IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2026] SGHC(I) 5

Originating Application No 23 of 2025

Between

(1) DTH
(2) DTI

… *Applicants*

And

(1) DTF
(2) DTG
(3) DTJ

… *Respondents*

JUDGMENT

[Arbitration — Award — Recourse against award — Setting aside — Whether award in conflict with public policy of Singapore under Art 34(2)(*b*)(ii) UNCITRAL Model Law on International Commercial Arbitration — International Arbitration Act (Cap 143A, 2020 Rev Ed)]
[Arbitration — Award — Recourse against award — Setting aside — Whether tribunal's decision was not in accordance with the arbitral procedure agreed by the parties]

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DTH and another
v
DTF and others

[2026] SGHC(I) 5

Singapore International Commercial Court — Originating Application No 23 of 2025
S Mohan J, Roger Giles IJ, Anselmo Reyes IJ
31 March 2026

2 June 2026 Judgment reserved.

Roger Giles IJ (delivering the judgment of the court):

Introduction

1 The doctrines of maintenance and champerty have rendered Singapore historically resistant to legalising third-party funding for dispute resolution, animated by the principle that justice is not a commodity to be trafficked in. Against this background, the application before us concerns the following question – where a tribunal declines to award to the successful arbitrant costs associated with such third-party funding on the grounds that it does not have the authority or power to do so under Singapore law, whether that decision may be liable to be set aside as being contrary to Singapore's public policy. A related question is whether such an award may be said to have been made in breach of the parties' agreed arbitral procedure.

2 DTH and DTI (collectively, "Applicants") are the successful parties in a Singapore-seated arbitration ("Arbitration") brought against DTF, DTG and DTJ (collectively, "Respondents"). In SIC/OA 23/2025 ("OA 23"), the Applicants seek to set aside or remit the final award on costs ("Costs Award") issued by the arbitral panel ("Tribunal"), to the extent that the majority of the Tribunal ("the Majority") determined that it did not have the power or authority to award the Applicants their third-party funding costs.

3 The third respondent, a joint venture company, did not play any active part in the application. For the avoidance of doubt, references in this judgment to the Respondents are to the first and second respondents.

4 The application is brought by the Applicants on the grounds:[1]

(a) that the Majority's determination in the Costs Award is in conflict with the public policy of Singapore; and

(b) that the arbitral procedure adopted by the Majority in arriving at its decision on the recoverability of third-party funding costs was not in accordance with the agreement of the parties.

5 The Applicants ask that this court set aside the impugned portion of the Costs Award, or remit the matter for the Tribunal to reconsider its decision.[2] This court would be entitled to do so under, respectively, Article 34(2)(*b*)(ii) and Article 34(2)(*a*)(iv) of the United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration

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1 SIC/OA 23/2025 filed 17 October 2025, at Prayer 1; Witness Statement of DTI dated 17 October 2025 ("WS-DTI") at para 11.

2 Applicants' Written Submissions dated 16 February 2026 ("AWS") at paras 51 and 62–65.

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(1985, amended 2006) ("Model Law"), which is given the force of law in Singapore by s 3 of the International Arbitration Act 1994 (2020 Rev Ed) ("IAA").

6 For the reasons that follow, we are of the view that neither ground for setting aside the Costs Award has been made out. OA 23 is accordingly dismissed.

Facts

7 The present application is related, and in a sense a sequel to, the proceedings we heard and determined in *DPT v DPV* [2025] SGHC(I) 29 ("*DPT v DPV*"). In those proceedings, the first respondent, referred to in this judgment as DTF, and the second respondent, referred to here as DTG, had applied in SIC/OA 10/2025 ("OA 10") to set aside the partial award issued by the Tribunal on the substance of the underlying dispute between the parties ("Partial Award"). The Partial Award was issued by the Tribunal prior to the Costs Award that is sought to be impugned in the present application. We heard OA 10 on 22 September 2025 and dismissed it on 1 December 2025 when we delivered our judgment in *DPT v DPV*.

8 The factual background to the dispute leading up to the present application has been set out in some detail in *DPT v DPV*. Accordingly, we do not propose to rehearse it here but provide a brief summary instead.

