THIRD PARTY FUNDING FOR ARBITRATION IN MALAYSIA

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DEDICATION

Especially to …

My beloved parents, my sister, my brothers
and all my friends
for their helps and understandings

至敬爱的父母，弟妹们
亲朋戚友们
当然，还有那些不看好的人

有你们，才可以更强
（有时候，不逼逼自己，都不知道自己的极限在哪里！）

Thanks for Everything!!

谢谢！！

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ABSTRACT

It is submitted that currently arbitration cost is no longer inexpensive. The School of International Arbitration, Queen Mary University of London, had in 2015 carried an international arbitration survey that showed 'cost' is the worst feature of arbitration. As such, some claimants or respondents are unwilling to participate in arbitration unless there is likelihood of success or option to mitigate the financial risks. The current trend is that the third parties help to fund claimants or respondents their arbitration costs. Although initially third party funding is practised in litigation, there is now a growing tendency to expand its scope into arbitration. Generally such funding involves an agreement between the claimant or the respondent and the funder whereby the funder agrees to fund the arbitration proceeding in return for a share of the remedies recovered therefrom. The legal position of this practice is that it is illegal under the common law doctrine of champerty and maintenance. It appears that the tendency to tolerate third party funding in dispute resolution system is unavoidable and irresistible; as such there are jurisdictions such as the United Kingdom, Australia and Singapore that have legalised third party funding by making changes to their laws. It is submitted that the practice is still illegal in Malaysia. Thus, the objective of this research is to identify a framework to legalise third party funding in Malaysian arbitration process. The method used in carrying this research is by examining the approaches taken by those countries, mainly the United Kingdom, Australia, Singapore and Hong Kong that have legalised third party funding. The finding of the examination of the approaches, it is found that there are four steps in legalising third party funding: firstly is to pass a statute that abolishes the civil liability and tortious of maintenance and champerty principle; secondly is to develop mandatory rules and practices for arbitration practitioners; thirdly, to legalise third party funding agreements, and fourthly is to build up statutory provisions that regulate third party funding practice in arbitration. It is suggested that Singapore's framework is just simple and clear to be emulated. In conclusion, this study established a general framework to legalise third party funding for arbitration under this rapid changing environment, and a legal reform is an essential.

ABSTRAK

Kos timbangtara tidak lagi murah hari ini. School of International Arbitration, Queen Mary University of London, pada 2015 menerbitkan sebuah kajian timbangtara antarabangsa yang menunjukkan 'kos' timbangtara adalah ciri yang paling teruk. Oleh itu, pihak yang menuntut atau responden enggan mengambil bahagian dalam proses timbangtara melainkan terdapat kemungkinan untuk kejayaan atau pilihan untuk mengurangkan risiko kewangan. Trend semasa adalah pihak ketiga membantu untuk membiayai kos timbangtara bagi pihak yang menuntut atau responden. Pada mulanya, pembiayaan pihak ketiga diamalkan dalam proses litigasi, kini terdapat kecenderungan yang semakin meningkat untuk diperluaskan ke proses timbangtara. Ia melibatkan satu perjanjian di antara pihak menuntut atau responden dan pembiaya di mana pembiaya bersetuju untuk membiayai kos prosiding timbangtara, sebagai balasan, mengongsikan remedi yang dipulihkan daripadanya. Amalan ini menyalahi undang-undang di bawah doktrin "*champerty"* dan "*maintenance*". Tetapi, kecenderungan untuk bertolak ansur dengan pembiayaan pihak ketiga dalam sistem penyelesaian pertikaian tidak dapat dielakkan dan tidak dapat ditolak; negara-negara seperti United Kingdom, Australia dan Singapore telah mengesahkan pembiayaan pihak ketiga dengan mengubahkan undang-undang. Ia berhujah bahawa amalan itu masih haram di Malaysia. Jadi, objektif kajian ini adalah mengenal pasti rangka kerja untuk mengesahkan pembiayaan pihak ketiga bagi timbangtara di Malaysia. Kaedah kajian ini adalah dengan mengaji pendekatan yang digunakan oleh negara-negara, terutamanya United Kingdom, Australia, Singapura dan Hong Kong di mana pembiayaan pihak ketiga telah disahkan. Hasil mendapati bahawa terdapat empat langkah dalam mengesahkan pembiayaan pihak ketiga: pertama adalah mengmansuhkan liabiliti sivil dan tort "*maintenance"* dan "*champerty*"; kedua adalah memdirikan peraturan dan piawaian amalan bagi pengamal timbangtara; ketiga, mengesahkan perjanjian pembiayaan, dan keempat adalah membina peruntukan berkanun untuk mengawal selia amalan pembiaya pihak ketiga dalam timbangtara. Kesimpulannya, kajian ini membentuk satu rangka kerja umum untuk mengesah Pembiayaan Pihak Ketiga untuk timbangtara, dan reformasi perundangan adalah penting.

