-party funder be recovered? Second, to what extent can they be recovered? Third, can a third-party funder be held liable for adverse costs orders? Finally, can an order of security for costs be made against a third-party funder?

5.1.1 *Can the Costs Paid by a Third-Party Funder Be Recovered?*

The first issue largely turns on the words used in national arbitration laws and institutional rules. Arguments are often made that costs provisions which refer only to 'recoverable costs' means costs 'incurred by the parties' and exclude recovery of costs by a third-party funder.[64] Some legislation is broad enough to include third party funding costs. The *Arbitration Act 1996* (UK), for example, provides that the tribunal can 'determine the recoverable costs of the arbitration on such basis as it thinks fit'.[65] 'Costs' are defined to include the 'legal or other costs of the parties'.[66] As this provision makes no reference to the party incurring the costs, it leaves room for recovery of costs paid by a third-party funder. The London Court of International Arbitration (LCIA) Rules provide that the arbitral tribunal may decide that 'all or part of the legal or other expenses incurred by a party (the "Legal Costs") be paid by another party'.[67] There is no case which has decided whether the LCIA Rules costs provision is narrower than the provision in the English *Arbitration Act*. However, it could be argued that the use of the phrase 'incurred by a party' does 'not explicitly require the party claiming legal costs to have effected payment itself'.[68] How these rules have in fact been interpreted by arbitrators is unknown as, subject to mandatory applicable law, the LCIA Rules preclude appeal on matters of law.[69]

In Hong Kong, tribunals have a broad discretion to make 'directions with respect to the costs of arbitral proceedings'.[70] This language does not limit the power by reference to expenses incurred by the parties. It is, therefore, likely to permit the recovery of costs paid by a third-party funder. There is no express power in the Singapore *International Arbitration Act 1994* (Chapter 143A) for the

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64 For example, *Compagnie de Bauxites de Guinee v. Hammermills Inc* (US District Court for District of Columbia, No 90–0169 29 May 1992).
65 *Arbitration Act 1996* (UK) s. 6(3).
66 *Ibid*., s. 59.
67 London Court of International Arbitration, *Arbitration Rules 2016* r 28.3 ('LCIA Rules').
68 Jonas von Goeler, *Third-Party Funding in International Arbitration and Its Impact on Procedure* 379 (Kluwer Law International 2016).
69 LCIA Rules rr 26.8, 29.2.
70 *Arbitration Ordinance* (Cap 609), s. 74(1).

tribunal to make a costs award, although it is clearly contemplated by the Act.[71] As a consequence, it can be inferred that the lack of an express power in the *International Arbitration Act 1994* (Chapter 143A) does not preclude recovery of costs paid by a third-party funder. The SIAC Rules and Investment Arbitration Rules grant the tribunal the power to order that 'all or part of the legal or other costs of a party be paid by another party'.[72] As the SIAC Rules refer to 'costs of a party' and make no mention of whether the party need directly incur such costs, it is likely that the SIAC Rules also permit recovery of costs paid by a third-party funder. The argument that the Singapore and Hong Kong legislation permit recovery of costs paid by a third-party is buttressed by the fact that the HKIAC Arbitration Rules, the China International Economic and Trade Arbitration Commission (CIETAC) Investment Arbitration Rules and the SIAC Investment Arbitration Rules expressly allow the tribunal to consider third-party funding arrangements when making a costs award.[73]

In a manner similar to England and Wales, the Australian *International Arbitration Act 1974* (Cth) grants the arbitral tribunal a broad discretion to award 'the costs of an arbitration (including the fees and expenses of the arbitrator or arbitrators)'.[74] Under the Act, the tribunal, in making an award, 'can direct to whom, by whom, and in what manner, the whole or any part of the costs that it awards shall be paid'.[75] As the *International Arbitration Act 1974* (Cth) makes no reference to the party which needed to incur costs in order for them to be recoverable, it is likely that it permits the recovery of costs paid by a third-party funder. The Australian Centre for International Commercial Arbitration (ACICA) Rules allow for recovery of 'the legal and other costs … directly incurred by the successful party in conducting the arbitration'.[76] The qualification of recoverable costs with the words 'directly incurred by the successful party' makes the ACICA Rules narrower than, for example, the equivalent provision in the HKIAC Rules, which refers to 'the reasonable costs for legal representation and other assistance … if such costs were claimed during the arbitration'.[77] The official commentary to the

