ETHICAL ISSUES ARISING IN CONNECTION WITH
THIRD PARTY FUNDING (TPF)
OF INTERNATIONAL COMMERCIAL ARBITRATION

Introduction:

1. It is an inescapable fact that the leading international third party funders have not yet ventured investment into the market of cases arising in Indonesian litigation or Indonesian seated international arbitration to any known degree. Concerns about reliability of tribunals, predictability of outcome and about securing the fruits of the funders’ investment, have seemingly acted as a powerful deterrent.

2. In contrast, Funders do seem willing to engage with Indonesian parties and their lawyers to provide financial support for litigation and arbitration being pursued by Indonesian parties, proceeding in what they regard as trusted jurisdictions and seats, and in support of enforcement action where assets can be found in enforcement friendly jurisdictions.

3. On the basis of my understanding that third party funding is not regulated nor restricted in Indonesia, either under the Advocates Law of 2003 or the Indonesian Lawyers’ Code of Ethics, it begs the question of whether, (a) the presence of the burgeoning but regulated advance of TPF elsewhere in Asia; and, (b) the risk of unscrupulous, unethical and unregulated providers and willing users of TPF entering the Indonesian litigation and arbitration marketplace, requires immediate intervention by any or all of the legislature, leading arbitration institutions and professional bodies in Indonesia, to guard against unethical interference in dispute resolution processes.

4. I venture the opinion, respectfully, that inaction in this area, runs an unacceptable risk of compromise of universal norms of ethical behaviour in arbitration; and exacerbation of adverse perceptions abroad of dispute resolution processes in Indonesia.

What is TPF and who is a TP Funder?

5. The Recent ICCA-Queen Mary Task Force Report on Third-Party Funding proceeded on the basis of the following all-embracing working definitions:

The term “third-party funding” refers to an agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that party,

a) funds or other material support in order to finance part or all of the
cost of the proceedings, either individually or as part of a specific range of cases, and

b) such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment.

The term “third-party funder” refers to any natural or legal person who is not a party to the dispute but who enters into an agreement either with a party, an affiliate of that party, or a law firm representing that party:

a) in order to provide material support for or to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and

b) such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment.

Recent legislation in local seats defining the components and participants in TPF generally accords with these basic definitions.

The principal ethical obligations arising in or externally to the agreement and by reason of it:

Subject Area 1: Disclosure and Conflicts of Interest:

6. Starting with its conclusions concerning disclosure and conflicts of Interest, the same ICCA-Queen Mary Report advanced four principles of ethical conduct to be followed abbreviated thus:

A.1. A party/its representative should disclose the existence of a third-party funding arrangement and the identity of the funder to the arbitrators and the arbitral institution or appointing authority from the outset;

A.2. Arbitrators and arbitral institutions may expressly request disclosure of the involvement of a third-party funder and its identity;

A.3. For the purposes of application of these principles, it defined a funder in the wide terms already set out and provided;

A.4. In light of any disclosures, arbitrators and arbitral institutions
should assess whether any potential conflicts of interest exist between an arbitrator and a third-party funder, and assess the need to make appropriate disclosures or take other appropriate actions that may be required under applicable laws, rules, or Guidelines.

7. How did the Task Force get there? - From the considerable span of background and tradition in the members of the Task Force, the dangerous potential for imperilment of the integrity of the arbitral process by reason of TPF was thus identified:

“A number of factors contribute to increased interest in potential conflicts of interest due to the involvement of third-party funders. One frequently noted factor is that a number of leading arbitrators have taken positions within, or ad hoc consultant roles with, some funders. Other factors include the increasing number of cases involving third-party funding, the highly concentrated segment of the funding industry that invests in international arbitration cases, the symbiotic relationship between funders and a small group of law firms, related links among elite law firms and some leading arbitrators, and what might fairly be characterized as general calls for increased transparency, including with respect to potential arbitrator conflicts.”

