Indonesian Journal of International Law

Volume 20 | Number 3 Article 3

April 2023

# Behind the scenes of controversial International Commercial Arbitration: Case Study of Heirs to the Sultanate of Sulu v. Malaysia

Tze Chin Ong
*University of Malaya*, tzechinong@um.edu.my

James Ding Tse Wen
*Lincoln's Inn Lawfirm*

Indonesian Journal of International Law (2023), Vol. 20 No. 3, pp. 379 - 410
http://doi.org/10.17304/ijil.vol20.3.3

# BEHIND THE SCENES OF CONTROVERSIAL INTERNATIONAL COMMERCIAL ARBITRATION: CASE STUDY OF HEIRS TO THE SULTANATE OF SULU V. MALAYSIA

**Tze Chin Ong*, Nurhidayah Abdullah*, James Ding Tse Wen****

*Faculty of Law, University of Malaya, Malaysia
**Lincoln's Inn Lawfirm, Malaysia
*Correspondence: tzechinong@um.edu.my*

Abstract

*An ad hoc arbitration final award of US$14.92 billion (approximately RM62.59 billion) in favour of the heirs of the 19th-century sultanate, the late Sultan of Sulu, Sultan Jamalul Kiram II against Malaysia handed down by a sole arbitrator had created much discussion in the international public and private law arena. Malaysia challenged the Award in the Paris Court of Appeal and successfully stayed the Award's enforcement in France. During the same time, two Luxembourg-registered subsidiaries of the Malaysian state oil company Petronas were served with 'saisie-arret' by bailiffs, pending any appeal by Petronas against the seizure. This paper focuses on the international private law setting of international commercial arbitration and its significance to the case study. This paper concentrates on issues derived from international commercial arbitration regarding the case study of the Award, including the arbitration clause and seat, the issue of third-party funding and ethical international commercial arbitration. This paper employed the qualitative content analysis research method in analysing the issues related to international commercial arbitration using primary and secondary sources. The findings of the article conclude that there are divergences in the principles applied in the Award regarding arbitration clause and seat, that the case is motivated by third-party funding which calls for further ethical considerations and discussion in international commercial arbitration.*

**Keywords:** *ethics, international commercial arbitration, Malaysia, Sultanate of Sulu, third-party funding*

Received : 27 December 2022 | Revised : 20 March 2023 | Accepted : 27 April 2023

## I. INTRODUCTION

The recently published final arbitration award in *Nurhima Kiram Fornan, Fuad A Kiram, Sheramar T Kiram, Permaisuli Kiram-Guerzon, Taj-Mahal Kiram-Tarsum Nuqui, Ahmad Narzad Kiram Sampang, Jenny Ka Sampang and Widz-Raunda Kiram Sampang v Malaysia* (the "Award") caused a stir the global arbitral community. For the arbitration practitioners, it is seen as one of the largest sums awarded in arbitration in recent times. The sacrosanct principles underlying arbitration would

be the clarion call, as some would no doubt be extolling, to those who do not respond or actively participate in arbitral proceedings as the Award, recently released for public dissemination, would demonstrate. Yet, as the Award is being scrutinized, pertinent questions arise as to how the Award reached its finale and conclusion. The journey that the parties or subject-matter took is no less impressive, from the shores of Sabah (formerly a region recognized to be part of the Sulu sultanate) to Spain, and then finally to France has generated much intrigue. This is particularly to the validity of the reference of the dispute to arbitration in the first place and subsequently, to the conduct of the arbitral proceedings from the start to its conclusion.

Before the Award is analysed, it is worth noting that on or about 11 July 2022, the claimants, who essentially were the victors in the Award, managed to seize two Luxembourg-registered subsidiaries of PETRONAS, the Malaysian state-owned oil and gas company[1] which is the most thriving multinational company in the current global energy crisis. PETRONAS facing with the 'saisie-arret' against two of its subsidiaries in Luxembourg, Petronas Azerbaijan (Shah Deniz), and Petronas South Caucasus units. Shortly thereafter, the Malaysian government managed to stay the enforcement of the Award pending the disposal of the application to set aside the Award. Again, on 29 September 2022, another exequatur petition with The Hague Court of Appeal seeking recognition of the arbitration award was pursued in The Netherlands against Malaysia's assets.[2] This article focuses on the initial reference of the dispute to arbitration, the implications and effects to third-party funding and ethical issues arising in international commercial arbitration.

[1] Sathish Govind, "Descendants Of Sultan Sulu Seizes Two Petronas Subsidiaries And Press $15 Billion Claim On Malaysia." Business Today, 12 July 2022, https://www.businesstoday.com.my/2022/07/12/descendants-of-sultan-sulu-seizes-two-petronas-subsidiaries-and-press-15-billion-claim-on-malaysia/

[2] Jose Barrock, "Heirs of late Sulu sultan try to seize Malaysian assets again." The Edge, 29 September 2022, https://www.theedgemarkets.com/article/heirs-late-sulu-sultan-try-seize-malaysian-assets-again.

## II. BACKGROUND OF THE DISPUTE

While this article is not meant to be a historical review of the formation of the state of Sabah (formerly known as North Borneo), some historical background on Sabah is worth noting as it would provide the contextual background of the arbitration. The territory was divided into many parts and various nations such as the British, Netherlands, Spain and Germany had varying degree of control or interest in or around Borneo at the time. Through the treaty dated 29 December 1877, the then Sultan of Brunei granted Alfred Dent and Baron Gustavus de Overbeck areas along the north coast of Borneo, incidentally areas that were also claimed by the Sultan of Sulu. Thereafter, in the Deed signed on or about 4 January 1878 ("1878 Agreement"), the then Sultan of Sulu, Sultan Mohammed Jamalul Alam agreed to "grant and cede" to Alfred Dent and Baron Gustavus de Overbeck a large part of north Borneo, *"... commencing from the Pandassan River on the west coast to Maludu Bay, and extending along the whole east coast as far as the Sibuco River in the south, comprising all the provinces bordering on Maludu Bay, also the States of Pietan, Sugut, Bangaya, Labuk, Sandakan, Kinabatangan, Mamiang and all the other territories and states to the southward thereof bordering on Darvel Bay and as far as the Sibuco River, with all the islands, belonging thereto within three marine leagues [9 nautical miles] of the coast"*. Subsequently, Alfred Dent and his partners established the British North Borneo Provisional Association Limited (the "BNBPAL") with 1878 Agreement under its management. Around 1 November 1881, the British Government granted the Royal Charter and the British North Borneo Company (the "BNBC") was incorporated. The BNBPAL was dissolved and restructured as the BNBC, managing the 1878 Agreement.