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71 Section 21 provides 'Any costs directed by an award to be paid shall, unless the award otherwise directs … ', *International Arbitration Act 1994* (Singapore) s. 21(1). Note, however, the tribunal has an express power to award costs in making a ruling on jurisdiction under s. 10(8).

72 Singapore International Arbitration Centre, *Investment Arbitration Rules 2017* r 37 ('SIAC Investment Arbitration Rules'); Singapore International Arbitration Centre, *Arbitration Rules 2016,* r 37 ('SIAC Rules').

73 SIAC Investment Arbitration Rules, r 35; Hong Kong International Arbitration Centre, *Administered Arbitration Rules,* r 34.4 (HKIAC Rules); China International Economic and Trade Arbitration Commission, *Investment Arbitration Rules 2017* Art. 27 ('CIETAC Investment Arbitration Rules').

74 *International Arbitration Act 1974* (Cth) s. 27.

75 *International Arbitration Act 1974* (Cth) s. 27(2)(a).

76 Australian Centre for International Commercial Arbitration, *ACICA Rules 2016* Art. 44(e) ('ACICA Rules').

77 HKIAC Rules, *supra* n. 73, r 34(1)(d).

ACICA Rules suggests that they 'closely reflect' Article 38 of the Swiss Rules and Article 40 of the UNCITRAL Rules, which lack the 'directly incurred by the successful party' qualification.[78] One commentator argues that in this context, the inclusion of the words 'directly incurred by the successful party' must refer to the costs being directly incurred 'in pursuing the arbitration'.[79] However, the point has not authoritatively been determined.

5.1.2 *What Costs Paid by a Third-Party Funder Be Recovered?*

While it is likely that costs are not excluded from recovery in each of the jurisdictions under consideration simply because they were initially paid by a third-party funder, there remains uncertainty as to the types of costs recoverable.

Awardable costs under the *Arbitration Act 1996* (UK) include arbitrators fees, institutional fees and 'the legal or other costs of the parties'.[80] In *Essar v. Norscot*,[81] a sole arbitrator in an arbitration under the International Chamber of Commerce (ICC) Rules made an order awarding indemnity costs to the claimant on the basis that the respondent had deliberately withheld payments from the claimant in order to financially cripple it.[82] The sole arbitrator included in those indemnity costs an amount owed by the claimant to its litigation funder as a result of a funding agreement with industry-standard terms because the claimant was forced to rely upon litigation funding to pursue its claim as the result of the respondent's actions.[83] The respondent obtained leave to appeal to the English High Court and argued that the sole arbitrator incorrectly construed 'other costs' under s59(1)(c) of the *Arbitration Act 1996* (UK) to include the profit margin of a third-party funder. The English High Court held there was no serious irregularity under s68(2)(b) of the *Arbitration Act 1996* (UK) because, at best, the arbitrator had made an error of law by misconstruing s59(1)(c). In any case, the Court held that the arbitrator's construction was correct. The Court described the *Arbitration Act 1996* (UK) as a 'complete code as to the conduct of the arbitration', and, therefore, the principles in the English Civil Procedure Rules were irrelevant.[84] The Court also held that 'other costs' could include management time and the cost of

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78 Von Goeler, *supra* n. 68, at 379–380, citing Samuel Luttrell & Gabriel Moens, *Commentary on the Arbitration Rules of the Australian Centre for International Commercial Arbitration* 66 (Official Commentary 2009).

79 Von Goeler, *supra* n. 68, at 380.

80 *Arbitration Act 1996* (UK) s. 59(1).