8. The Task Force proceeded on the basis of six essential tenets or premises in reaching their conclusions set out as follows:

(1) The existence of third-party funding or insurance in an international arbitral dispute can create the potential for an arbitrator conflict of interest with the funder or insurer;

(2) Knowledge of the existence and identity of a third-party funder or insurer in international arbitral disputes is essential for arbitrators to assess and make necessary disclosures of potential conflicts of interest;

(3) Disclosure of potential conflicts is important to avoid potential challenges to an arbitral award and to preserve the overall integrity of international arbitration;

(4) Third-party funding may be provided through a variety of structures such that it is difficult to isolate a single definition of third-party funding;

(5) Avoiding conflicts of interest is in the best interest of all parties and arbitrators, and is important for the legitimacy of
international arbitration and the assured enforceability of arbitral awards; and

(6) Disclosure should strike an appropriate balance between providing adequate information for arbitrators, parties, institutions, and appointing authorities to assess potential conflicts of interest, and reducing the potential for unnecessary delay, frivolous challenges to arbitrators, or unfounded applications for disclosure of financial information and funding agreements.

9. These principles of disclosure of TPF arrangements and providers also feed into principles derived and illustrated by the Task Force, in relation to protection of privilege and professional secrecy. These derived principles (which cannot be covered fully in the time available) generally protect disclosure beyond the existence and identity of TP Funding/Funders and tend towards prevention of breach of privilege or confidentiality obligations. They also seek to ensure a level playing field in relation both to the award of costs and orders for security for costs.

Subject Area 2: Ethics and professional conduct in relation to TPF:

10. A number of compromising situations or risks of impairment of ethical standards of professional conduct of party representatives, which must be guarded against and proscribed by statutory regulation, disciplinary rules and/or codes of conduct, may include the following:

a. Referral fees or kickbacks from funders to lawyers;

b. Skewed legal advice - influenced by the extraneous temptation of securing a one-off fast buck of fee income in a weak case, falsely presented as meritorious; or, conversely, over-timorous advice on merits to a client given in fear of losing the case and with it a lucrative relationship with a funder;

c. Advice to clients on the funding contract itself (particularly the funder’s price or share defined by reference to a range of factors including litigation and non-enforcement risks) being influenced by commercial considerations and self-interest – there is an obvious case for regulation requiring independent advice on the funding agreement from a lawyer other than the one retained to prosecute the claim in arbitration;

d. Surrender of control of the arbitration to the funder – particularly in relation to settlement offers, which might amount to champerty and maintainence in some jurisdictions;
e. Dangerous liaisons with third party funding brokers – who is the broker acting for and how is he/she remunerated, who by, and in what event;

f. Risks generally stemming from actual or apparent conflicts of interest;

g. Risks and dangers of divulging privileged or confidential information of a client, inherent in hawking a case around potential funders and brokers when seeking funding;

Different means of ensuring ethical professional conduct and risk avoidance in the use of TPF:

11. In the limited time available these may best be illustrated by the contrasting and recent approaches to the problem in two proximate Asian seats, Singapore and Hong Kong.

Singapore:

12. TPF was legitimised and regulated for arbitration proceedings by Amendment to the Civil Law Act (Cap 43) “CLA” and the Legal Profession Act (Cap 161) “LPA”, and by bringing into operation, the Civil Law (Third Party Funding) Regulations 2017 “CLTPF Regs”. TPF is not yet permissible in civil litigation but I venture it is bound to come as the legislation and subordinate legislation is set up to legitimise it, merely by amending the Regulations to add civil litigation as another form of “Prescribed dispute resolution proceedings” to Regulation 3.