9 The Applicants and the first and second respondents entered into a joint venture for the provision of financing technology services as shareholders in the

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third respondent.[3] The parties' relationship subsequently deteriorated,[4] and the first and second respondents purported to terminate shareholder and investment agreements entered into with the Applicants ("Agreements").[5] The Applicants were also removed as directors of the third respondent and terminated as employees.[6]

10 In the Arbitration, the Applicants brought claims against all three respondents for breaches of the Agreements, and against the first and second respondents for minority oppression under s 216(1) of the Companies Act 1967 ("CA").[7]

The Partial Award

11 In the Partial Award, the Tribunal unanimously determined that the first and/or second respondents had breached the Agreements in a number of respects, and that the purported termination of the Agreements was invalid.[8] The Tribunal also unanimously determined that in a number of respects, the first respondent, which had become the majority shareholder in the third respondent in the course of the parties' relationship, had acted in a manner oppressive to the Applicants in contravention of s 216(1) of the CA.[9] The Majority also found

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3 Affidavit of DTI dated 30 April 2025 at paras 3 and 13; Witness Statement of the Chief Legal Officer of the 1st and 2nd Respondents' parent company dated 21 November 2025 ("WS-CLO") at para 9.

4 WS-DTI at para 24; Founders' Statement of Claim (Amended) filed in the Arbitration ("SOC(A1)") at paras 81–117: WS-DTI at DTI-1, Tab 36, pp 4577–4593.

5 Partial Award at [289] and [291]: WS-DTI at DTI-1, Tab 4, p 387.

6 Partial Award at [293]: WS-DTI at DTI-1, Tab 4, p 387.

7 Partial Award at [305]: WS-DTI at DTI-1, Tab 4, p 389.

8 Partial Award at [592(a)]: WS-DTI at DTI-1, Tab 4, pp 538–539.

9 Partial Award at [593(a)]: WS-DTI at DTI-1, Tab 4, p 540.

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additional breaches of the Agreements,[10] and found oppressive conduct in an additional respect.[11] In awarding the Applicants relief, the Majority declared that an issuance of shares in the third respondent to the first respondent – which had the effect of watering down the Applicants' interest in the joint venture vehicle – was invalid as against the Applicants.[12] The Majority ordered that the first respondent should buy out the Applicants' shares in the third respondent for a total sum of US$14,736,000 – comprising US$9,824,000 to the first applicant and US$4,912,000 to the second applicant.[13]

12 As referred to at [7] above, the Respondents applied in OA 10 to set aside the Partial Award. Following our dismissal of OA 10, the Respondents filed an appeal to the Court of Appeal, which appeal is currently pending.

The Costs Award

13 The Applicants had entered into a Litigation Funding Agreement ("LFA") with a litigation funder ("Funder"), under which the following terms in quotation marks appeared as defined terms in the LFA.[14] Under the LFA, the Funder was entitled to receive from any "Resolution Sum":[15]

> (a) reimbursement of the total funded costs paid or payable by the Funder;

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10 Partial Award at [592(b)]: WS-DTI at DTI-1, Tab 4, p 539.

11 Partial Award at [593(b)]: WS-DTI at DTI-1, Tab 4, p 540.

12 Partial Award at [522], [523(b)] and [598(f)]: WS-DTI at DTI-1, Tab 4, pp 503–504 and 542.

13 Partial Award at [595]: WS-DTI at DTI-1, Tab 4, p 540.

14 WS-DTI at DTI-1, Tab 8, pp 1199–1216.

15 WS-DTI at DTI-1, Tab 8, p 1199, Clause 4.1.

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(b) an amount in respect of each "Resolution" calculated as the greater of:

(i) a multiple of the total funded costs, the multiple varying from 0.5 times to 3 times depending on the length of time from the date of the LFA to the "Resolution"; or

(ii) a percentage of the total "Resolution Sum", the percentage varying from 5% to 30% depending on the length of time between the date of the LFA and the "Resolution"; and

(c) if the Funder funded any ancillary proceedings, the amounts payable under (b) shall be increased by adding either another whole multiple to each multiple in (i), or 5% to each percentage in (ii).

14 The LFA was subsequently varied to increase the Funder's entitlements in return for additional funding.[16] It is not necessary to elaborate further on the terms of that variation as they have no bearing on the application before us.

15 In the Arbitration, the Applicants claimed third-party funding costs ("TPF costs") of US$14,608,695.11, *in addition to* legal costs and disbursements incurred in the Arbitration totalling US$4,561,716.59.[17] The Applicants also claimed a sum of US$1,403,701.38 as an uplift on the legal costs of their English solicitors pursuant to a conditional fee agreement.[18] The

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16 WS-DTI at para 30 and DTI-1, Tab 8, pp 1232–1233.