Chronology of the events as follows:

A. 1885 and what has become to be known as the Madrid Protocol, Spain relinquished all claims to Borneo and to the adjacent islands and renounced claims of sovereignty over territories in the continent of Borneo which included those belonging previously to the Sultan of Sulu, to the British government;

B. 1888, the British government entered into an agreement with the BNBC for the creation of a state of North Borneo and placed it under the British Protectorate;

C. 1891, Great Britain and the Netherlands concluded a convention that defined the boundaries between the Netherlands' possessions in Borneo and those territories therein under the British's protection;

D. 1898, the Treaty of Peace of Paris saw Spain ceding the Philippines Archipelago to the United States of America;

E. 1903, the Sultan of Sulu concluded the "Confirmation of Cession" with the British government where a number of islands such as Muliangin, Muliangin Kechil, Malawali, Tegabu, Bilian, Tegaypil, Lang Kayen, Boan, Lehiman, Bakungan, Bakungan Kechil, Libaran, Taganack, Beguan, Mantanbuan, Gaya, Omadal, Si Amil, Mabol, Kepalai and Dinawan were treated to have been included in the original cession granted to Alfred Dent and Baron Gustavus de Overbeck [the "Deed of Cession"]. In return, the annual payment of MYR5.300 (Malaysian Ringgit Five Thousand Three Hundred Only) had be made to the Sultan of Sulu and his heirs;

F. 1930, the United States and Great Britain concluded a convention that essentially delimiting the boundaries between the Philippines Archipelago and the state of North Borneo;

G. 1946, the BNBC entered into an agreement with the British government where BNBC transferred all rights, interests and powers in respect of the state of North Borneo to the British Crown thereby effectively making North Borneo a British colony; and

H. 1963, the Federation of Malaya, the United Kingdom, North Borneo, Sarawak and Singapore concluded the agreement in respect of the creation of Malaysia. In particular, North Borneo was '*federated with the existing States of the Federation of Malaya as the [State] of Sabah*'.

With the above background in mind, it is crucial for the starting point to be the Deed of Cession as that is the source of contention by the Sulu descendants[3] that Malaysia stoppage of the annual payment of MYR5.300 (Malaysian Ringgit Five Thousand Three Hundred Only) meant that, as alleged, gave them right to damages.

Moreover, in 1935 with the establishment of the Commonwealth of Philippines and the death of the last sultan, Sultan Jamalul Kiram II who left no descendant. An official announcement through President Manuel L. Quezon's memorandum, the Philippines government no longer recognizes the Sulu Sultanate.[4] The non-existence of the heirs of the Sulu Sultanate cast doubt upon the inception of the recent *ad hoc* arbitration. Besides, according to Nik Anuar[5] the unsettling appointment of the heirs of the Sulu Sultanate date back to 1936, Datu Raja Muda Mawalil Wasit, a self-proclaimed Sultan of Sulu on 17 July 1936, a brother to the late Sultan Jamalul Kiram II was opposed by Dayang Dayang Hadji Piandao, the late Sultan Jamalul Kiram II niece and foster-child. She claimed that she received majority support from her follower from Rumah Bechara in Jolo as compared to Datu Raja Muda Mawalil Wasit.

## III. SULU DESCENDANTS' RIGHT TO ARBITRATE

While it is perhaps easier to categorize Alfred Dent's and Baron Overbeck's respective agreements with the then Sultan of Sulu as one that is within the sphere of private international law, subsequent events such as the transfer of the BNBC to the British Crown and to the demise of the Sulu sultanate, leaving behind the debate of who are the

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[3] It is noted that the Sultanate of Sulu or more precisely, the heirs or successors of the then Sultan of Sulu,
Sultan Jamalul Kiram II, were no longer recognized by the Philippines government, *DO 169/127, Sultan's*
*Heirs Claim on North Borneo, The National Archive*.

[4] Norizan Kadir & Suffian Mansor, "Reviving the Sultanate of Sulu Through its Claim over Sabah, 1962-1986," *Akademika,* Vol. 87, no. 3 (2017): 125-138, doi: 10.17576/akad-2017-8703-09.

[5] Nik Anuar Nik Mahmud, *Tuntutan Filipina ke atas Borneo Utara [Philippine claim to North Borneo]* (Bangi: Penerbit Universiti Kebangsaan Malaysia, 2009), 57.

legitimate heirs of the Sulu sultanate, could arguably intersect certain aspects of public international law. Finally, in today iteration, it is rather the reverse as the Malaysian government 'stands in' the place of the BNBC (subsequently, the British Crown) whereas the descendants of the Sulu sultanate could no longer exercise any form of sovereignty.[6] As well noted, the relationship between rules of public international law jurisdiction and rules of private international law may, debatably, have some interaction.[7] In the case of *Sultanate of Sulu v. Malaysia*, the interactions between public and private international law become apparent, as it is historically state sovereignty and colonisation that has stretched into private international law of sphere of international commercial dispute based on an impugned clause of 'arbitration', from Deed of Cession to arbitration agreement?

There are few judicial receptions that touched upon the issue surrounding the claim or payments in relation to Sabah. It is important that the proprietary of the arbitration proceedings leading up to the Award be viewed in light of such judicial thoughts or pronouncements and the first to be referred to is the 1939 Macaskie Judgment. Here, Charles Macaskie, the Chief Justice of North Borneo (at the time), held inter alia-

> *"The Deed of Cession was a complete and irrevocable grant of territory and the right reserved was only the right to an annual payment, a right which is in the nature of movable property."*

The dispute that arose resulting in the 1939 Macaskie Judgment was due to the quibble between the 9 principal heirs or descendants of the Sulu Sultanate as to whom was entitled to receive the annual payment of MYR5.300 (Malaysian Ringgit Five Thousand Three Hundred Only). The said judgment did not touch upon the validity of the Deed of Cession or the nature of the said annual payment. What is pertinent to observed from the 1939 Macaskie Judgment is that the claimants' decision to file their dispute in the Courts demonstrates that the proper forum for any dispute resolution remains with the Courts. This is further

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[6] *Ibid.*

[7] James Crawford and Ian Brownlie, *Brownlie's Principles of Public International Law*, 8th ed, (Oxford: Oxford University Press, 2012), 474.

solidified as the Deed of Cession itself does not contain any arbitration clause or agreement. What was spelled out explicitly in the Deed of Cession (the "Deed of Cession") insofar as dispute resolution went was (the "Impugned Clause"):

> *"In case of any dispute shall arise between His Highness the Sultan, his heirs or successors and the said Gustavus Baron de Overbeck or his Company it is hereby agreed that the matter shall be submitted to Her Britannic Majesty's Consul-General for Borneo."*

As Malaysia gained independence from the British Crown and federation of Malaysia formed the roles such as the British Consul-General was rendered under the purview of the Malaysian Courts. As the Sulu descendants' underlying issue is to the payment only, it is unlikely that the Impugned Clause could be read, by any reasonable way, as giving rise to a clear and unambiguous agreement to arbitrate arising from the Deed of Cession. Nor could any ground, be it from private international or public international law, compel arbitration to be forum of dispute resolution between Malaysia and the Sulu descendants. The United Nations Commission on International Trade Law (UNCITRAL) model law on international commercial arbitration 1985[8] (the Model Law) makes it clear that an "arbitration agreement" requires an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

In *Albit Resources Sdn Bhd v Casaria Construction Sdn Bhd*[9], the Malaysian Court of Appeal held that to constitute an arbitration clause or an arbitration agreement there is no specific words or forms required. The essential is that the intention of the parties to submit to arbitration is clear and unequivocal regardless of whether the arbitration clause is incomplete or it lacks of certain particulars, even an electronic transmission would suffice.[10]

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[8] UNCITRAL, Model Law on International Commercial Arbitration (1985), Art. 7 (be it Option I or Option II).

[9] Albit Resources Sdn Bhd v Casaria Construction Sdn Bhd [2010] 3 MLJ 656

[10] Lim Su Sang v Teck Guan Construction & Development Co Ltd [1966] 2 MLJ 29 (FC); and Woh Hup (Pte) Ltd v Property Development Ltd [1991] 3 MLJ 82.