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LIST OF ABBREVIATIONS

ABBREVIATION	FULL NAME
UNCITRAL	- United Nations Commission on International Trade Law
Model Law	- Model Law on International Commercial Arbitration
Act 2005	- Arbitration Act 2005
ATE	- After-the-event
BTE	- Before-the-event
CFA	- Contingency fee agreement
IBA	- International Bar Association
KLRCA	- Kuala Lumpur Regional Centre for Arbitration

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CHAPTER 1

INTRODUCTION

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INTRODUCTION

1.1 Background of Study

The arbitration forum is preferable compared to public proceedings on the ground that it is relatively cheap in costs, but today's arbitral forum have been strike down on its efficiency on cost and time. [1] The large figure can be easily observed from the international arbitration and investment arbitration, in which, the involved amount of disputes generally measured in millions of dollars. [2]

A global survey for arbitration done by the Queen Mary [3] indicated "cost" as the worst feature of arbitration. But, the users who attempt to take advantages of

[1] Drik-Reiner Martens and Heiner Kahner Kahlert. *Back to the Roots of Arbitration.* Martens Rechsanwalte, available at http://kluwerarbitrationblog.com/2015/10/26/back-to-the-roots-of-arbitration/ as accessed on 10th August 2016.
[2] Ignacio Torterola. *Third party funding in International Investment Arbitration,* available at: http://investmentpolicyhub.unctad.org/Upload/Documents/Torterola_Third%20Party%20Funding%20in%20Arbitration.pdf as accessed on 20th April 2016.
[3] Queen Mary School of International Arbitration and White & Case LLP, *Improvements and Innovations in International Arbitration, International Arbitration Survey 2015,* available at http://www.arbitration.qmul.ac.uk/docs/164761.pdf as accessed on 13rd July 2016.

adopting private dispute settlement instead of the civil proceeding; they generally weight the outcome on costs matter as important as the merit of the case. [4]

The courts are subsidized by the taxpayer, but not arbitration. [5] Since costs are the apparent drawback of the arbitration process, it forms discouragement or fear among the users to begin or even take part in arbitration. [6]

Then, the funder comes in as an irrelevant party to the arbitration process, sitting on plenty of cash, and offer to help the users to bear the substantial costs of arbitration forum; but the funder would ask an exchange of a share of the recovered damages if the users' claim succeeded. In the event, if the funded claim was failed, the money would not have to pay back to the funder. This offer create a scenario of win something and lose nothing may just sound for the users, and there is no other option left. [7]

From the funders' view, as mentioned by Ignacio, the chance to fund international arbitration and investment arbitration are highly demanded as there involved figures of damages normally counted in millions. [8] This is because the greater the recovered damages for the claimant, the greater the shared damages the funders can get. And this is no surprise that there is a height of facilitating third party funding in an arbitral process involving investment disputes. [9] Same goes to

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[4] Ank A. Santes. *Cost in International Arbitration: A Plea for a Debate on Early Guidance by the Arbitral Tribunal on the Principles it will apply when deciding on Costs*, White & Case LLp for White & Case, available at: http://kluwerarbitrationblog.com/2009/06/10/costs-in-international-arbitration-a-plea-for-a-debate-on-early-guidance-by-the-arbitral-tribunal-on-the-principles-it-will-apply-when-deciding-on-costs/ as accessed on 2nd August 2016.