17 Applicants' Costs Submissions for the Arbitration dated 4 October 2024 at paras 1–2: WS-CLO at CLO-5, p 361 of Case Management Bundle Volume 1 ("CMB-1").

18 Applicants' Costs Submissions for the Arbitration dated 4 October 2024 at paras 1(c) and 36: WS-CLO at CLO-5, pp 361 and 380 of CMB-1.

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Majority determined that it was unable to award the uplift,[19] but that decision is not the subject of this application and accordingly, we need not say more on it.

16 As is apparent, and as the Applicants emphasised to us,[20] the consequence of the Majority's decision meant that payment by the Applicants of the TPF costs to the Funder would leave the Applicants with almost nothing by way of recovery from the sum of US$14,736,000 payable by the first respondent under the terms of the buyout order (see [11] above).

17 The Tribunal issued a compendium of documents on the question of costs, and the parties agreed at the hearing of this application that the Costs Award is to be construed by reference to *all* of the following documents taken together:

(a) The Costs Award itself which comprises 239 paragraphs, culminating in the "Dispositive Orders". It bears the signatures of all three members of the Tribunal, save that the signature of the dissenting member contains the qualification "Subject to Dissenting Opinion".

(b) The "Dissenting Opinion" ("Dissent") which comprises 99 paragraphs, and sets out the dissenting member's reasons for departing from the conclusions of the Majority on, *inter alia*, the power to award TPF costs to the Applicants.

(c) The "Majority's Reply to the Dissent on the Final Award on Costs" ("Majority's Reply") comprising 46 paragraphs. The Majority's

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19 Final Award on Costs dated 18 July 2025 ("Costs Award") at [238]: WS-CLO at CLO-19, p 1627 of CMB-1.

20 WS-DTI at para 10(b).

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Reply is itself accompanied by a 13-paragraph addendum by one member of the Majority, containing further elaboration and comment.[21]

18 In the Costs Award, the Tribunal awarded that the first respondent shall pay the Applicants' legal costs, including the costs of the arbitration, in the amount of US$4,129,633.56, together with interest.[22] The Tribunal (via the Majority) dismissed both the claim for TPF costs and the uplift claim.[23]

The Majority's reasons

19 We turn now to the Majority's reasons for dismissing the claim for the TPF costs ("TPF Decision").

20 The Arbitration was conducted pursuant to the Singapore International Arbitration Centre ("SIAC") Rules (6th edition, 1 August 2016) ("SIAC Rules"). The Applicants' position, in essence, was that the TPF costs were recoverable pursuant to Rule 37 of the SIAC Rules, which provided that the Tribunal "shall have the authority to order in its award that all or part of the legal *or other costs* of a party be paid by another party" [emphasis added]. The arguments before the Tribunal (and before us) were focused on the italicised words and their precise ambit.

21 The Majority did not accept the Applicants' contention. Their principal grounds, as distilled from their reasons, were as follows:[24]

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21 Majority's Reply to the Dissent on the Final Award on Costs dated 18 July 2025 ("Majority's Reply"): WS-CLO at CLO-19, pp 1653–1673 of CMB-1.

22 Costs Award at [238(a)]–[238(b)]: WS-CLO at CLO-19, p 1627 of CMB-1.

23 Costs Award at [238(c)]: WS-CLO at CLO-19, p 1627 of CMB-1.

24 Costs Award at [209]–[220]: WS-CLO at CLO-19, pp 1619–1621 of CMB-1.

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(a) Although legislative amendments effected in 2017 to the Civil Law Act 1909 (Cap 43, 1999 Rev Ed) ("CLA") by the Civil Law (Amendment) Act 2017 (Act 2 of 2017) ("2017 Amendments") served to legalise TPF contracts (as we elaborate at [29]–[33] below), those amendments did not adversely affect the rights of an opposing party as an unsuccessful litigant, nor did they operate so as to permit the recovery of the funding costs from the opposing party.

(b) The agreement of the parties in Rule 37 did not otherwise confer upon the Tribunal the power to order the recovery of TPF costs, for the following reasons:

(i) Section 12(5) of the IAA provides that an arbitral tribunal "may award any remedy or relief that could have been ordered by the General Division of the High Court"; thus, insofar as the High Court did not have the power, in court proceedings before it, to order an unsuccessful party to pay the TPF costs of the successful party, the Tribunal could have no greater power or authority in that regard; and

(ii) TPF costs did not fall within the meaning of "other costs" within Rule 37.