The very indication in the form of an agreement to submit a dispute or difference, and the absence of such agreement is of crucial importance. Fundamentally, arbitration is a consensual process, thus, if there is no intention to arbitrate or such intention is vague, then it must mean that any disputes arising must be resolved through the Courts. The very indication in the form of an agreement to submit a dispute or difference, and the absence of such agreement is of crucial importance. Fundamentally, arbitration is a consensual process, thus, there is no intention to arbitrate or if such intention is vague, then it must mean that any disputes arising must be resolved through the Courts.

The aforesaid proposition was long established in the seminal decision of the House of Lords in *Scott v Avery and others.*[11] The House of Lords held that the court had to ascertain the meaning of the parties from the language used and their intention. There should be no right of action until the court ascertains the parties' agreement in their choice of mode of proceedings according to their intention in the particular agreement agreed upon.

In the decision of *Scott v Avery*[12], previous case law of the 18th century on the topic of arbitrability that was cited all made mention the term "arbitration". The indication that any disputes is to be arbitrate, would represent the minimum threshold required to demonstrate the parties' intention to arbitrate any dispute arising between them. There are, no doubt, other complexities that would arise when dealing with a poorly drafted arbitration clause or agreement but the fundamental question or determination in the first place must be whether there is an agreement to arbitrate a dispute or difference between the parties.[13] In the case of *Compagnie D'Armement Maritime S.A v Compagnie Tunisienne De Navigation S.A*[14] The House of Lords had to deal with an arbitration clause clouded with ambiguities to resolve the applicable governing laws. Notwithstanding and the different point, in this case, was that the parties clearly intended for all disputes or differences to be

[11] Scott v Avery and others [1843-60] All ER Rep 1.
[12] *Ibid.*
[13] see Compagnie D'Armement Maritime S.A v Compagnie Tunisienne De Navigation S.A [1971] A.C. 572.
[14] *Ibid.*

resolved by arbitration as it was plainly spelled it. This is distinguished from the circumstances where there is a clause or an agreement where at the minimum, arbitration was stated as the mechanism to resolve disputes or differences between the parties. In such a scenario, parties challenging or opposing the jurisdiction of the arbitral tribunal would need to make representations to the arbitral tribunal or where national laws provide, apply to the national Courts for a determination on the said challenge.

Besides the arbitration clause, there are other complexities that may affect the operability of arbitration between the disputing parties, and this typically occurred in where the parties involved and the project in-question are from different jurisdictions. In seeking neutrality and in essence, fair play, for various consideration, arbitration clauses in recent times provide parties the choice for selecting the different sets of laws to govern the terms and conditions in the contract, the arbitration clause and to the seat of the arbitration. Where the arbitration clause or agreements suffers from lack of particulars as to the governing law of the contract, it has been held that the system of laws which is the contract is most closely connected to would apply[15]. Similarly, where the governing law is stated to be of a particular jurisdiction, the seat of the arbitration, where it is silent, is likely to be of that jurisdiction.[16] The close connection test requires a real co-relation between the parties involved and to the subject-matter in dispute as determining factors in deciding which sets of law systems would apply to the contract, the seat of arbitration and the arbitration agreement itself in the event such matters are not stated.

However, the rights of the Sulu descendants to arbitrate their dispute need to be based on a valid arbitration clause or agreement in the first place. The absence of a valid arbitration clause of agreement in the Deed of Cession renders such rights as a non-starter.

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[15] Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb 193 ConLR 87 (UK Supreme Court).

[16] Who Hup (Pte) Ltd v Property Development Ltd [1991] 1 SLR 652 (Singapore High Court).

## IV. LACK OF AN ARBITRATION AGREEMENT IS FATAL

The infirmity, in other words, the lack of an arbitration agreement, could not be overcome by the participation of the parties opposing the arbitral tribunal's jurisdiction in such circumstances.[17] In fact, in the Malaysian High Court's decision of *Government of Malaysia v. Nurhima Kiram Fornan & Ors*[18] ("*Nurhima Kiram Fornan*"), the Malaysian government applied for (and obtained) the first 'anti-arbitration' injunction in Malaysia for *inter alia* several declarations including a declaration that there was no valid or binding arbitration agreement in the Deed of Cession or between the Government of Malaysia and the Sulu descendants, who form the claimants in the Award and injunctive reliefs against the Sulu descendants from participating in the arbitral proceedings, that would subsequently resulted in the Award, or to enforce such resulting arbitration award.

As well noted by Hetal Doshi and Sankalp Udgata[19] it is lack of essential elements of an arbitration agreement of intention to settle disputes by arbitration and the subject matter capable of settlement by arbitration specified in the Deed of Cession. Moreover, the non-existent of the Her Britannic Majesty's Consul-General for Borneo cannot be replaced by an arbitrator acting as a default forum of adjudication.

The relevant Sulu descendants did not participate in the aforesaid Court proceedings. Notwithstanding, the High Court determined, it is submitted that for arbitration to be the mechanism or forum, the arbitration clause or agreement must clearly state the parties' intention to submit their dispute to arbitration.[20] In this regard, the Malaysian High Court reached the conclusion that the Impugned Clause could not amount to a valid arbitration, no matter how it is read. Further, the Malaysian High Court further considered the 1939 Macaskie Judgment in *Dayang Dayang Haji Piandao Kiram of Jolo, Philippines & Others v The Government of North Borneo & Others, High Court of North*

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[17] Hetal Doshi and Sankalp Udgata, "Anti-arbitration injunction by Malaysian High Court—un(measured) invocation of sovereign immunity" *Arbitration International* 36, no. 3 (2020): 415–418, doi: 10.1093/arbint/aiaa025

[18] Government of Malaysia v. Nurhima Kiram Fornan & Ors [2020] MLJU 425.

[19] Doshi and Udgata, "Anti-arbitration injunction"

[20] [2020] MLJU 425.

*Borneo, Civil Suit No 169/39 ("*Dayang Dayang case*")*and reached the similar conclusion that the Sulu descendants' legal suit at the High Court of the State of North Borneo[21] clearly indicates the absence of any intention to arbitrate in the first place.[22] In *Dayang Dayang case*, way back in 1939, the then Sulu Sultanate heirs had already initiated an action based on the Deed of Cession before the High Court of North Borneo (now Sabah) for a declaration for monies payable under the deed. This clearly indicates the absence of an arbitration agreement, as the action was filed in the High Court of North Borneo and the jurisdiction lies in the Court rather than arbitration. Besides that, according to the Fork-in-the-Road rule in some investment treaty arbitrations that the choice of litigation is either in the host State's domestic courts or through international arbitration, once the choice is made, it is final.[23] As such, since back in 1939 the choice of litigation was with the High Court of North Borneo hence it is precluded from winding back the clock to initiate proceedings in arbitration.

The Sulu descendants' predecessors' conduct in filing the aforesaid legal suit was indicative of their acceptance that arbitration was not the forum or mechanism to deal with or resolve any arising dispute or difference pertaining to the Deed of Cession. Accordingly, and given that the state of Sabah is the modern iteration of North Borneo, the High Court in *Nurhima Kiram Fornan* case had no difficulty in concluding that any dispute arising from the Deed of Cession, including the subject-matter in the Award that is to say the receipt of the cession monies, is to be dealt with at the High Court of Sabah.