[5] Matthew B. Kirsner. *Arbitration*: Which Party Should Bear the Cost? *Litigation:* Features, Virginia Lawyer, April 2002

[6] Marius Nicolae Iliescu. *A Trend Towards Mandatory Disclosure of Third party funding? Recent Developments and Positive Impact*, Queen Mary University of London, available at: http://kluwerarbitrationblog.com/2016/05/02/a-trend-towards-mandatory-disclosure-of-third-party-funding-recent-developments-and-positive-impact/ as accessed on 13rd July 2016.

[7] *Ibid.*

[8] Ignacio Torterola. op. cit.

[9] *Ibid.*

commercial disputes where the parties are keen to get financial assistance from the funders to pay for their lawsuit regardless of their financial status. [10]

This sequence called as third party funding in civil proceedings or arbitration process. Third party funding is an alternative financing mean which has to expand its portfolio into arbitration [11] other than litigation after some time. [12] Generally, it's involved an agreement between the funder and a client where the funder will provide funds to pay all the incurring fees and disbursements on an on-going basis for litigation or arbitration process in exchange for a share of the remedies recovered in the claim. On the same time, the funders bear the risk of the non-damages award. [13]

As such, contracts to obtain shared damages out of legal proceedings fall under the civil offence of the doctrine of champerty under the common law, and thus illegal and void as well under the consideration of public justice. [14] Lord Denning MR stated in *Re Trepica* case, striking down a champertous arrangement:

> *"The reason why the common law condemns champerty is because the abuses to which it may give rise. The common law fears that the champertous maintenainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty unlawful." [15]*

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[10] Maxi Scherer. *Out in the open? Third-party funding in arbitration*. Wilmerhale, available at: https://www.cdr-news.com/categories/arbitration-and-adr/out-in-the-open-third-party-funding-in-arbitration as accessed on 3rd August 2016.
[11] Kabir Singh, Sam Luttrell and Elan Krishna. *Third-Party Funding and Arbitration Law-Making: The Race for Regulation in the Asia – Pacific*, Clifford Chance Asia, available at: http://kluwerarbitrationblog.com/2016/07/14/third-party-funding-and-arbitration-law-making-the-race-for-regulation-in-the-asia-pacific/ as accessed on 15th July 2016.
[12] *Ibid.*
[13] Lisa Bench Nieuwveld. *Third party funding – Investment of the Future?* Conway & Partners, available at http://kluwerarbitrationblog.com/2011/11/01/third-party-funding-investment-of-the-future/ as accessed on 15th July 2016.
[14] Ng Jern-Fei. The Role of the Doctrines of Champerty and Maintenance in Arbitration, 76 *Arbitration* 208 – 213, Sweet & Maxwell, May 2010.
[15] *Re Trepica Mines Ltd (No. 2)* [1963] Ch. 199, 224.

The common law doctrines which prohibit champertous agreements are no longer given effects when the English's Parliament announced that conditional fees agreement (CFAs) is legal and enforceable. [16] Such change followed after the abolition of civil liability and tortious maintenance and champerty after passing of Criminal Law Act 1967. [17] This phenomenon recorded total attitude change on the consideration of public justice regarding the doctrines of maintenance and champerty; positively to encourage the growth of third-party funding as a mechanism to secure the access to justice. [18]

Further in 2005, *Atkin* [19] case justified by the Court of Appeal that maintenance and champerty would not give effects to laymen in pursuing their claims holding a third party funding contract. Thus, third party funding has increased use in England. [20]

The abolition of criminal offences of maintenance and champerty also take place in Australia after England had passed their Criminal Law Act 1967. Australia legal reform takes place gradually in each state, such as Victoria amend on their Crime Act 1958 and Wrongs Act 1958, New South Wales enacted Maintenance and Champerty Abolition Act 1993. [21] In *Fostif* [22] and *Trendlen* case, [23] the High Court ultimately put an end to these obsolete offences of maintenance and champerty by upholding the third party funding agreement. [24]