13. In brief summary the legislative regime in Singapore works in this way:

a. By (i) abolishing the Common Law torts of maintenance and champerty (seen by some as doing away in a trice with centuries of disapprobation and proscription of stirring up and trafficking in litigation for a share of the spoils, in claimed pursuit of access to justice!) (Section 5A CLA); and, (ii) for the avoidance of doubt, declaring in sub-section 3A of section 107 of the LPA that sub-section 3 (which otherwise subjects a solicitor to the law of maintainence and champerty like anyone else) does not prevent a solicitor from promoting, advising on and drafting contracts for TPF or acting in a dispute arising out of a TPF contract.

b. Next by validating certain contracts for funding of claims by a “qualifying Third-Party funder” in “prescribed (by Regulation) dispute resolution proceedings” and declaring that such contracts are not contrary to public policy or illegal by reason of it being a contract for maintenance or champerty.
c. Presently, under Regulation 3 of the CLTPF Regs, “prescribed dispute resolution proceedings” includes only: international arbitration proceedings and court, (for stay of claims in litigation or enforcement of arbitration agreements or awards) and mediation proceedings arising out of, or related to international arbitration proceedings.

d. By Section 5B (8) (a) and (b) of the CLA, The Minister is empowered to make the CLTPF Regs to prescribe the qualifications and requirements a qualifying Third-Party Funder is required to meet (there are only two – the Funder must operate in Singapore and have a capital worth of not less than SGD5M) but interestingly at subsection (c) the Minister may make Regulations:

(c) governing the provision and manner of third-party funding including the requirements that the Third-Party Funder and the funded party must comply with.

e. More interestingly, no such Regulations have been made because this power to regulate is the Sword of Damocles positioned to smite Lawyers and Funders if they do not operate in accordance respectively, with the Legal Profession (Professional Conduct) Rules 2015 (as amended) the “PCR”; and a Law Society Guidance Note on TPF (“the Guidance”) effective from 25 April 2017, which sets out best practices for lawyers dealing with TPF; and, in the case of Funders and Arbitrators, with Guidelines issued by Institutions (such as the Singapore Institute of Arbitrators and SIAC) and in the background, the principles behind a Code of Conduct for Litigation Funders, updated to January 2018, adopted by the Association of Litigation Funders of England and Wales – many of which funders now operate in this region.

Regulation of, and Guidance issued to Lawyers:

14. The most important rules and guidance may be extracted (not exhaustively) as follows:

15. Rule 49A of the PCR provides:

Disclosure of third-party funding

49A.—(1) When conducting any dispute resolution proceedings before a court or tribunal, a legal practitioner must disclose to the court or tribunal, and to every other party to those proceedings —

(a) the existence of any third-party funding contract related to the costs of those proceedings; and
(b) the identity and address of any Third-Party Funder involved in funding the costs of those proceedings.

(2) The disclosure under paragraph (1) must be made —

(a) at the date of commencement of the dispute resolution proceedings where the third-party funding contract is entered into before the date of commencement of those proceedings; or

(b) as soon as practicable after the third-party funding contract is entered into where the third-party funding contract is entered into on or after the date of commencement of the dispute resolution proceedings.

Although this disclosure obligation applies to and binds Singapore Counsel and Foreign Lawyers Registered to practice in Singapore under the Legal Profession Act, it does not bind the ever-increasing band of foreign lawyers not so registered, who act in, and are encouraged to seat their arbitrations in Singapore. It therefore represents a deficiency in ethical regulation, in circumstances where there is no direct obligation or guidance requiring a party itself to make disclosure of a funding arrangement that is an ethical imperative.

16. Rule 49 B PCR provides:

**Prohibition against financial and other interests in Third-Party Funder**

**49B.—** (1) A legal practitioner or a law practice must not, directly or indirectly, hold any share or other ownership interest in a Third-Party Funder —

(a) which the legal practitioner or law practice has introduced or referred to a client of the legal practitioner or law practice in relation to dispute resolution proceedings; or

(b) which has a third-party funding contract with a client of the legal practitioner or law practice.

(2) A legal practitioner or a law practice must not receive any commission, fee or share of proceeds from the Third-Party Funder mentioned in paragraph (1).