81 *Essar Oilfields Services Ltd v. Norscot Rig Management PVT Ltd* [2017] Bus LR 227, [2016] EWHC 2361 (Comm).

82 *Ibid*., at 232 (21).

83 *Ibid*., at 233 (22)–(26).

84 *Ibid*., at 236–237 (49)–(51).

obtaining funding for the dispute, provided the costs relate to the arbitration and were incurred for the purposes of it.[85] Furthermore, as the costs provision in the ICC Rules was substantially identical to s59(1)(c), the Court was persuaded by an ICC Commission report which suggested that third-party funded costs were recoverable.[86]

The *International Arbitration Act 1974* (Cth) allows the tribunal to award 'the costs of an arbitration (including the fees and expenses of the arbitrator or arbitrators)'.[87] This is broad enough to allow a funder's profit margin to be recoverable because the word 'including' indicates the specific categories of costs are given as non-exhaustive examples. Similarly, the Hong Kong *Arbitration Ordinance* (Cap 609) only limits costs to those that are 'reasonable having regard to all the circumstances',[88] and the costs of preparation prior to commencement of proceedings are expressly recoverable.[89] As mentioned previously, Singapore's *International Arbitration Act* (Chapter 143A) contains no express power to make a costs award. It, therefore appears, that the arbitration legislation in each of Australia, Singapore and Hong Kong do not bar tribunals from making an order compensating a funder's profit margin.

The fact that the HKIAC Arbitration Rules, CIETAC Investment Arbitration Rules and the SIAC Investment Arbitration Rules expressly permit a tribunal to consider third-party funding arrangements in making costs orders further indicates that Hong Kong and Singapore are not inherently hostile to compensating the funder's profit margins.[90] However, it should be noted there is no case law addressing a scenario like *Essar* in Australia, Singapore or Hong Kong.

Whether *Essar* should be followed outside England is hotly debated in the arbitration community. Opponents of *Essar*-like orders argue that the possibility of paying an unknown profit margin raises the financial risks of adverse costs to an unacceptable level.[91] Given these concerns, it is likely that tribunals will hesitate to order reimbursement of a third-party funder's conditional premiums unless the unsuccessful party has caused the impecuniosity of the successful party, the unsuccessful party was aware of the funding agreement, and the funding agreement contained

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85 *Ibid*., at 237–238 (56)–(58).

86 *Ibid*., at 238–239 (61)–(67), citing ICC Commission on Arbitration and Alternate Dispute Resolution, *Decisions on Costs in International Arbitration* 92–93 (Report 2015).

87 *International Arbitration Act 1974* (Cth) s. 27(1).

88 *Arbitration Ordinance* (Cap 609), s. 74(7)(a).

89 *Arbitration Ordinance* (Cap 609), s. 74(7)(b).

90 *See* International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-party Funding in International Arbitration* 159 (Report No 4 Apr. 2018) ('ICCA Report'); *Supra* n. 74 and accompanying text.

91 *See* International Council for Commercial Arbitration, *Report of the ICCA-Queen Mary Task Force on Third-party Funding in International Arbitration* 157 (Report No 4 Apr. 2018).

industry-standard terms.[92] Each of these facts which were present in *Essar* will likely determine whether the recovery of a funder's profit margin is 'reasonable'.

Furthermore, a successful party is unlikely to be able to recover the costs paid by a third-party funder, contingent or otherwise, where the funder has no right of reimbursement from the successful party. For example, in *Quasar de Valores v. Russia*,[93] the tribunal denied recovery of costs paid by a third-party funder where the third-party funder contributed funds with no contractual obligation to repay them. In that case, the third-party funder obtained an ancillary benefit of a favourable precedent to use in other arbitrations.