Furthermore, it appeared that the basis for the Sulu descendants' choice for Spain as the seat of arbitration was their beliefs that they would not be afforded neutrality in either Malaysia or the Philippines. It is doubtful that there was any real nexus between Spain and the Deed of Cession. The neutrality alone is insufficient to grant jurisdiction for arbitration or the arbitral tribunal to be constituted, and that a 'real

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[21] Dayang Dayang Haji Piandao Kiram of Jolo, Philippines & Others v The Government of North Borneo & Others, High Court of North Borneo, Civil Suit No 169/39.
[22] *Ibid.*
[23] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer , *Principles of International Investment Law*, (Oxford: Oxford University Press, 2012), 267.

nexus' ought to be established between the subject-matter of the dispute and the seat of the arbitration, in such circumstances.

The arbitrator's reasoning and approach in the Award with respect of the arbitral tribunal's jurisdiction attract some analysis in this paper. The arbitrator drew his jurisdiction from the Impugned Clause and relied on the Superior Tribunal of Justice of Madrid's judgment dated 29 March 2019[24] that stated *inter alia*:-

> *"The Judgment of March 29, 2019 provided as follows on the Arbitration Agreement:*
>
> *...Therefore, having unequivocally agreed to submit to arbitration in the following terms:*
>
> *...Should there be any dispute, or reviving of all grievances of any kind, between us, and ours heirs and successors, with Mr. Gustavus Baron de Overbeck or his Company, then the matter will be brought for consideration or judgment of Their Majesties' Consul-General in Borneo (Brunei)...; before the impossibility of resorting to the arbitrator originally appointed, taking into account that there is apparently, within the scope of cognition of this proceeding, no limitation to the will of the defendant in being subjected to said arbitration clause, an arbitrator shall be appointed, as requested, regardless of further considerations, as the claimant met the substantive requirements for the referred action..."*[25]

Putting aside the merits, that is to say the correctness of the finding in the Superior Tribunal of Justice of Madrid's judgment above that the Impugned Clause amounted to a valid arbitration agreement, the aforesaid decision ought to be read together with the judgement that the decision on 29 June 2021,[26] by a majority, to set aside the arbitral

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[24] Judgment 11/2019; see https://jusmundi.com/en/document/decision/es-nurhima-kiram-fornan-fuad-a-kiram-sheramar-t-kiram-permaisuli-kiram-guerzon-taj-mahal-kiram-tarsum-nuqui-ahmad-narzad-kiram-sampang-jenny-ka-sampang-and-widz-raunda-kiram-sampang-v-malaysia-sentencia-del-tribunal-superior-de-justicia-de-madrid-nr-11-2019-friday-29th-march-2019#decision_20262.

[25] Award, para. 25.

[26] see https://jusmundi.com/en/document/decision/es-nurhima-kiram-fornan-fuad-a-kiram-sheramar-t-kiram-permaisuli-kiram-guerzon-taj-mahal-kiram-tarsum-nuqui-ahmad-narzad-kiram-sampang-jenny-ka-sampang-and-widz-raunda-kiram-sampang-v-malaysia-sentencia-del-tribunal-superior-de-justicia-de-madrid-tuesday-29th-june-

proceedings and to vacate all related rulings in the said arbitral proceedings; and the Annulment Proceeding 88/2020, which contained the instruction from the clerk of the Court addressed to the arbitrator to stop and close the present arbitration immediately.[27]

While the arbitral tribunal had no difficulty in accepting the Superior Tribunal of Justice of Madrid's judgment, among others, that the Impugned Clause was a valid arbitration agreement, the arbitral tribunal's diametrical opposing stance[28] against the its own subsequent decisions. This is rather surprising given that the Courts' role,[29] whilst supervisory in nature, retains the powers to determine the arbitral tribunals was seised or vested with the appropriate jurisdiction and this issue was unfortunately not addressed substantively by the arbitral tribunal in the Award.

Despite the anti-arbitration injunction granted in Malaysia which is an interim measure of protection by the court in accordance with UNCITRAL Model Law, Article 9,[30] the precedent of *Dayang Dayang* case,[31] and the Fork-in-the-Road rule,[32] could not prevent the *ad hoc* arbitration from granting its final award.

## V. JURISDICTIONAL QUAGMIRE

The arbitral tribunal's decision to move the seat of arbitration to Paris on the basis to ensure the parties had full control over the procedural and substantive rules governing the arbitration and that the Superior Court of Justice of Madrid's decision "*...create a certain risk for the Parties of incurring in a denial of justice in Madrid...*" is not easy to follow substantively.

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2021#decision_20263.

[27] Award, paras. 109 and 116.

[28] Award, paras. 124 and 125.

[29] Marta Infantino, "International Arbitral Awards' Reasons: Surveying the State-of-the-Art in Commercial and Investment International Dispute Settlements" *Journal of International Dispute Settlement*, Vol. 5, no. 1 (2014): 175-197.

[30] Government of Malaysia v. Nurhima Kiram Fornan & Ors [2020] MLJU 425.

[31] Dayang Dayang Haji Piandao Kiram of Jolo, Philippines & Others v The Government of North Borneo & Others, High Court of North Borneo, Civil Suit No 169/39.

[32] Dolzer, Kriebaum and Schreuer, *Principles of International Investment Law*, 267

Putting aside the merits of having the seat of arbitration in Spain, the claimants' choice for selecting Spain was due to the apparent belief that the justice they sought would not be obtained in Malaysia or the Philippines. Further, it is a stretch to approbate and reprobate the authority of the Spanish's Courts in the way the arbitral tribunal did when it came to the validity of the arbitrator's appointment and to the constitution of the arbitral tribunal in the first place. This is because the conferment of jurisdiction to an arbitral tribunal originates from an arbitration agreement and in the arbitral proceeding, it was not a situation involving the invocation of the *Kompetenz-Kompetenz* rule, rather it the non-recognition or hostile resistance to the Courts' ultimate determination on the validity of the arbitration agreement or arbitral tribunal's jurisdiction.[33]

A common feature exemplified in the Award was to the arbitral tribunal's repeated emphasis to invite the Government of Malaysia to participate or submit its position. While affording the opportunity to participate in the arbitral proceeding is deemed as good practice, it could not be construed as a recognition of the arbitral tribunal's jurisdiction. At best, it would mean that one of the aspects of natural justice had been complied with. Similarly, the Government of Malaysia's decision not to respond at all is rather peculiar as the conveyance of its right to challenge the arbitral tribunal's jurisdiction would not waive such a right[34] although the need to do remains debatable given that the Government of Malaysia had obtained the relevant remedies to challenge the arbitral tribunal's jurisdiction was obtained and which remained unchallenged by the claimants. In this regard, the UK Supreme Court in *Dallah Estate*[35] reaffirmed the principle that the Courts remain the final arbiter when it comes to the validity of the arbitral tribunal's jurisdiction and thus, the claimants' inaction to the Court proceedings would be its undoing to the overall determination on the issue of the validity of the arbitration agreement.

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[33] Dallah Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan [2011] 1 AC 763 (UK Supreme Court) at para. 23

[34] *Ibid*.

[35] *Ibid.* at paras. 84 & 86.