(3) Paragraph (2) does not prohibit receiving any fee, disbursement or expense payable by the client mentioned in paragraph (1) for the provision of legal services by the legal practitioner or law practice to that client.

17. The “Guidance” obviously mirrors those regulatory requirements but goes further and dictates action as follows in relation to any terms of a funding agreement:
**Confidentiality and privilege**

You should advise your client on the applicability of common interest privilege to documents disclosed to funders.

You should also advise your client to enter a confidentiality agreement with the funder before disclosing any documents to it.

**Scope of funding provided**

You should advise your client on the scope of funding provided, especially the funder’s liability for adverse costs.

**Managing conflicts of interest**

To avoid conflicts of interest, you should advise that the funding agreement should recognize that you owe your duties to your client and not the funder. Your duty is to the party that retains you.

You should advise your client that the funding agreement should let you continue to act solely for the client and not the funder, should any conflict of interest arise.

**Funder’s level of involvement and dispute resolution**

You should advise that the agreement should set out the funder’s level of involvement in decision-making, and the dispute resolution procedures should the funder and claimant disagree.

**Duty to disclose third-party funding**

When conducting any dispute resolution proceedings, you must disclose to the court/tribunal and other parties if your client is engaged in third-party funding, and if so, the funder’s identity and address.

(As per rule 49A of the PCR 2015 supra. But note the additional guidance below, reflective of a particular danger of concealed TPF and a reminder of the fact and deficiency that none of these rules and guidance regulate the parties themselves).

You should check with your client at the start of your retainer if he/she intends to engage third-party funding. You should check with your client again if you become aware of circumstances that strongly suggest he/she is engaged in third-party funding.
Singapore Institute of Arbitrators Guidelines for Third Party Funders:

18. The Guidelines set out their objective thus:

       .......these SI Arb Guidelines for Third Party Funders aim to promote best practices among Funders who intend to provide funding to parties in Singapore-seated international arbitrations. These guidelines set expectations of transparency and accountability between the Funder and Funded Party, as well as to encourage Funders to behave with high ethical standards towards Funded Parties so as to uphold the integrity of international arbitration practice in Singapore. These guidelines and its recommendations may be referred to by parties seeking funding, or their legal advisers, when negotiating a third party funding contract.

19. The most important rules and guidance may be extracted (not exhaustively or in order) and summarised as follows:

   a. A funder shall take reasonable steps to ensure:

      i. it can and will comply with the qualifying requirements and meet its financial obligations throughout the proceedings and notify the party interested in the funding and its legal practitioner if it may not be able to do so;

      ii. it has advised the party interested in funding to get independent legal advice on the terms of the Funding Contract;

      iii. there are no circumstances arising from the funding that might give rise to any reasonably foreseeable conflict of interests with any relevant party.

   b. A Funder shall observe the confidentiality and/or privileged nature of all information and documentation relating to the claim to the extent provided by law, and subject to the terms of any Confidentiality or Non-Disclosure Agreement agreed between the Funder and the party interested in funding. It shall not seek disclosure of information from the party’s legal representative which might amount to a breach of privilege or confidentiality, unless with the funded party’s consent;

   c. Funding Contracts must:

      i. be in writing, clear, specify the amount of funding and the return to the Funder;
ii. permit disclosure of the Funder’s identity;

iii. include a fair and transparent dispute resolution mechanism;

iv. state whether the Funder is liable to pay: adverse costs orders; any insurance premium to obtain costs insurance; security for costs or any other financial liability;

v. be clear on the extent to which the Funder may: provide input on the Funded Party’s decisions in relation to settlements and how such input should be taken into account; terminate the Funding Contract in the event of clearly prescribed conditions; and provide that the Funder shall remain liable for accrued obligations notwithstanding termination of the Funding Contract.