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[16] Law of England. Section 58 of the Court and Legal Services Act 1990 (Chapter 41).
[17] Law of England. Section 13 and 14 of the Criminal Law Act 1967 (Chapter 58)
[18] Lord Neuberger. President of The Supreme Court. Harbour Litigation Funding First Annual Lecture: *From Barretry, Maintenance and Champerty to Litigation Funding*. Gray's Inn, 8 May 2013.
[19] [2005] EWCA Civ 655.
[20] Lord Neuberger. op. cit.
[21] Law of New South Wales, Australia. Act 88 of 1993. Repealed into Maintenance, Champerty and Barratry Abolition Act 1993.
[22] *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] 229 CLR 386; 229 ALR 58.
[23] *Mobil Oil Australia Pty Ltd v Trendlen Pty Ltd* [2006] HCA 42.
[24] Law Council of Australia. *Regulation of Third Party Litigation Funding in Australia. Position Paper*. June 2011, available at https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/RegulationofthirdpartylitigationfundinginAustralia.pdf as accessed on 12rd August 2016.

As mentioned before by Ignacio, the involvement of third party funders in arbitration becomes the mainstream when they had gradually appeared in investment arbitration in these recent years. [25] This speedy growth of third party funding in arbitration is the satellite effect of well-developed litigation funding industry. [26] The growing number of the funders in arbitration forum creates several problems, such as the legitimacy of the funding agreement, financial standard, and ethical manner. [27]

In the event when the increasing international disputes to arbitrate, the users (here referred to investors, in which, they find themselves vulnerable when claiming against a nation) demand on third party funding to solve their financial problem; hence, the seat jurisdiction and its regulation on third party funding become the crucial consideration in selecting the arbitration seat. [28]

This event had driven the legal reform trend in Asia Pacific especially for the leading seat, such as Hong Kong and Singapore. The legislative changes have yet to take place but both seats looking positively on this legal change. If the law reform succeeds, Hong Kong and Singapore will be more attractive as a centre for arbitration. [29]

In short, a seat needs to be tolerant of third party funding. [30] If cost is the barrier, economic incentive such as contingency or conditional fee agreements and others forms of third party funding should be allowed. [31]

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[25] Ignacio Torterola. op. cit.; see example: S & T Equipment and Machinery Ltd v Romania (ICSID Case No. ARB/07/13); Abaclat v Argentina (ICSID Case No. ARB/07/5); Fuchs v Georgia (ICSID Case No. ARB/07/15); Kardassoppoulos v Georgia (ICSID Case No. ARB/05/18); Teinver v Argentina (ICSID Case No. ARB/09/1).
[26] Kabir Singh, Sam Luttrell and Elan Krishna. op. cit.
[27] *Ibid.*
[28] *Ibid.*
[29] *Ibid.*
[30] *Ibid.*
[31] Securities Commission Malaysia. Chapter 6: Public and Private Enforcement. *Corporate Governance Blueprint 2011: Towards Excellence in Corporate Governance,* July 2011, available at

1.2 Statement of Problem

Jurisdiction on third party funding affects the selection of the seat of arbitration by the users. A seat rules the conduct of arbitration forum and governs the interaction between the civil court and private arbitral tribunal. However, *lex arbitri* often give statutory effects to arbitration forum although not directed into arbitration rules. For example, the doctrine of maintenance and champerty under common law were not even provided in arbitration Act but it gives effects to the third party funding. [32]

Malaysia, one of the commonwealth jurisdictions, in which, the doctrine of maintenance and champerty held that third party funding is a forbidden fruit. [33] Latest decision made by Ravinthran JC justified that the contract to pay if the legal suit succeeded, even orally, was champertous, illegal and against public policy; thus it was void and unenforceable in *Mastika* case. [34]

Meanwhile, other commonwealth jurisdictions have successively abolished the civil offences and tortious maintenance and champerty under common law; and permitting champertous agreements to come into force in arbitration forum or legal proceedings. Within these two years, Hong Kong and Singapore were caught in a race of legal reform to allow third party funding for arbitration in order to stand still as a preferable arbitration seat. [35]

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http://www.sc.com.my/wp-content/uploads/eng/html/cg/cg2011/pdf/cg_blueprint2011.pdf as accessed on 6th August 2016.