Furthermore, the arbitral tribunal's overarching basis to tie-in the principle of judicial non-interference in international arbitration to the provision of *Article 7 of the Spanish Arbitration Act ("SAA")*[36] is equally not easy to follow. Article 7 is unlikely to be construed as a *carte blanche* rule to ousts the Courts' jurisdiction but rather, simply to narrow the Courts' intervention in accordance with the provisions of the SAA.[37] It would be harder to justify that the Courts' determination in the circumstances to annul the arbitration proceedings be validly considered as a breach of the principle of judicial non-interference[38] as was held by the arbitral tribunal. Putting these into context, the arbitral tribunal's concluding remarks on the relocation of the seat of arbitration to Paris stating that France is a "*... favourable venue for international arbitration.*"[39], would be difficult to uphold substantively.

Despite the infirmities in validity of an arbitration agreement in the Deed of Cession and to the Superior Court of Justice of Madrid's initial determination that the Impugned Clause is a valid arbitration agreement, it remains that the Award has been duly issued and enforcement efforts have been made in several jurisdictions. While the issue of enforcement of the Award is beyond the scope of this article, it now appears to be burden of the Government of Malaysia to engage with the successful claimants of the Award in multiple jurisdictions to resist such enforcement proceedings that would be initiated[40].

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[36] Award, para. 121.

[37] See Articles 8, 9 and 22 of the Spanish Arbitration Act in particular (but not limited to the aforesaid).

[38] See in M/s. S.B.P. and Company Versus M/s. Patel Engineering Limited and another (2006) 1 MLJ 1 (S.C) at paras. 29-32.

[39] Award, paras. 143 and 144.

[40] Articles V and VI of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards (New York, 10 June 1958) [New York Convention]; see Articles 34 and 36 of the Model Law. See also, https://jusmundi.com/en/document/decision/fr-nurhima-kiram-fornan-fuad-a-kiram-sheramar-t-kiram-permaisuli-kiram-guerzon-taj-mahal-kiram-tarsum-nuqui-ahmad-narzad-kiram-sampang-jenny-ka-sampang-and-widz-raunda-kiram-sampang-v-malaysia-ordonnance-de-la-cour-dappel-de-paris-tuesday-12th-july-2022#decision_25582 wherein the Paris Court of Appeal had granted a stay of the Award on 12 July 2022 pending the outcome of the appeal for annulment of the Award.

Further, the exploration on the issue of third-party funding would suggest the motivation and shed some light as to how the Award came about and whether the promulgation of third-party funding be detrimental on both litigants and respondents alike.

## VI. SOME DEFINITIONS OF THIRD PARTY FUNDING AND ITS RECOGNITION

`Notwithstanding that an anti-arbitration injunction had been granted in *Nurhima Kiram Fornan* case[41] to restrain foreign arbitration proceedings on grounds of sovereign immunity, the Award was now in the full force of recognition and enforcement, and have targeted Malaysian state oil company PETRONAS' assets overseas. The motivation behind the costly pursuit of recognition and enforcement of the arbitration award in recouping investment is, in the authors' view, motivated primarily by third-party funding, that is contrary to the conventional value of justice and adjudication.[42] According to *The Edge,*[43] the third-party funder of the case is Therium Capital Management Ltd, a global litigation investment firm with current deployed capital at circa US$1 billion specialising in competition/antitrust litigation, consumer disputes, corporate litigation and arbitration, intellectual property disputes, international arbitration, securities litigation and disputes.[44] Scholars describe such third-party funders in many unflattering terms, for example 'vulture investors',[45]

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[41] Government of Malaysia v. Nurhima Kiram Fornan & Ors [2020] MLJU 425.

[42] W. Bradley Wendel, "Alternative Litigation Finance and Anti-Commodification Norms" *DePaul Law Review* 63, no. 2 (2014): 655, note 2; Anthony J. Sebok, "The Inauthentic Claim," *Vanderbilt Law Rev*iew 64, (2011):134

[43] Jose Barrock, "Special Report: The Sulu heirs' claims – A thorn in Malaysia's side," The Edge, 25 July 2022, https://www.theedgemarkets.com/article/special-report-sulu-heirs-claims-%E2%80%93-thorn-malaysias-side

[44] "About Us," Therium, accessed 31 October 2022, https://www.therium.com/about-us/.

[45] Mark Kantor, "Third-Party Funding in International Arbitration: An Essay About New Developments," *Foreign Investment Law Journal* 24, no. 1 (2009): 65, 66.

'Oz-like' controllers of the arbitral process 'from behind a curtain',[46] gamblers,[47] or loan sharks.[48]

There are many definitions of third-party funding, depending on its scope, funding models, the extent of the fund, operation structures, financial benefits, parties involved, type of cases, and regulated or unregulated funding. It is hard to define third-party funding as it involves many characteristics and in many different forms and sizes.[49] Among others, the definitions such as in the US Chamber Institute for Legal Reform (ILR) 2009 paper described third-party funding as "*the practice of providing money to a party to pursue a potential or filed lawsuit in return for a share of any damages award or settlement.*"[50] At the roundtable discussion of the Third Party Funding in International Arbitration in Europe: Part 1—Funders' Perspectives,[51] was unable to provide a consensus on a definition based on the different types of financing, among others the definition in the roundtable discussion includes "*every possible contract where the pay-out under that contract is linked to the proceeds of litigation*", "*the litigation to be considered an asset and all related contracts as derivatives", "any financial*

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[46] Mark J. Goldstein, "Should the Real Parties in Interest Have to Stand Up? Thoughts About a Disclosure Regime for Third-Party Funding in International Arbitration,", *Transnational Dispute Management* 8, no. 4 (2011): 5.

[47] Jonathan T. Molot, "Litigation Finance: A Market Solution to a Finance Problem," *Georgetown Law Journal* 99 (2010): 65, 96 (describing hedge funds as trying to 'earn returns by betting on litigation'). See also US Chamber Inst. for Legal Reform, Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States (2009) 4; Kantor, "Third-Party Funding in International Arbitration," 74–75.

[48] Douglas R. Richmond, "Litigation Funding: Investing, Lending, or Loan Sharking?" *Professional Lawyer Symposium*, no. 17 (2005); Kingston White, "A Call for Regulating Third-Party Divorce Litigation Funding," *Journal of Law & Family Studies* 13, no. 2 (2011): 395; Daniel Brook, "Litigation by Loan Shark," *Legal Affairs* (Sept.–Oct. 2004), http://www.legalaffairs.org/issues/September-October-2004/feature_brook_sepoct04.msp

[49] Sebok, "The Inauthentic Claim," 61, 63-67.

[50] John Beisner, Jessica Miller & Gary Rubin, "Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States," (Washington: U.S. Chamber Institute for Legal Reform, 2009).

[51] Maxi Scherer, Aren Goldsmith & Camille Fléchet, "Third Party Funding in International Arbitration in Europe: Part 1 – Funders Perspectives," *Revue de Droit des Affaires Internationales/International Business Law Journal,* no.2, 2012.