5.1.3 *Adverse Costs Orders Against Third-Party Funders*

Generally, costs awards in an arbitration cannot be made against non-parties because of the consensual nature of arbitration.[94] Although non-parties may be bound to an award by doctrines of joinder, implied consent to arbitrate, groups of companies, estoppel or alter ego, each of these require that the third-party funder have some interest in the substance of the dispute.[95] This stands in stark contrast to the powers of state courts, which have on occasion even ordered costs against the parent companies of interested third-party funders.[96]

Neither English nor Australian arbitration laws confer upon the arbitral tribunal jurisdiction to make costs awards against non-parties. In England, tribunals may apply for the assistance of a court in support of arbitral proceedings under section 44 of the *Arbitration Act 1996* (UK). However, the matters in respect of which an English court may make an order are defined exhaustively in that section, and do not include costs orders. Similarly, Australian courts may only provide assistance to arbitral tribunals in the form of subpoena orders.[97]

The new Hong Kong regime does not provide for costs orders made against third-party funders. The Hong Kong Law Reform Commission recommended that the question of third-party funders' liability for adverse costs be further considered during the initial three-year period following the implementation of the new regime.[98]

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92 *Ibid.,* at 158–159.
93 *Quasar de Valores SICAV S.A. et al v. The Russian Federation* (SCC Arbitration No 24/2007), Award (20 July 2012) (233).
94 *See* ICCA Report, *supra* n. 90, at 161; Von Goeler, *supra* n. 68, at 420.
95 Von Goeler, *supra* n. 68, at 419.
96 *Excalibur Ventures LLC v. Texas Keystone Inc* [2017] 1 WLR 2221.
97 *Arbitration Act 1974* (Cth) s. 23(3).
98 Law Reform Commission of Hong Kong, *Third Party Funding for Arbitration* 106 (7.31) (Report Oct. 2016).

Where the national arbitration legislation in Singapore and Hong Kong neither expressly permit nor prohibit tribunals from making costs orders against third-party funders, institutional rules may empower a tribunal to make costs orders against third parties. A Queen Mary University of London/International Council for Commercial Arbitration (ICCA) Report on third-party funding suggested that Article 35 of the 2017 SIAC Investment Arbitration Rules, which provides that 'the tribunal may take into account any third-party funding arrangements in ordering in its Award that all or a part of the legal or other costs of a Party be paid by another Party' is an express conferral of power to make costs orders against third-party funders.[99] With respect to the learned authors, it is difficult to see how Article 35 amounts to a conferral of power to make orders against non-party funders where it only refers to an award for a *party* to pay the legal costs of *another party*. The same argument can be mounted in respect of similar provisions in the HKIAC Arbitration Rules and the CIETAC Investment Arbitration Rules.[100]

5.1.4 *Security for Costs Against Third-Party Funders*

Each of the surveyed jurisdictions confer upon tribunals a power to make orders for security for costs against parties.[101] However, none of the surveyed jurisdictions extend this power to make orders against third-party funders. The Hong Kong Law Reform Commission saw it unnecessary to expressly grant the tribunal the power to order security for costs against a third-party funder given that the powers of a tribunal to order a funded party to give security for costs (which would likely be paid by the funder anyway) arguably afford sufficient protection.[102]

5.2 Disclosure of Third-Party Funding Agreements

Another facet of third-party funding arrangements that has been the source of ongoing discussion is whether a party to a dispute funded by a third party must disclose their funding arrangements to other parties to the dispute.[103] The

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[99] ICCA Report, *supra* n. 90, at 163.

[100] *supra* n. 74 and accompanying text.

[101] *See Arbitration Act 1996* (UK) s. 38(3); *International Arbitration Act 1974* (Cth) s. 23K; *International Arbitration Act* (Ch. 143A) (Singapore) s. 12(1)(a); *Arbitration Ordinance* (Cap 609) (Hong Kong) s. 56(1)(a).

[102] Law Reform Commission of Hong Kong, *Third Party Funding for Arbitration* 113 (8.15) (Report Oct. 2016).

