THIRD-PARTY FUNDING IN MALAYSIAN ARBITRATION: WHAT TO EXPECT FROM 1 JANUARY 2026*

by

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ABSTRACT

The Arbitration (Amendment) Act 2024 (Act A1737), coming into force on 1 January 2026, represents a major reform of Malaysian arbitration law. For the first time, it establishes a statutory regime governing third-party funding ('TPF'), abolishing the common-law doctrines of maintenance and champerty for arbitration, and introducing rules on disclosure and the regulation of funders. This article analyses the new provisions (**sections 46A–46I**) of the *Arbitration Act 2005* as amended, explains their policy rationale, and compares Malaysia's forthcoming framework with the position in England and Wales following *R (PACCAR Inc) v. Competition Appeal Tribunal*.[1] It concludes that the reform brings Malaysia into alignment with leading arbitral jurisdictions and enhances access to justice while preserving procedural integrity.

Keywords: Arbitration – Third-party funding – Maintenance and champerty – Disclosure – Costs – Malaysia – England and Wales.

INTRODUCTION

The Arbitration (Amendment) Act 2024, which will come into operation on 1 January 2026, marks a watershed in Malaysia's arbitral development.[2] For the first time, Parliament has enacted a statutory regime expressly recognising and regulating **third-party funding** ('TPF') in arbitration.

Historically, Malaysian law has recognised the common-law doctrines of *maintenance*[3] and *champerty*,[4] particularly in the context of litigation. The Arbitration (Amendment) Act 2024 now expressly provides that, in relation to arbitration, those doctrines shall cease to apply to third-party funding.[5] This change removes the uncertainty that had previously surrounded the enforceability of funding agreements in Malaysia.

The 2024 amendments modernise the **Arbitration Act 2005** by inserting a new **Chapter 2 (sections 46A–46I)** on TPF. This change aligns Malaysia with other arbitral hubs such as Singapore and Hong Kong, both of which liberalised funding in 2017.[6] The legislative rationale, as stated during the Bill's second reading, was to "*enhance access to justice and investor confidence in arbitration conducted in Malaysia.*"[7]

This article analyses the structure and intent of the new regime, compares it with the current position in England and Wales, and considers its likely implications for arbitral practice once it takes effect.

LEGISLATIVE FRAMEWORK OF THE AMENDMENT ACT

Key Definitions – Section 46A

Section 46A defines the central terms: a "*third-party funder*" as one who finances a party's arbitration costs without any legal interest in the arbitration apart from the funding agreement; a "*third-party funding agreement*" must be in writing; and "*costs or expenses of the arbitration*" include expenses incurred before or during proceedings and in any related court proceedings.[8] The section further provides that a funder receives a financial benefit **only if the arbitration is successful**, confirming that recoveries are contingent and aligning Malaysian practice with international norms.

Temporal Application – Section 46B

Chapter 2 applies prospectively. Agreements concluded **before 1 January 2026** fall outside its scope and remain governed by pre-existing common law, under which *maintenance and champerty* may still render such contracts unenforceable.

Abolition of Maintenance and Champerty – Section 46C

Section 46C abolishes the common-law rule of maintenance and champerty **in relation to arbitration**, declaring that TPF agreements are not contrary to public policy on that ground.[9] However, other public-policy rules continue to apply (**section 46C(2)**). This statutory abrogation removes a long-standing obstacle to funding, bringing clarity and modernity to Malaysia's arbitral landscape.

Code of Practice – Sections 46D and 46E

The Minister in the Prime Minister's Department may issue a **Code of Practice** governing TPF. The Code may address promotion of funding, funder control, minimum capital, conflict of interest management, and protection of funded parties.[10] Non-compliance does not of itself create liability but may be considered by a tribunal or court when relevant (**section 46E(2)**). This "soft regulation under statutory authority" mirrors international best practice– combining flexibility with accountability.

Disclosure and Confidentiality – Sections 46F–46I

Sections **46F–46I** balance confidentiality with transparency:

(1) **Section 46F** permits disclosure of arbitral information to potential funders "for the purpose of seeking or securing funding", notwithstanding section 41A's confidentiality rule.

(2) **Section 46G** requires a funded party to disclose the existence of the agreement and the funder's name to the other party and the tribunal or court within fifteen days of execution (or on commencement if pre-existing).[11]

(3) **Section 46H** obliges similar disclosure when the agreement terminates.