[32] Kabir Singh, Sam Luttrell and Elan Krishna. op. cit.

[33] Lisa Bench Nieuwveld and Victoria Shannon. (2012). *Third-Party Funding in International Arbitration,* Kluwer Law International BV, The Netherlands.

[34] *Mastika Jaya Timber Sdn Bhd v Shankar a/l Ram Pohumall* [2015] 5 MLJ 707.

[35] Kabir Singh, Sam Luttrell and Elan Krishna. op. cit.

In addition, Securities Commission of Malaysia (SC) identified that the climbing costs of proceedings and prohibition on third party funding arrangements, such as contingency fees contract to keep the users away in pursuing their claim in Malaysia [36] although the avenue had been statutory provided. [37] This sequence reflects unclear rules of laws, non-accessible legal structure, and ineffective and inefficient dispute resolution system, in which, these had largely deterred the investors' rights [38] as well as the growth of social and economic institutions. [39]

Securities Commission of Malaysia urges to create a research group to study the viability of third party funding under Malaysian context [40] as a solution, and further clarify that the funding approach was not an abuse of process or contrary to public justice. [41] In the year 2011 as well, the Malaysian Bar had undergone changes on contingency fee agreement, [42] which are, however, limited to personal injury cases. [43]

Hence, the position of Malaysia in attempting to legalise third party funding for arbitration is not clear at the present time. As such, there are no mandatory rules of laws provided that can legalise third party funding for private dispute settlement system in Malaysia; like the statutory abolition of criminal offences and tortious maintenance and champerty in an Act and statutory permitting third party funding arrangements to resemble others commonwealth jurisdictions.

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[36] Securities Commission Malaysia. Chapter 6: Public and Private Enforcement. *Corporate Governance Blueprint 2011: Towards Excellence in Corporate Governance*, July 2011.
[37] Law of Malaysia. Order 15 rule 12 of the Rules of High Court 1980.
[38] Securities Commission Malaysia. op. cit.
[39] Lord Neuberger. op. cit.
[40] Securities Commission Malaysia. op. cit.
[41] *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* [2006] 229 CLR 386, per joint judgement of Gummow, Hayne and Crennan JJ.
[42] Law of Malaysia. Section 112 of the Legal Profession Act 1976.
[43] Su Tiang Joo and Lim Yin Faye. (2014) Chapter 34: Malaysia. *The Dispute Resolution Review.* 6th Ed. Law Business Research.

The approach in adapting third party funding for public or private enforcement is force majeure. The trend of adopting third party funding in arbitration process is increased and emerges in Asia, and Malaysia should adopt it.

1.3 Purpose of the Study

Since third-party funding agreement was not allowed during the ancient doctrine of maintenance and champerty under Malaysian context, the aim of carrying out this research is to study the viability of implementing third party funding to assist the claimant in pursuing their claims in Malaysia. The recognition of third party funding is a pertinent one which will affect the standing of Malaysia as the preferred arbitration centre in Asia Region, and favourable business and investment destination as well. Hence, it is crucial to implement third party funding for arbitration in Malaysia.

1.4 Research Question

The research question for this study is there a framework to make third party funding legal in Malaysia?

1.5 Objective of the Study

The objective of this study is to identify a framework to make third party funding legal in Malaysia.