*solution offered to a party regarding the funding of proceedings in a given case*", some funders distinguish the definition into two categories such as classic funding and evolving definition.[52]

In the report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration 2014,[53] the working definition of third-party funding as "*the terms 'third-party funder' and 'after-the-event-insurer' refers to any person or entity that is contributing funds or other material support to the prosecution or defense of the dispute and that is entitled to receive a benefit (financial or otherwise) from or linked to an award rendered in the arbitration*."[54] However, in the recent 2019 Uncharted Waters report,[55] which analysed third-party funding in European collective redress defined third-party funding as "*a third party ensures financial means or other material support to a party to proceed with the view of pursuing a claim or defending against it; in return, such third party is entitled to receive repayment plus financial gain from money awarded in judicial proceedings or from the settlement reached.*"[56] Generally, third-party funding in international commercial arbitration can be described as a third-party funder who is not a party in the arbitration that provides financial or other material support to a party to that arbitration for an exchange of benefit as a return of investment. The fund covers the funded party's legal fees, expenses in the arbitration and may include the opponents' costs by way of security. Typically, the fund includes lawyers' contingency fee arrangements and insurance contracts by different stakeholders and different entities.

Traditionally, common law regarded third-party funding as tortious wrongs under the doctrine of maintenance and champerty, particularly if the funders are not parties to the action. In the case of

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[52] *Ibid.*

[53] William W. Park & Catherine A. Rogers, "Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force," *Penn State Law Legal Studies Research Paper Series* no. 42 (2014).

[54] *Ibid.*

[55] Mag. Marko Djinovic & Ana Vlahek, "Uncharted Waters: An Analysis of Third Party Litigation Funding in European Collective Redress," (Washington: U.S. Chamber Institute for Legal Reform, 2019).

[56] *Ibid.*

*Giles v Thompson,*[57] Lord Justice Steyn defines maintenance as "*the support of litigation by a stranger without cause*" and champerty as "*an aggravated form of maintenance... the support of litigation by a stranger in return for a share of the proceed*". A universal concern was that such arrangements would potentially give rise to abuses of process and thus would be contrary to public policy. In *Re Trepca Mines,*[58] Lord Denning further summarised these concerns where his Lordship stated that "*the common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses."* [59] In the case, Lord Denning had reiterated that the champertous agreement is void.[60]

The abolishment of the doctrines of maintenance and champerty, at least in Australia, was the landmark decision of the High Court of Australia in *Campbells Cash & Carry Pty Ltd. v Fostif Pty Ltd*,[61] where the case was initiated by a litigation funder for claims concerning the recovery of amounts paid by tobacco retailers to tobacco wholesalers. The litigation funder funded the litigation in exchange of one-third of any amounts recovered and the benefit for costs. The court found that third-party funding does not constitute an abuse of process and is not against public policy in the jurisdictions which had abolished maintenance and champerty as crimes and torts. In United Kingdom, the development of third-party funding was recognised in the case of *Arkin v Borchard Lines Ltd and others,*[62] where the Court of Appeal recognised in the *obiter dictum* that third-party funding was important to facilitate access to justice up to the amount of their investment. It has since known as the '*Arkin cap*' in the third-party funding market. In Europe, except for Greece and Portugal, third-parting funding is thriving, particularly in Germany, Switzerland, and The Netherlands.[63]

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[57] Giles v Thompson [1993] 3 All ER 321, at 328
[58] Re Trepca Mines Ltd (No 2) [1963] Ch 199, at 219
[59] *Ibid*.
[60] *Ibid.*
[61] Campbells Cash & Carry Pty Ltd. v Fostif Pty Ltd. (2006) 229 CLR 386 (Austl.).
[62] *Arkin v Borchard Lines Ltd and others* [2005] EWCA Civ 655, paras. 39 and 40. See also the decision of the Court of Appeal UK in *Gulf Azov Shipping Company v Idisi* [2001] EWCA Civ 21, para. 54. of the reasoning (by Lord Phillips).
[63] Catherine A. Roger, *Ethics in International Arbitration*, (Oxford: Oxford University Press, 2014), page 179-180.

In the case of *Bundesgerichtshof – BGH, Urteil des I. Zivilsenats vom 13.9.2018 - I ZR 26/17*[64], it was held by the German Federal Court of Justice that third-party funding in actions for confiscation of profits are inadmissible pursuant to Section 10 of the German Act Against Unfair Competition. The Swiss Federal Supreme Court case of *BGE 131/223*[65] found that a provision of the 2003 Zurich Cantonal Act on the Legal Profession which provides that it is illegal to fund a lawsuit on a commercial basis violated freedom of commerce guaranteed by the Swiss Federal Constitution.[66] The Amsterdam Court of Appeal in the case of *ECLI:NL:GHAMS:2011:BU8763* [67] found that a no cure-no pay clause in a third-party funding agreement was not in conflict with public interest.[68]

In Hong Kong, the Court of Final Appeal in *Unruh v Seeberger & Anor*[69] suggested a refined approach to the question of public policy in relation to third-party funding, where the Court stated that "*countervailing public policies must be taken into account, especially policies in favour of ensuring access to justice and of recognising, where appropriate, legitimate common interests of a social or commercial character in a piece of litigation."* Facing increasing competition in the legal services, Singapore enacted the Singapore's Civil Law Act and the Civil Law (Third-Party Funding) Regulations 2017 to legalise and regulate third-party funding for arbitration in Singapore. Third-party funding was extended to domestic arbitration in Singapore since June 28, 2021. Nevertheless, in Malaysia, although proponents of third-party funding have been pushing for its recognition, especially in the context of commercial arbitration. In the High Court case of *Amal Bakti Sdn Bhd*

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[64] M. Burianski, N. Katja Krug, German Federal Court of Justice Prohibits Third-Party Funding in Actions for "Confiscation of Profits," White&Case, February 2019, https://www.whitecase.com/sites/whitecase/files/files/download/publications/german_federal_ court_of_justice_prohibits_third_party_funding.pdf.

[65] BGE 131/223, (10.12.2004)

[66] Djinovic & Vlahek, "Uncharted Waters: An Analysis of Third Party Litigation Funding in European Collective Redress."

[67] ECLI:NL:GHAMS:2011:BU8763 (13.12.2011):273

[68] Djinovic & Vlahek, "Uncharted Waters: An Analysis of Third Party Litigation Funding in European Collective Redress."

[69] Siegfried Adalbert Unruh V. Hans-Joerg Seeberger and Another [2007] 2 HKC 609, at 639 – 640.

*& Ors v Milan Auto (M) Sdn Bhd & Ors*,[70] the learned Judge held that "*it is trite that court will not entertain champerty agreements or its like on public policy grounds…*". Further, Section 24(e) of the Contracts Act 1950 provides that a contract which is "*opposed to public policy*" is to be declared void. Similarly, Section 112 of the Legal Profession Act 1976 clearly prohibits contingency fee arrangements. The raising trend of recognition of third-party funding in various developing countries jurisdictions has shown the significance of third-parting funding's impact on international commercial and investment arbitrations.

## VII. INTERNATIONAL ARBITRATION AND THIRD-PARTY FUNDING

Third-party funding is a new global phenomenon in a fast-growing trend around the globe affecting civil justice, contract law, legal profession regulations, public policy, and constitutional law. International arbitration is purportedly to be more cost-effective

had been long proven wrong, in fact, it is a very costly affair.[71]A 2006 PricewaterhouseCoopers study[72] concluded that international arbitration was more expensive than cross-border international litigation. Further, it was reported in the UK Law Society Gazette that the costs of international arbitration continue to grow up to 65% in a year and it is getting pricier[73]. A 2008[74] study also concluded that the

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[70] Amal Bakti Sdn Bhd & Ors v Milan Auto (M) Sdn Bhd & Ors [2009] 5 MLJ 95, at paragraph 103I

[71] Sundaresh Menon, "Some Cautionary Notes for an Age of Opportunity, Chartered Institute of Arbitrators International Arbitration Conference [online]," 22 August 2013, 10. Available at https://singaporeinternationalarbitration.files.wordpress.com/2013/08/130822-some-cautionary-notes-for-an-age-of-opportunity-1.pdf.