d. In relation to potential conflicts of interest and control of proceedings, a Funder shall not:

i. induce or take any steps that cause or are likely to cause the Funded Party’s legal practitioner to act in breach of their professional duties;

ii. pay any commission, fee or share of proceeds to legal practitioners or law practices for the introduction or referral of clients or potential clients;

iii. knowingly allow a legal practitioner or law practice representing the Funded Party to directly or indirectly hold any share or other ownership interest in the Funder

iv. seek to influence the Funded Party’s legal practitioner to cede control or conduct of the dispute to the Funder except where and to the extent expressly permitted by the Funding Contract

v. fund or continue to fund other parties to the same proceedings where there arises an actual or potential conflict of interests between or among the funded parties and shall notify the funded parties, and with their agreement address, how any such conflict may be resolved

e. A Funder should cooperate regarding disclosure to an arbitral tribunal or court of any information concerning the funding if any applicable rules or order of arbitral tribunal or court so require.
SIAC practice note (pn – 01/17 31 march 2017) on arbitrator conduct in cases involving external funding:

20. This final piece of the suite of rules and guidance, is designed to supplement existing rules and obligations applying to arbitrators to ensure ethical behaviour in relation to TPF in Singapore, and is directed by its flagship Institution towards the arbitrators it appoints.

21. Its principle requirements are directed towards ensuring impartiality and independence and the pre-requisite of disclosure of the existence of TPF in the reference.

   a. By paragraph 4 a candidate for appointment’s disclosure obligations of any circumstances that may give rise to justifiable doubts about his/her independence or independence now expressly include: “any relationship whether direct or indirect, with an External Funder, as soon as reasonably practicable and in any event before his appointment”. Likewise (by paragraph 6) if discovered or arising during the proceedings.

   b. By paragraph 5 unless otherwise agreed by the parties, “the Tribunal shall have the power to conduct such enquiries as may appear to the Tribunal to be necessary or expedient, which shall include ordering the disclosure of the existence of any funding relationship with an External Funder and/or the identity of the External Funder and, where appropriate, details of the External Funder’s interest in the outcome of the proceedings, and/or whether or not the External Funder has committed to undertake adverse costs liability.”

   c. By paragraphs 7 and 8 the Tribunal may request the parties to inform the Tribunal and the Registrar at the earliest opportunity (and inform them of their continuing obligation to do so) of the involvement, withdrawal or change of an External Funder.

Hong Kong:

22. The regime allowing and regulating TPF in Hong Kong is not yet fully in force pending approval and issuance of the Code of Practice for Third Party Funders, following statutory consultation which was closed just a few weeks ago.

23. There are many similarities with the regime in Singapore but some significant differences so that it will best serve to highlight the differences in approach.

24. The new regime is to be brought into effect pursuant to the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, which adds a new part 10A to the Arbitration Ordinance Cap 609.
25. In short summary the legislation:

- Sets out its dual purpose of ensuring that TPF is not prohibited by common law doctrines and of providing measures and safeguards in relation to it; and by its following provisions, seeks to achieve those purposes;

- Provides a comprehensive set of definitions, which are consistent with the now familiar definitions elsewhere, of elements and participants in a TPF arrangement.

- Abolishes the common law offences of maintenance, champerty and barratry by a common barrator (meaning in this context, a person litigating for the purpose of harassment or profit!) but preserving (as in Singapore) rules of law whereby a contract may be treated as contrary to public policy or otherwise illegal and not enforced.

- Provides for an authorized (by the Secretary for Justice) body to issue, amend or revoke a code of practice, after a stipulated form and period of consultation, which code, pursuant to Section 98 Q (1),

  `may, in setting out practices and standards, require third party funders to ensure that ......`

  And there follows at subsection 1 (a)–(j) and subsections 2-3 a substantial replication in outline of the ethical practices and standards found in the regulations and guidance applicable in Singapore, which has been fleshed out in the Draft Code which has been issued. It is not necessary to repeat those ethical requirements again here. It is fair to say that in some respects, the Draft Code in Hong Kong is a more demanding rubric for a funder’s operations than the equivalent guidance in Singapore.