(4) **Section 46I** provides that non-compliance does not automatically render the funder liable but may be taken into account by the tribunal or court.

These provisions encourage early transparency, enabling arbitrators to identify potential conflicts of interest while maintaining confidentiality in other respects.

Jurisdictional Reach – Amended Section 3

The Amendment Act expands section 3 so that Chapter 2 applies to (1) domestic arbitrations seated in Malaysia; (2) international arbitrations seated in Malaysia; and (3) arbitrations seated abroad or with no seat where any services "in relation to the arbitration" are provided in Malaysia.[12] This ensures that Malaysia-connected funding and service activities are subject to a consistent legal framework.

Significance

The reform achieves three objectives: legitimacy through express validation of TPF; transparency through mandatory disclosure; and flexibility through the Ministerial Code of Practice. Collectively, these provisions bring Malaysia into alignment with global standards and strengthen its position as a competitive arbitral seat.

POLICY CONSIDERATIONS AND LEGISLATIVE RATIONALE

Parliament's rationale for enacting the TPF framework is twofold: **access to justice** and **economic modernisation**.[13] Arbitration can be prohibitively costly; a statutory framework enables parties with strong claims but limited liquidity to pursue meritorious cases. At the same time, it signals to international investors that Malaysia embraces modern dispute-resolution finance.

The choice of a *delegated regulatory model* – where principles are set by statute but operational standards by ministerial code – illustrates Malaysia's pragmatic approach. It allows adaptation to market conditions while maintaining governmental oversight.

Comparative Analysis: Malaysia v. England and Wales

The English Position

English law recognises TPF through case law and industry self-regulation rather than statute. The landmark decision in *R (PACCAR Inc) v. Competition Appeal Tribunal*[14] held that certain funding agreements providing the funder a share of damages constitute damages-based agreements ('DBAs') under section 58AA of the *Courts and Legal Services Act 1990 as amended* and are unenforceable unless compliant with the **Damages-Based Agreements Regulations 2013** as amended. Following *PACCAR*, the Civil Justice Council (CJC) recommended legislative clarification excluding TPF from the DBA regime and endorsed continued light-touch oversight.[15] As of late 2025, the government has yet to implement those reforms.

Regulation in England remains voluntary *via* the Association of Litigation Funders ('ALF') Code of Conduct, which prescribes capital and ethical standards but has no statutory force.[16] Neither the Arbitration Act 1996 nor the principal English institutional or professional frameworks, including the LCIA Rules and the CIArb's Guideline on Third-Party Funding,[17] impose any binding obligation on parties to disclose funding arrangements. Disclosure remains largely a matter of tribunal discretion or good practice rather than legal duty.

Points of Divergence

Although both jurisdictions recognise the legitimacy of third-party funding, their approaches differ fundamentally in **method, transparency, and regulatory philosophy**.

First, the **source of legal authority** diverges sharply. Malaysia has enacted a dedicated statutory framework through sections 46A to 46I of the *Arbitration Act 2005* as amended. This removes any residual doubt about the legality and enforceability of TPF agreements in arbitration. In England and Wales, by contrast, funding remains governed by judicial precedent and voluntary codes rather than statute. The absence of legislative intervention means that enforceability still depends on judicial interpretation, as illustrated by the uncertainty following *R (PACCAR Inc) v. Competition Appeal Tribunal*.

Secondly, Malaysia has **abolished the doctrines of maintenance and champerty** for arbitration altogether (**section 46C**), thereby eliminating the historical common-law bar to funding. English law, while no longer treating such arrangements as criminal or tortious, has never formally abrogated those doctrines; instead, they have become obsolete through gradual judicial erosion. The Malaysian model therefore provides a cleaner and more decisive legal environment for funders.

Thirdly, Malaysia introduces **mandatory disclosure obligations**. Sections 46G and 46H require a funded party to notify both the opposing party and the arbitral tribunal of the existence of a funding agreement and of any subsequent termination. This contrasts with the English position, where disclosure remains discretionary and depends on the tribunal's procedural directions. The Malaysian provisions promote transparency and help pre-empt potential conflicts of interest.

Fourthly, the regimes differ in their **regulatory structures**. Malaysia's Ministerial **Code of Practice**, authorised under sections 46D and 46E, represents "*soft regulation with statutory backing*": it allows the Minister to set minimum standards on capital adequacy, funder control, and ethical conduct. England currently relies on the Association of Litigation Funders' Code of Conduct, a purely voluntary instrument without legislative status. Malaysia thus embeds public oversight while retaining market flexibility.