[72] Joseph R. Profaizer, "International Arbitration: Now Getting Longer and More Costly," *The National Law Journal,* July 28, 2008; which referred to a survey conducted by PricewaterhouseCoopers and Loukas Mistelis from Queen Mary School of International Arbitration, International Arbitration: Corporate Attitudes and Practices 2006.

[73] Kate Durcan, "International Arbitration: Getting pricier, but still growing," The Law Society Gazette, 16 October 2008, https://www.lawgazette.co.uk/analysis/international-arbitration-getting-pricier-but-still-growing/48011.article.

[74] Loukas Mistelis & Crina Mihaela Baltag, "Trends and Challenges in International

costs of international arbitration are the drawbacks of international arbitration. Similarly, the International Comber of Commerce (ICC) Commission on Arbitration 2007 report[75] also comes to the same conclusion that 82% of the arbitration amounted to legal costs and 16% of costs were arbitrators' fees and expenses.[76]The high cost of international arbitration raises questionable access to justice and would encouraged what Jeremy Bentham stated that "*wealth had indeed the monopoly of justice against poverty*".[77] Rising costs of international arbitration prevents access to justice but flourishes the legal service industry attracting '*deep-pocket'*[78] companies entering the market of legal services. Such specialised third-party funders include insurance companies, investment banks, investment companies, hedge funds, and law firms that view third-party funding as an opportunity to create wealth and expand their investment portfolios. These "non-parties", motivated primarily by financial gain and therefore funds international arbitration would be less about vindicating disputing parties' rights but mainly to maximize its return on investment.[79]

In the ICCA-Queen Mary Task Force on Third-Party Funding Report 2018[80] highlighted the concerns of disclosure and conflict of interest. Some of the factors raised in regard to conflict of interest are the number of arbitrators who have taken positions within, or *ad hoc* consultant roles with funders; the small number of funders; the increase in funded

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Arbitration: Two Surveys of in-house counsel of major corporations," *World Arbitration and Mediation Review* 2, no. 5 (2008): 93.

[75] Winston & Strawn LLP, What can be done about arbitration costs?; made reference to the ICC Commission on Arbitration's 2007 report on Techniques for controlling time and costs in arbitration, https://iccwbo.org/content/uploads/sites/3/2018/03/icc-arbitration-commission-report-on-techniques-for-controlling-time-and-costs-in-arbitration-english-version.pdf.

[76] *Ibid.*

[77] Jeremy Bentham, "Defense of Usury," (New York, Theodore Foster, 1837), 36.

[78] Marialuisa Taddia, "Litigation funding: calling for backup," The Law Society Gazette, 3, March 2014, https://www.lawgazette.co.uk/practice/litigation-funding-calling-for-backup/5040166.article.

[79] Beisner, Miller & Rubin, "Selling Lawsuits, Buying Trouble."

[80] International Council for Commercial Arbitration, "Report of The ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration," The ICCA Reports No. 4, 2018, https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf.

international arbitration claims; and the relationship between funders and law firms. The potential conflicts of interest in third-party funding derived from the directness of funders' investments, their economic interest in the outcome of a dispute, and the potential control over their claims.[81] There are few known cases of disclosure of third-party ordered by tribunals such as *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd Sti v. Turkmenistan*,[82] and *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*.[83] While the identity of the funders was disclosed but there is not known if any arbitrator has been disqualified or an award challenged based on conflicts of interest.[84] Similarly, in the case of *Sultanate of Sulu v. Malaysia*, there is no order for disclosure of the third-party identity, it is only through the response to *The Edge*[85] that Therium Capital Management Ltd admitted that they are the funder of the case. Since there is no order for disclosure in the case of the *Sultanate of Sulu v. Malaysia*, hence the structure of the funding is not known to afford any analysis in this paper. Further, the ICCA-Queen Mary Task Force on Third-Party Funding Report 2018[86] also emphasized the importance of disclosure to avoid potential challenges to an arbitral award and to preserve the integrity of international arbitration.[87] It is in the best interest of all parties and arbitrators to avoid conflicts of interest for the

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[81] Sebastián Torres Linke, "Third-Party Litigation Funding in International Arbitration: Conflicts of Interest with Arbitrators", A Thesis for the Seminar, University of Münster, 2019.

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

[83] See EuroGas Inc and Belmont Resources Inc v. Slovak Republic (ICSID Case No. ARB/14/14), Transcript of the First Session and Hearing on Provisional Measures (17 March 2015) p. 145 ("We think that the Claimants should disclose the identity of the third-party funder, and that third-party funder will have the normal obligations of confidentiality.").

[84] [94] S. Perry, "Pakistan fights bid to revive treaty claims as funder is revealed", Global Arbitration Review, 16 November 2017, https://globalarbitrationreview.com/article/pakistan-fights-bid-revive-treaty-claim-funder-revealed.

[85] The Edge, "Special Report: The Sulu heirs' claims – A thorn in Malaysia's side."

[86] International Council for Commercial Arbitration, "Report of The ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration."

[87] *Ibid*.

legitimacy of international arbitration and the assured enforceability of the arbitral awards.[88]

The funder in the case of *Sultanate of Sulu v. Malaysia* is in the midst of recouping its investment by actively enforcing the doubtful arbitration award going after potential Malaysia state own assets. Critics of third-party funding concerns[89] had become a reality, and the Government of Malaysia will be paying the high costs of international arbitration proceedings tailing every recoupment process of the funders. The raising concerns of third-party funding burden to least developed and developing countries raised concerns in the international arena. United Nations Commission on International Trade Law, Working Group III, Investor-State Dispute Settlement Reform ("Working Group III: ISDS reform")[90] has provided positive consideration for reform to establish an advisory centre on ISDS with respect to the cost of the proceeding, correctness, and consistency of decisions as well as access to justice.[91] The advisory centre of ISDS aims to benefit the least developed and developing countries and all States with limited experience in addressing ISDS and reform of third-party funding. It is a noble initiative that would benefit developing countries like Malaysia facing the challenges of the high costs of investment arbitrations. However, the *Sultanate of Sulu v. Malaysia* case as the 1878 Deed of Cession is not an investment treaty, it is rather a historical piece of document, a form of colonialization at the time.[92]

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[88] *Ibid*.

[89] Marco de Morpurgo, "A Comparative Legal and Economic Approach to Third-Party Litigation Funding," *Cardozo Journal of International and Comparative Law* 19 (2011): 343, 384-85.

[90] Working Group III: Investor-State Dispute Settlement Reform, https://uncitral.un.org/en/working_groups/3/investor-state

[91][91] United Nations Commission on International Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019), https://documents-dds-ny.un.org/doc/UNDOC/GEN/V19/104/76/PDF/V1910476.pdf?OpenElement

[92] Norizan Kadir & Suffian Mansor, "Reviving the Sultanate of Sulu Through its Claim over Sabah, 1962-1986," *Akademika,* Vol. 87, no. 3 (2017): 125-138, doi: 10.17576/akad-2017-8703-09.