1.6 Significant of Study

Alternative dispute resolution (ADR) had been introduced into Malaysia, and arbitration forum was a preferable dispute settlement in the industry as well as transnational business and investment activities. The reason was that the provision of arbitration as dispute resolution had integrated into the parties agreements, such as PAM 2006 Form and PWD 203A (Rev. 1/ 2010) Form in construction industry; trade agreement like ASEAN-China Free Trade Area (ACFTA) agreement and bilateral investment treaties (BITs) discussed among states and individual project treaties, eg in respect of trans-border construction proposed, the Kuala Lumpur-Singapore High-Speed Rail (HSR) project. As such, these business activities typically incurred a large sum of money to operate; and the critical time is that when there are some disputes from differences. When the amount incurred is too large, lack of economic incentive in pursuing a civil remedy, and increased the cost of arbitration forum over time; the parties may discourage to include or even initiate arbitration.

Therefore, this research had been conducted since the costs to arbitrate is a preliminary matter that shall be considered before initiating an arbitration forum in order to settle the arising dispute, besides keep a close relation between the disputing parties. It is vital emerging a framework for the seat to allow third party funding and reduce the investors' worries of not getting enough funds into his / her favour state. In addition, Malaysia can attract more and more foreign businessmen and investors to come over as Malaysia is the preferable seat of arbitration which allows third party

funding for the users to pursue their rights. Furthermore, the refinement and implementation of this research will create new jobs opportunities in Malaysia as there will be more and more business and investment coming in. Ultimately, the ancient doctrine of maintenance and champerty should undergo a transformation or better eliminated to adopt the modern context, the Access to Justice, in Malaysia.

1.7 Scope of the Study

This study will focus on the discovery of the law reform proposal or legal framework that have been planned, approved and executed successfully, or waiting to be implemented upon notification of *gazette*, or just passing through the Parliament for a final disposition in legalising third party funding in their jurisdiction. The structure of legalising third party funding is unique and confined and normally marked a drastic change in public policy.

In consideration of the researcher, Malaysia is one of the commonwealth countries which adopt and practice English common law, inclusive of its rules of law, doctrines, and principles which have been well implanted into Malaysian legal system; thus, the study has been focus commonwealth countries. The data would have collected from the commonwealth jurisdictions which has undergone law reform in permitting third party funding for arbitration forum or litigation proceedings.

Since this research is more to literature review only, to review and analyse the legal reform in others commonwealth jurisdictions, no survey will be carried out. Therefore, the proposed framework to legalise third party funding for arbitration in Malaysia shall base on the data derived in others commonwealth jurisdictions.

1.8 Research Methodology

The study has been planned into stages so that the cause of research can be done in a systematic and effective way. There is five phase approaching to achieve the research's objective, and each phase will then describe below.

1.8.1 First Stage: Identification of Problems, Issues and Literature Review

Preliminary study is a process of extensive reading and understanding on the background, history, concepts, body of knowledge, practice, and issues as well for the research. The reading materials shall come from published resources, such as seminar paper, journals, articles, and justified electronic resources via World Wide Web, such as Kluwer Arbitration Blog, Herbert Smith Freehills, Norton Rose, and Kuala Lumpur Regional Centre for Arbitration (KLRCA) as well as subscribed online databases by Purpustakaan Sultanah Zanariah, Universiti Teknologi Malaysia.

Literature review on background knowledge of the third party funding has been carried out to give an in-deep illustration, writing, information, and description of existing topic of study.

1.8.2 Second Stage: Data Collection

The main sources for the research data were abstracted from published working proposal or framework for law reform on third party funding which can be retrieved easily from the electronic resources via the state's Law Commission official websites.

1.8.3 Third Stage: Data Analysis

Major activity on this phase is documentary analysis. The proposal or the framework for law reform will be carefully studied and reviewed, with emphasised on the statutory amendments, case law decisions, changes on public justice, and code of conduct for third party funding.

1.8.4 Fourth Stage: Preparation of Research Report

The writing up stage is where all the outcomes from the research into an organised form. This process will divide the research materials into the proper chapters, such as literature review and data analysis, in which, these will file accordingly and produced in required format. At the end, conclusion and recommendations will be established.

1.8.5 Fifth Stage: Compilation of the Thesis

This is the final phase where the research study will be compiled with proper bind. All the binding process shall satisfy the rules and regulations underpinned by the Universiti Teknologi Malaysia.

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