Fifthly, **enforceability and risk allocation** stand on different footing. In Malaysia, the express statutory validation of TPF agreements means they cannot be struck down as contrary to public policy. In England, the post-*PACCAR* position exposes many funding agreements to challenge if they fall within the definition of a damages-based agreement. The Malaysian framework thereby offers greater certainty to funders and funded parties alike.

Finally, the **territorial scope** of the regimes diverges. Malaysia's new section 3(3A) extends the TPF provisions beyond Malaysia-seated arbitrations to include arbitrations seated abroad, or with no designated seat, where any services related to the arbitration are provided in Malaysia. English legislation, by contrast, applies only to arbitrations seated within its jurisdiction. The Malaysian provision therefore creates a broader jurisdictional nexus, ensuring consistent application of the TPF framework to Malaysia-linked activities.

Taken together, these distinctions reveal two different philosophies. Malaysia's model is **legislative, transparent, and access-to-justice-oriented**; England's remains **market-driven and self-regulatory**. Both systems aim to balance fairness and flexibility, but Malaysia's approach offers a measure of statutory clarity and procedural discipline that England has yet to achieve.

COMPARATIVE NOTE: AIAC ARBITRATION RULES 2026 AND SECTION 46F OF THE ARBITRATION ACT 2005

Malaysia's regulatory approach to third-party funding operates on two complementary levels. At the **statutory level**, section 46F of the *Arbitration Act 2005* authorises a party to disclose arbitral information to potential funders "for the purpose of seeking or securing funding" and imposes corresponding duties of disclosure under sections 46G–46H once a funding agreement is concluded or terminated.[18]

At the **institutional level**, **Rule 31 of the AIAC Arbitration Rules 2026**[19] reinforces these obligations by requiring a funded party to disclose in writing to the tribunal, the opposing party, and the AIAC both the existence of any funding arrangement and the identity of the funder—at the commencement of proceedings or as soon as practicable thereafter.[20] The rule further obliges prompt notification of any change in the funding relationship and empowers the tribunal to take the existence of funding, and any non-compliance with the disclosure duty, into account when making orders or allocating costs.[21]

Together, these provisions establish a coherent transparency regime that aligns Malaysian arbitral practice with global best standards, particularly those of the **ICC Arbitration Rules 2021** (Article 11(7)) and the **HKIAC Administered Arbitration Rules 2024** (Article 44), both of which mandate disclosure of the existence and identity of third-party funders. By contrast, the **UK framework** remains largely **discretionary**: neither the *Arbitration Act 1996* nor the **LCIA Arbitration Rules 2020** impose any binding disclosure obligation, and the **CIArb Guideline on Third-Party Funding** offers only non-binding professional guidance.[22] Malaysia's combined statutory-institutional model therefore provides a more formalised and transparent disclosure regime than that currently found under English law.

ANTICIPATED JUDICIAL AND ARBITRAL APPLICATION

The effectiveness of the new framework will depend on judicial and arbitral interpretation. First, **tribunal discretion under section 46E(2)** – how non-compliance with the Code or disclosure rules affects costs – will require elucidation. Tribunals may draw comparative guidance from the English Commercial Court's decision in *Essar Oilfields Services Ltd v. Norscot Rig Management Pvt Ltd*,[23] which upheld an arbitral award allowing recovery of the claimant's funding costs as "other costs" under the Arbitration Act 1996. Malaysian tribunals may, by analogy, treat funder-related costs as "reasonable expenses" where expressly authorised in the funding agreement and justified by the circumstances.

Secondly, **confidentiality exceptions** under section 46F will need careful construction. The phrase "for the purpose of seeking or securing funding" may test how far parties can disclose materials to potential funders without breaching arbitral confidentiality.

Thirdly, the **jurisdictional extension** in section 3(3A) may raise issues where foreign-seated arbitrations use Malaysian legal or administrative services. Judicial interpretation will be required to delineate the territorial reach of the provision.

Finally, the **Code of Practice**[24] will likely become a persuasive reference in both arbitral and judicial reasoning, much as the ALF Code informs English practice.

PRACTICAL IMPLICATIONS

For Parties and Counsel

From 1 January 2026, parties relying on funding should ensure their agreements are **in writing** and structured in accordance with the Act. Counsel and parties should make prompt disclosures under section 46G to avoid procedural objections and should consider TPF implications when drafting arbitration clauses.