22 Further, the Majority determined that the TPF costs stipulated in the LFA did not come within the scope of third-party funding permitted under the 2017 Amendments. This was on the basis that under the definition of a "third-party funding contract" in s 5B(10) of the CLA, the TPF costs were not "for the purpose of funding all or part of the costs of [the Applicants]" within the meaning of s 5B(2) of the CLA, and did not constitute a contract or agreement

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"for the funding of all or part of the costs of the proceedings in return for a share or other interest in the proceeds or potential proceeds of the proceedings".[25]

23 In relation to the Majority's reasons at [22] above, it is argued by the Respondents that they constituted an independent basis for the decision in the Costs Award on TPF costs, separate and distinct from the Majority's determination that there was no power or authority to award the TPF costs.[26] The Respondents contend that the Applicants do not challenge this independent ground; the Applicants, of course, disagree. We return to this question later at [99]–[108] below.

Issues to be determined

24 Based on the foregoing summary of the background, the following issues arise for our determination:

(a) Whether the TPF Decision is in conflict with the public policy of Singapore and ought to be set aside pursuant to Article 34(2)(*b*)(ii) of the Model Law ("Public Policy Issue"); and

(b) Whether the arbitral procedure adopted by the Majority in arriving at the TPF Decision was not in accordance with the agreement of the parties, and should accordingly be set aside under Article 34(2)(*a*)(iv) of the Model Law ("Arbitral Procedure Issue").

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25 Costs Award at [145]–[148]: WS-CLO at CLO-19, pp 1591–1592 of CMB-1.

26 1st and 2nd Respondents' Written Submissions dated 3 March 2026 ("1R2R-WS") at para 11.

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25 If either issue is determined in the Applicants' favour, the TPF Decision in the Costs Award may be liable to be set aside or, pursuant to Article 34(4) of the Model Law, remitted to the Tribunal.

The parties' cases

The Public Policy Issue

26 The Applicants advance three main arguments. First, they contend that questions of public policy ultimately fall within the court's purview.[27] The Applicants further submit that the court, in exercising its supervisory role, has the final say on an arbitral tribunal's consideration of public policy and accordingly, may set aside the TPF Decision should it reach a different conclusion from the Majority on its understanding and application of public policy.[28] The Applicants contend that the TPF Decision necessarily required the Majority to interpret and apply the public policy of Singapore of ensuring access to justice. Thus, this court is empowered and duty bound to consider whether the Majority's decision was correct. The Applicants cite the Hong Kong decision of *G v N* [2023] HKCFI 3366 ("*G v N*") in support of their contention.

27 Second, as it is not part of the public policy of Singapore to ensure that costs recovery for the winning party in arbitration is assessed on the basis of any particular principle, there is no public policy constraint on the extent of costs recovery for the winning party in an arbitration, with arbitral tribunals maintaining a broad discretion over costs.[29] Different fora within the same

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27 AWS at para 15.

28 AWS at para 17.

29 AWS at para 27.

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jurisdiction adopt distinct approaches,[30] and in arbitration (in contrast to litigation), this balance tilts even further in favour of providing tribunals with a wide discretion in the award of costs.[31]

28 Third, the Majority's TPF Decision conflicts with the public policy of Singapore of "ensuring access to justice in arbitration".[32] At the hearing before us, Mr Calvin Liang, counsel for the Applicants, in response to clarification sought by us, refined this formulation of the applicable public policy to that of ensuring "[a]ccess to justice for impecunious but deserving parties with meritorious claims in the arbitration".[33] The Applicants submit that the Majority was wrong to impose its own limitations under the rubric of public policy.[34] Further, the Majority erred when they reasoned that the fundamental rationale in legalising TPF was subject to the policy against saddling the unsuccessful party with disproportionate liability for costs in the form of the TPF costs of the successful party. Further and/or in any event, the policy considerations governing the recoverability of TPF costs differ between court litigation and arbitration.[35]

29 On these grounds, the Applicants seek to set aside or remit the TPF Decision. At the hearing before us, Mr Liang confirmed that the Applicants were asking for the setting aside application to be suspended and for the matter to be remitted to the Tribunal, pursuant to Article 34(4) of the Model Law.