Working Group III: ISDS reform,[93] at its 37th session, concluded that it would be desirable that reforms be developed by UNCITRAL in order to address concerns related to the definition, and to the use or regulation of third-party funding in investor-State dispute settlement (ISDS).[94] The current lack of transparency and lack of regulation on third-party funding was one of the great concerns which necessitate reforms in third-party funding. The impact of third-party funding on the proceedings and ISDS system were mentioned during the working group deliberations.[95] Among others, the concerns of third-party funding on the proceedings are conflicts of interest of arbitrators arising out of third-party funding; the influence of third-party funding on decision on cost allocation (incurrence of costs and potential shift of burden of proof); relevance of third-party funding for decision on security for costs; protection of privileged information disclosed to a third-party funder and extent to which the third-party funder is bound by confidentiality obligations; and control of third-party funders over the arbitration process and negative impact on amicable resolution of disputes.[96] The concerns of the impact on ISDS system are the impact of third-party funding on the increase of the number of ISDS cases and frivolous claims; the impact of third-party funding on the promotion and protection of investments; the imbalance created by the practice of third-party funding as respondent States generally do not have access to it.[97] The concerns of the working group are timely in addressing the raising trends on third-party funding in international commercial and investment arbitrations and further recognition of third-party funding in developing countries and jurisdictions. The working group also provides possible reform options such as (i) prohibiting third-party funding entirely in ISDS; and (ii) regulating third-party funding by, for example, introducing mechanisms to ensure a level of transparency including through disclosures (which could also assist in ensuring the

[93] UNCITRAL, Third-party Funding, https://uncitral.un.org/en/thirdpartyfunding

[94] United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), Thirty-eighth session, Vienna, 14–18 October 2019, Note by the Secretariat on Possible reform of investor-State dispute settlement (ISDS) Third-party funding – Possible solutions.

[95] *Ibid.*

[96] *Ibid.*

[97] *Ibid.*

impartiality of the arbitrators), by imposing sanctions for failure to disclose, and by providing rules on third-party funders and on when they could provide funding.

Subsequently, at the 39th session, the Working Group III: ISDS reform,[98] continue its work on third-party funding and felt that improvements in the procedural framework would be desirable. In October 2020, the Working Group III: ISDS reform considered issues relating to frivolous claims, security for costs, and counterclaims based on notes prepared by the Secretariat (A/CN.9/WG.III/WP.192 and A/CN.9/WG.III/WP.193).[99] Frivolous claims have also been said to harm the reputation of host States and to generate regulatory chill.[100] With regards to frivolous claims, a more predictable framework makes it possible to dismiss such claims at an early stage of the proceeding and provides an expedited process was discussed.[101] A draft provisions on procedural rules reform was produced by the working group at the 39th session. The procedure rules reform includes early dismissal of claims manifestly without legal merit; security for costs; allocation of costs; counterclaims and third-party funding.[102]

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[98] United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), Thirty-ninth session https://uncitral.un.org/en/thirdpartyfunding

[99] United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), Thirty-eighth session, New York, 30 March – 3 April 2020, Note by the Secretariat on Possible reform of investor-State dispute settlement (ISDS) Third-party funding – Multiple proceedings and counterclaims https://documents-dds-ny.un.org/doc/UNDOC/LTD/V20/006/03/PDF/V2000603.pdf?OpenElement

[100] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Note by the Secretariat on Possible reform of investor-State dispute settlement (ISDS)
Security for cost and frivolous claims, Thirty-ninth session, New York, 30 March – 3 April 2020, A/CN.9/WG.III/WP.192, 6.

[101] United Nations Commission on International Trade Law, Fifty-fourth session Vienna, 28 June–16 July 2021 Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session (Vienna, 5–9 October 2020).

[102] United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), Forty-third session, Vienna, 5–16 September 2022, Possible reform of investor-State dispute settlement (ISDS): Draft provisions on procedural reform, A/CN.9/WG.III/WP.219.

Besides that, the recently approved and amended of International Centre for Settlement of Investment Dispute Convention Arbitration Rules 2022 ("ICSID Convention Arbitration 2022 Rules") on 21 March 2022 is much welcome which provides principal rules for third-party funding. The amendments consist of Rule 14 Notice of Third-Party Funding; Rule 41 Manifest Lack of Legal Merit; Rule 43 Preliminary Objections; Rule 48 Ancillary Claims; Rule 50 Costs of the Proceeding; Rule 52 Decisions on Costs; and Rule 53 Security for Costs. The amendments of the ICSID Convention Arbitration 2022 Rules would contribute as overarching rules for third-party funding which view optimistically to influence the reform of UNCITAL Model Law and international commercial arbitration in the future.[103]

Besides the above, more discussions should move to the argument of sanctions as proposed by the Honorable the Chief Justice Sundaresh Menon in his keynote speech of 2013[104] whereby it was alluded that ignorance of the ethical code due to lack of sanctions amounts to nothing.[105] In spite of some arbitral institutions having adopted various suggestions for a code of conduct, there are limited discussions on sanctions[106] that would effectively deter misconduct[107] and hence, it is not difficult to anticipate an upward trend of potentially dubious cases being brought as an investment machinery which would threaten the integrity of international arbitration. It is worth considering that, whether it is worthwhile to allow the respectable legal profession to intrude and control by third-party funders such as financial institutions, insurance companies, and capital investment firms, hedge funds to enter the highly competitive market threatening the value of justice and adjudication once hold. It is little doubt that third-party funding is here to stay, notwithstanding, the underlying rationale for the common law doctrine of maintenance and champerty ought to reverberate so that a

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[103] ICSID Convention Arbitration 2022 Rules

[104] Menon, "Some Cautionary Notes for an Age of Opportunity."

[105] Judith Gill, "The IBA conflicts guidelines – who's using them and how?" *Dispute Resolution Internation* 1, no. 1 (2007): 58.

[106] Menon, "Some Cautionary Notes for an Age of Opportunity."

[107] *Ibid.*, citing Markham Ball, "Probity Deconstructed: how helpful, really, are the IBA guidelines on conflicts of interest in international arbitration?" *Arbitration International* 21, No. 3 (2005).

just balance between the need for access of justice and a modest return could be achieved.

## VIII. CONCLUSION

This article concludes that there is no arbitration clause in the *Sultanate of Sulu v. Malaysia* case, leading up to the Award. Hence, the propriety of the arbitral proceeding remains suspect and the outcome of the setting aside or annulment proceedings would be keenly awaited. Historical events elongate in legal challenges affecting the integrity and interest of international arbitrations require urgent attention and possible solutions. Ethical challenges concerning third-party funding that require further discussions, particularly in the formulation of proper and consistent guidelines and rules leading up to UNCITRAL Model Law reform. The raising concerns of the international arbitration communities in their notable works on reforms and recommendations are much welcome.

With the global economy facing a recession in the next few years, and national legal regimes increasing recognition of third-party funding as beneficial means of access to justice. Third-party funding impacts on international commercial and investment arbitration, particularly to developing countries with limited experience should be accorded some assistance from international arbitration institutions and their relevant authorities. . Further, the impact on the legal profession around the globe in light of deregulation of third-party funding, the opening legal services to other sectors such as financial institutions, insurance companies, and capital investment firms, hedge funds to enter the legal services, would require clear rules of reforms in balancing the challenges faced and the benefits that come with it.

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