For Funders

Funders operating in or through Malaysia **should prepare** for the introduction of capital adequacy, control, and conduct standards that may be prescribed in a forthcoming Ministerial **Code of Practice**, once issued under section 46D of the Arbitration Act 2005 as amended. Section 46E(2) provides that tribunals and courts may take account of compliance or non-compliance with such a Code when determining matters before them. Accordingly, prudent funders should begin aligning their internal policies and documentation with the principles embedded in the Act itself.

Preparation, in this context, entails reviewing funding templates to ensure they are in writing, success-based, and consistent with the definitions in section 46A; building disclosure procedures that comply with the 15-day rule and termination-notification obligations under sections 46G and 46H; and establishing confidentiality protocols consistent with section 46F. Funders should also anticipate that tribunals may scrutinise cost-recovery provisions and expect transparency in the structuring of funding returns once the Act takes effect on 1 January 2026.

For Arbitral Tribunals

Tribunals will exercise oversight in verifying disclosure and addressing non-compliance through procedural directions or costs orders. Section 46I shields funders from automatic liability but leaves tribunals' discretion to consider non-compliance when appropriate.

Transitional Considerations

Funding agreements made before 1 January 2026 remain subject to the old common law. Parties entering agreements in the interim should align terms with the new statutory model to minimise enforceability risk.

CONCLUSION

The Arbitration (Amendment) Act 2024 inaugurates a new era for Malaysia's arbitral framework. By abolishing maintenance and champerty, introducing disclosure obligations, and establishing a ministerially supervised code, Malaysia offers statutory clarity coupled with regulatory flexibility.

In contrast, England and Wales continue to rely on self-regulation amid uncertainty following *PACCAR*. Malaysia's approach – combining legal certainty with market responsiveness – positions it as a forward-looking arbitration seat capable of attracting international parties and funders alike.

The ultimate test will lie in the courts' interpretation of sections 46E and 46F–I and in the practical operation of the Code of Practice. Nevertheless, the direction of travel is unmistakable: Malaysia has embraced third-party funding as a legitimate component of modern dispute resolution, reinforcing its commitment to both **access to justice** and **the rule of law**.

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Endnotes:

[1] [2023] UKSC 28.

[2] PU(B) 368/2025, "Appointment of Date of Coming into Operation", 7 October 2025 (Gazetted 13 October 2025).

[3] Improper support of litigation by a third party.

[4] Where a third party shares in the profits of the litigation.

[5] Arbitration (Amendment) Act 2024, s 46C.

[6] Civil Law (Amendment) Act 2017 (Singapore); Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (Hong Kong).

[7] *Hansard*, Dewan Rakyat, Second Reading of the Arbitration (Amendment) Bill 2024.

[8] Arbitration (Amendment) Act 2024, s 10, inserting s 46A(a)–(d) under Chapter 2 in Part III of the 2005 Act.

[9] *Ibid* s 10, inserting s 46C(1) under Chapter 2 in Part III of the 2005 Act.

[10] *Ibid* s 10, inserting s 46D(2)(a)–(e) under Chapter 2 in Part III of the 2005 Act.

[11] *Ibid* s 10, inserting s 46G(1)–(3) under Chapter 2 in Part III of the 2005 Act.

[12] *Ibid* s 3(c), inserting new s 3(3A) to the 2005 Act.

[13] *Hansard*, Dewan Rakyat, Second Reading of the Arbitration (Amendment) Bill 2024.

[14] [2023] UKSC 28.

[15] Civil Justice Council, Review of Litigation Funding in England and Wales: Final Report (July 2025).

[16] Association of Litigation Funders (UK), Code of Conduct for Litigation Funders (4th edn, 2021).

[17] Issued on 11 September 2025.

[18] Arbitration (Amendment) Act 2024, s 10, inserting s 46F–H under Chapter 2 in Part III of the 2005 Act.

[19] In force on 1 January 2026.

[20] AIAC Arbitration Rules 2026, r 31(1)–(3).

[21] *Ibid* r 31(4).

[22] Chartered Institute of Arbitrators, *Guideline on Third-Party Funding (2025)*, launched 11 September 2025.

[23] [2016] EWHC 2361 (Comm); [2017] 1 Lloyd's Rep 186.

[24] As of the date of this article, the Code has not been issued, but it is expected to be released in January 2026.