[103] *See* Markus Altenkirch & Brigitta John, *Should a Party be Obliged to Disclose Details About Receiving Third Party Funding in International Arbitration?,* Global Arbitration News (3 Feb. 2016), https://globalarbi

disclosure of funding may be beneficial for dispute resolution efficiency as it may indicate to the counter-party that an independent third party finds the claim has merit, encouraging early settlement.[104] Furthermore, disclosure of a third-party funder can prevent later challenges against the tribunal's independence and impartiality. On the other hand, mandatory disclosure may cause a propensity of unjustified applications for security for costs.

As a result of these considerations, disclosure of third-party funding agreements for the sake of disclosure itself is 'a sporadic occurrence'.[105] Nonetheless, parties may already be indirectly required to disclose specific details of third-party funding insofar as it is relevant and material to issues of impartiality and independence of arbitrators, security for costs applications, jurisdictional issues, costs awards, confidentiality and document production.[106] For example, in *Muhammet Çap & Sehil Inşaat Endustrive Ticaret Ltd. Sti. v. Turkmenistan*,[107] the International Centre for Settlement of Investment Disputes (ICSID) tribunal acknowledged that it had inherent powers to order disclosure of a third-party funding arrangement to preserve the rights of the parties and the integrity of the arbitral process. The tribunal ultimately ordered disclosure to inform its determination of a security for costs application, and to investigate a potential conflict of interest between an arbitrator and the funder.

In both England and Australia, there is no overarching legal requirement to disclose third-party funding arrangements to other parties to a dispute in litigation or arbitrations. The 2018 ALF Rules and the 2019 ALFA Guidelines do not include disclosure obligations or recommendations. Nonetheless, some parties choose to disclose funding arrangements. For example, in a 2012 ICSID Arbitration against Uzbekistan, Oxus Gold (a company which publicly traded on the London Stock Exchange) voluntarily disclosed that it had entered into a litigation funding agreement. This disclosure benefited Oxus by causing a substantial rise in its share price.

The Hong Kong Ordinance requires the funded party to disclose the existence of a funding agreement and the identity of the funder on the earlier date of the commencement of an arbitration or within fifteen days of a funding agreement being made.[108] The details of the funding agreement which must be disclosed, however, is limited to those

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trationnews.com/should-a-party-disclose-details-about-receiving-third-party-funding-in-international-arbitration20160201/ (accessed 8 Jul. 2020).

104 Von Goeler, *supra* n. 68, at 127.

105 *Ibid.*, at 130.

106 *Ibid.*, at 131–132.

107 *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* (ICSID Case No. ARB/12/6), Procedural Order No. 3 (12 June 2015).

108 *Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017* (Hong Kong) s. 98U.

required to be disclosed by law, under the funding agreement itself, and any order of the arbitral body.[109] The Code of Conduct also obliges a funder to 'remind the funded party of its obligation' to give such disclosure.[110] In addition, the HKIAC Abitration Rules and the CIETAC Investment Arbitration Rules require funded parties to disclose the existence of the agreement and the identity of the funder.[111]

Singapore addressed the disclosure of third party funding arrangements through amendments to the *Legal Profession (Professional Conduct) Rules 2015.*[112] Those rules oblige lawyers 'conducting any dispute resolution proceedings before a court or tribunal' to disclose third-party funding arrangements and the identity and address of the third party funder as soon as the funding agreement is made, or as soon as practicable thereafter.[113] In addition, the SIAC's new Investment Arbitration Rules empower the tribunal to 'order the disclosure of a party's third-party funding arrangement, the identity of the funder and, where appropriate, details of the funding agreement, such as the funder's interest in the outcome of the proceedings and/or whether the third party funder has committed to bear any adverse costs liability'.[114]

5.3 Control of the Litigation/Strategic Decisions

One of the biggest concerns associated with third-party funding is that funders will craft agreements which grant them control over decisions about the conduct of the litigation.[115] This is said to pervert the course of justice where the funder's interests diverge from the claimant. On the other hand, commentators point to the consensual nature of arbitration to justify a party's ability to consent to varying levels of control by the funder.[116]