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30 AWS at para 25.

31 AWS at para 26.

32 AWS at para 28.

33 Transcript dated 31 March 2026 ("Transcript") at p 51, ln 9–10.

34 AWS at para 29.

35 AWS at para 31.

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30 The Respondents oppose the application on three primary grounds. The first is that the Applicants suffered no prejudice because the Majority's decision rested on independent findings. Even if the Tribunal had accepted that TPF costs were recoverable in principle, it would not have awarded them.[36] In brief, the Majority's findings in this regard were: that (i) the TPF costs were not a cost incurred for the arbitration but an investment return; (ii) the LFA was in substance an investment agreement rather than a third-party funding agreement; and (iii) the LFA therefore fell outside the limited champerty exception under s 5B(2) of the CLA as the Funder's return represented a reward for risk assumed rather than part of the cost of funding the proceedings.[37]

31 Second, the Tribunal's determination on costs does not engage public policy considerations,[38] as it does not meet the high threshold for setting aside an award on public policy grounds. The threshold is such that setting aside applications on the grounds of public policy have typically succeeded only in cases involving corruption, bribery or fraud.[39] Further, it cannot be contrary to public policy for the Tribunal to conclude that TPF costs are irrecoverable, particularly as such costs are not recoverable in Singapore civil litigation.[40] Additionally, the Tribunal lacked the power to award TPF costs under the 2017 Amendments or any applicable rules.[41] Finally, the application is, in substance,

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36 1R2R-WS at paras 11 and 16.

37 1R2R-WS at paras 12–15.

38 1R2R-WS at paras 25–30.

39 1R2R-WS at paras 31–34.

40 1R2R-WS at para 35.

41 1R2R-WS at paras 37–63.

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a challenge based on alleged errors of law by the Majority, which do not justify setting aside an award.[42]

The Arbitral Procedure Issue

32 The Applicants contend that the Majority failed to comply with the agreed procedure in the SIAC Rules, read with Practice Note 01/17 ("PN 01/17"), by declining to award TPF costs on the basis that they had no jurisdiction, power or authority.[43] Such failure was causally related to the Majority's decision.[44] The Tribunal never raised s 12(5) of the IAA during the proceedings nor invited submissions on it, yet ultimately relied on it to decline jurisdiction to award such costs. The Applicants consistently maintained throughout the arbitration that the Tribunal had full discretion to award TPF costs under Rule 37 of the SIAC Rules, and the Tribunal itself had previously framed the issue of TPF costs as turning on the Applicants' degree of success rather than any jurisdictional constraint. Lastly, TPF costs are analogous to interest on costs and should be treated no differently, as both represent the cost of capital. In their view, the Respondents' acceptance that interest on costs should be awarded undermines any principled objection to TPF costs.[45]

33 In response, the Respondents deny any procedural breach. They argue that the Majority's decision on TPF costs does not fall within Article 34(2)(*a*)(iv) of the Model Law, and that the court should not revisit the Tribunal's interpretation of the parties' agreed procedure. Even if Article 34(2)(*a*)(iv) was engaged, the Applicants have not satisfied its

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42 1R2R-WS at paras 18–23.

43 AWS at para 57.

44 AWS at para 58.

45 AWS at paras 59–61.

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requirements.[46] Accordingly, the Respondents maintain that there is no basis to set aside or remit the TPF Decision.[47]

Discussion

The third-party funding landscape in Singapore

34 Before we turn our attention to the issues for determination, we consider it useful, in order to set the stage, to first summarise the landscape in Singapore in relation to third-party funding.

35 Prior to the amendments to the CLA effected in 2017, third-party funding in Singapore was significantly constrained by the common law rules concerning maintenance and champerty, which had long been regarded as inimical to the proper administration of justice (see [1] above). Limited exceptions to these rules existed at common law (*Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 at [43]), but as a general proposition, third-party funding agreements to fund the prosecution of legal proceedings (be it litigation or arbitration) were void as being contrary to public policy or illegal on the ground that such agreements constituted contracts for maintenance or champerty.

36 The legislative landscape underwent a significant transformation in 2017, when the CLA was amended by the 2017 Amendments. The 2017 Amendments introduced ss 5A and 5B and materially altered the legal framework governing third-party funding in Singapore.

37 First, s 5A(1) abolished civil liability under the law of Singapore for maintenance and champerty, thereby removing the principal common law

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46 1R2R-WS at paras 64–95.