- Requires by Section 98U disclosure by the funded party (a difference from Singapore where the disclosure obligation is placed on lawyers and funders are guided to co-operate in disclosure) by written notice of: (a) the fact that a funding agreement has been made; and (b) the name of the third party funder, to the arbitration body on commencement of the arbitration if the funding agreement is made on, or predates the commencement of the arbitration. If the funding agreement is made after the commencement of the arbitration, notice must be given within 15 days after the funding agreement is made. These time limits are designed to facilitate early detection of potential conflicts and timely recusal by or challenges to arbitrators. Section 98V requires disclosure about the ending of a funding
arrangements within 15 days of it ending to the other party and the arbitration body.

26. The Hong Kong approach has been vaunted as the better approach to ensuring ethical standards are maintained and to avoiding any impairment of the integrity of the arbitral process by TPF, on the basis that it involves statutory regulation by means of a code issued pursuant to statutory guidance, rather than the hotchpotch of different means of regulation and guidance, without effective sanctions for non-compliance, directed at the different players, which has been implemented in Singapore. I am not at all sure that is a deserved accolade or distinction, because:

a. Section 1.4 of the Draft Code provides that Section 98S of Cap 609 sets out the consequences (or lack of them) of failing to comply with the Code in the following terms:

98S.

(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.

Any teeth have thus been drawn by subsection 1; and subsection 2 does no more than express what arbitrators may do in exercising their wide discretion and power to take matters that they consider to be relevant into account, when making decisions.

b. The critically important Disclosure Provisions in section 98U and 98V mentioned above are in Division 5 of the added Part 10A of the Arbitration Ordinance, but section 98W similarly renders them toothless and again merely expresses existing powers and discretion in decision making thus:
98W. Non-compliance with Division 5

(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.

c. So far as I am aware, there has been no amendment to professional conduct regulations in Hong Kong requiring lawyers to ensure disclosure obligations are complied with by parties or by way of back up, to make disclosures themselves.

Conclusions:

27. Expediency and competition to be the premier centre for international arbitration in Asia made it inevitable that TPF would be legitimised and facilitated in the region. Control and regulation to maintain ethical standards and protect the integrity of the arbitral process was mandatory in the face of arrangements and practices that were not so long ago regarded as criminal and/or tortious in many important jurisdictions; and are still affected by the risk of being struck down on public policy grounds, if particular requirements are breached.

28. It is obviously in the interests of governments striving for a competitive edge in attracting arbitration to their shores, for them to provide the necessary and facilitative legal infrastructure that would allow this new life-blood of the business to flow; and not cause any thrombosis by heavy-handed regulation. In consequence, across all major centres of arbitration there is essentially light-touch, guided self-regulation of parties and funders (with some specific professional rules applying to some lawyers) backed by reserved powers to intervene and regulate more strictly, if all or any of the players misbehave and compromise the arbitral process and its reputation.

29. Is it sufficient – will this approach work and achieve potentially conflicting objectives? It is still early days and time will tell; but I venture we may be encouraged to conclude, by the high stakes and singular determination of the major governmental players and institutions to guarantee the integrity of arbitral processes, that TPF will not be allowed to cause any impairment of it. That determination will be buttressed not, I am afraid, by altruistic notions of serving the needs of access to justice, but by hard-headed business considerations in the minds of funders, their investors and users.
30. The vital and obvious requirements to be met by all of us now that these regulatory regimes (if they may be so described) are in place, are vigilance to detect and report any breach or compromise of ethical standards on the part of any participant in the process of arbitration in which a party is funded by an external third party. Those reports must be made to the relevant ministry, governmental authority, arbitral institution or professional body; and they need to be made before any perception of compromise or corruption of the arbitral process stemming from TPF might arise. That is something we can and should all work together to prevent.

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Given at the Bani Conference in Jakarta, Indonesia on 29 November 2018.