The 2018 ALF Rules stipulate that third-party funders must not seek to influence the party's representation or attempt to control the proceedings.[117] Nonetheless, funding arrangements can provide for the funder to have input in

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109 Hong Kong Code, *supra* n. 56, at 2.11.
110 *Ibid.*, at 2.10.
111 HKIAC Rules r 44; CIETAC Investment Arbitration Rules, r 27.
112 *Public Consultation on the Draft Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016,* Singapore Ministry of Law (30 June 2016), https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/public-consultation-on-the-draft-civil-law–amendment–bill-2016.html (accessed 28 Jul. 2020).
113 *Legal Profession (Professional Conduct) Rules 2015* (Singapore) s. 49A.
114 Singapore International Arbitration Centre, *Investment Arbitration Rules 2017,* r 24(l).
115 *Growing Trend of Third-Party Litigation Funding Creates Mixed Options,* Fulbrook Capital Management (15 Mar. 2012), https://fulbrookmanagement.com/growing-trend-of-third-party-litigation-funding-creates-mixed-options/ (accessed 4 Aug. 2020).
116 Oliver Gayner & Susanna Khouri, *Singapore and Hong Kong: International Arbitration Meets Third Party Funding,* 40(3) Fordham Int'l L. J. 1033, 1044 (2017).
117 2018 ALF Code, *supra* n. 34, r 9.3.

settlement decisions.[118] However, any dispute between a funder and a party is to be resolved by a binding opinion from a Queens' Counsel.[119] By contrast, the 2019 ALFA Guidelines only require a third-party funder to not cause the party's solicitor or barrister to breach their ethical duties.[120] This split reflects a perception that the Australian common law due process restrictions on valid third-party funding arrangements are less hostile to the funder taking control of the conduct of the proceedings than the English common law.[121] However, recent comments by Tomlinson LJ suggested that 'rigorous analysis of law, facts and witnesses, consideration of proportionality and review at appropriate intervals' are actions which are 'expected of a responsible funder' and do not interfere with the administration of justice.[122]

The Hong Kong Code provides that the funding agreement must establish the third-party funder cannot influence the funded party or its lawyers to 'give control or conduct of the arbitration to the third-party funder except to the extent permitted by law'.[123] It also includes an obligation not to incite breaches of professional duties.[124]

The Singapore Regulations are silent on the issue, and the Legal Profession Rules' provisions do not directly address the issue of control by a third-party funder, save for an overarching principle that legal practitioners must assist in the administration of justice.[125]

6 SIMILARITIES BETWEEN JURISDICTIONS

Putting aside the differences in the enforceability and ramifications of non-compliance, there are some standards which are common across all four jurisdictions.

Each jurisdiction, for example, has standards designed to ensure the solvency of third-party funders.

The Hong Kong Code imposes capital adequacy requirements,[126] including that the funder maintains access to a minimum of HK USD 20 million of capital,[127] and obliges funders to accept, in each funding agreement, a continuous disclosure obligation in respect of its capital adequacy.[128] The 2018 ALF Code includes a requirement that a funder have sufficient resources to fund the disputes they have

118 *Ibid.,* r 11.1.
119 *Ibid.,* r 13.2.
120 2019 ALFA Guidelines, *supra* n. 46, r 6.
121 Gayner & Khouri, *supra* n. 116, at 1039–1040.
122 *Excalibur Ventures LLC v. Texas Keystone & ORs* [2016] EWCA Civ 1144 [31].
123 Hong Kong Code, *supra* n. 56, r 2.9(1).
124 *Ibid.,* r 2.9(2).
125 *Legal Profession (Professional Conduct) Rules 2015* (Singapore) s. 9(1).
126 Hong Kong Code, *supra* n. 56, at 2.5(1).
127 *Ibid.,* at 2.5(2).
128 *Ibid.,* at 2.5(3)–(4).

agreed to fund (in any case at least GBP 5m) and to cover the aggregate liability under all of their funding agreements for a minimum period of 36 months.[129] The Singapore Regulations require funders to have a minimum paid-up share capital of at least USD 5m.[130] The 2019 ALFA Guidelines do not specify a dollar-figure, but require funders to be able to meet their debts as they become due and payable.[131]

Each jurisdiction except Singapore has standards requiring funders to abstain from misleading advertising,[132] obliging funders to take adequate steps to ensure (through written confirmation) a prospective client receives independent advice before executing a third-party funding agreement,[133] and prohibiting funding agreements granting a discretionary right for the funder to terminate the agreement for grounds outside specified circumstances.[134] These circumstances include where the funder reasonably ceases to be satisfied about the merits or commercial liability of the dispute, or reasonably believes a party has breached the funding agreement.[135]

7 CONCLUSION

Although both Hong Kong and Singapore are eager to allow third-party funders access to their respective jurisdictions, their regulatory framework differs from competing jurisdictions.[136] While England and Wales, and formerly Australia, have adopted a 'light touch' approach to regulation involving largely industry self-regulation and best practice standards,[137] Hong Kong and Singapore have adopted more prescriptive measures. The new Australian approach since 2020, requiring funders to have an Australian Financial Services Licence, introduces the toughest regulation of all four jurisdictions.

There is considerable overlap between each of the jurisdictions in standard capital requirements, termination of funding agreements, advertising, and pre-funding advice for potential funded parties. In other areas, the differences become

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129 2018 ALF Code, *supra* n. 34, rr 2, 9.4.

130 *Civil Law (Third-Party Funding) Regulations 2017* (Singapore) s. 4.

131 2019 ALFA Guidelines, *supra* n. 46, r 10.

132 Hong Kong Code, *supra* n. 56, at 2.2; 2019 ALFA Guidelines, *supra* n. 46, r 6; 2018 ALF Code, *supra* n. 34, r 6.

133 Hong Kong Code, *supra* n. 56, at 2.3(1); 2019 ALFA Guidelines, *supra* n. 46, r 6; 2018 ALF Code, *supra* n. 34, r 6.

134 Hong Kong Code, *supra* n. 56, at 2.14; 2019 ALFA Guidelines, *supra* n. 46, r 13; 2018 ALF Code, *supra* n. 34, r 12.

135 Hong Kong Code, *supra* n. 56, at 2.13; 2019 ALFA Guidelines, *supra* n. 46, r 12.2; 2018 ALF Code, *supra* n. 34, r 11.2.

136 *Third Party Funding of Arbitration in Singapore and Hong Kong: A Comparison,* Ashurst (13 Feb. 2017), https://www.ashurst.com/en/news-and-insights/legal-updates/third-party-funding-of-arbitration-in-singapore-and-hong-kong-a-comparison/ (accessed 9 Oct. 2020).

137 Gayner & Khouri, *supra* n. 116, at 1039.

clearer. Singapore and Hong Kong oblige lawyers and parties respectively to disclose the existence of a third-party funding arrangement to the counterparty where industry codes in Australia and the UK are silent. However, the UK industry code and Hong Kong have restrictive standards for third-party funders controlling strategic decisions where the Australian industry code and the Singapore regulations are silent. Each jurisdiction shows the potential for costs orders to be made against a party that is funded, including the profit margin of the third-party funder if the funded party is successful. However, only the English courts have confirmed an award reimbursing a funder's profit margin is permissible. Several arbitral institutions have amended their arbitration rules to permit tribunals to consider third-party funding arrangements in making costs awards. However, such reforms fall well short of granting tribunals an express power to make adverse costs awards against third-party funders, who are otherwise protected as they are not a party to the arbitration agreement.

It remains to be seen how the nascent Hong Kong and Singapore reforms will impact arbitral practice in their respective jurisdictions over time. It is entirely possible that even in the absence of formal regulation, arbitral tribunals in Australia and the UK will take it upon themselves to adopt norms of conduct which address many of the policy and due process concerns which spurred the Hong Kong and Singapore reforms. However, for the time being, they set a new standard for hands-on regulation of third-party arbitration funding arrangements.