47 1R2R-WS at paras 96–97.

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impediment to third-party funding arrangements. Section 5A(2), however, provided that the abolition does not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.

38 Second, s 5B, expressed by s 5B(1) to apply "only in relation to prescribed dispute resolution proceedings", went further and expressly permitted third-party funding notwithstanding the common law rules concerning maintenance and champerty. Of particular significance for present purposes is the exception from the common law rules in s 5B(2), which refers, albeit not in express terms, to a third-party funding contract, and the definition of a third-party funding contract in s 5B(10), both of which are set out below for ease of reference:

> **Validity of certain contracts for funding of claims**
>
> …
>
> (2) A contract under which a qualifying Third-Party Funder provides funds to any party for the purpose of funding all or part of the costs of that party in prescribed dispute resolution proceedings is not contrary to public policy or otherwise illegal by reason that it is a contract for maintenance or champerty.
>
> …
>
> (10) In this section, unless the context otherwise requires —
>
> …
>
> 'third-party funding contract' means a contract or agreement by a party or potential party to dispute resolution proceedings with a Third-Party Funder for the funding of all or part of the cost of the proceedings in return for a share or other interest in the proceeds or potential proceeds of the proceedings to which the party or potential party may become entitled.

39 Therefore, the 2017 Amendments potentially opened the door to third-party funding in all "prescribed dispute resolution proceedings". The "prescribed" proceedings in which third-party funding was permitted were defined and expanded incrementally by subsidiary legislation, commencing

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with international arbitration and related court and mediation proceedings, and subsequently extended to domestic arbitration proceedings and proceedings before the Singapore International Commercial Court ("SICC") (r 3 of the Civil Law (Third-Party Funding) Regulations 2017, as amended by the Civil Law (Third-Party Funding) (Amendment) Regulations 2021).

The Public Policy Issue

Applicable principles

40 It is not seriously disputed that the Applicants must first identify the particular rule or principle of public policy with which the award is said to be in conflict, as well as the part of the award in respect of which such conflict is said to arise (*BNX v BOE* [2017] SGHC 289 ("*BNX*") at [95]).

41 Such conflict must further meet the stringent standard articulated in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [59], namely, that the enforcement or upholding of the award would "shock the conscience", "violate the forum's most basic notions of morality and justice", be "clearly injurious to the public good" or be "wholly offensive to the ordinary reasonable and fully informed member of the public". It is well-established that this ground is of narrow ambit and entails a high threshold, as has been consistently reaffirmed and applied by the cases, including recently in *DNZ v DOA* [2026] SGHC(I) 1 at [125].

42 At the outset, we consider it important to make clear what this application is *not* about. The question before this court is *not* whether the Majority erred in determining that there was no power or authority to award the TPF costs. The policy of minimal curial intervention in arbitral proceedings is well-established and deeply entrenched in Singapore law, and the courts must

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be vigilant in guarding against what are in substance disguised attacks on the merits of arbitral decisions. This principle extends with equal force to cases where the award may contain an error of Singapore law – the mere fact that a tribunal has erred in its application or interpretation of Singapore law *does not* of itself mean that the resulting award is in conflict with the public policy of Singapore, and less still that it is liable to be set aside on that ground. To the considerable extent that the Applicants contend before us that the Majority was wrong to conclude that it had no power to award the TPF costs, and invited this court to so determine, we are of the view that that invitation must be firmly declined. It is not the function of this court to substitute its own view of the law for that of the Tribunal.

43 In our judgment, the question that falls for our determination is an altogether different one. It is, so far as necessary, whether there exists the public policy as identified by the Applicants (see [28] above) and, if so, whether the Majority's determination that the Tribunal did not have the power or authority to award the TPF costs conflicts with that public policy to the high degree conveyed by the expressions such as "shock the conscience", "violation of the forum's basic notions of morality and justice", "clearly injurious to the public good" and related expressions that the case law makes reference to. That is a demanding threshold, and one that is not easily met.

44 Access to justice comprises both the ability to institute proceedings to vindicate rights, irrespective of their ultimate success, and also the extent of the relief obtained. The gravamen of the Applicants' proposed public policy is that access to justice necessitates the recoverability of TPF costs. This is put on the basis that an impecunious litigant (hereafter referred to as the "fundee") may otherwise be deterred from pursuing a claim if such costs are irrecoverable. Conversely, the prospect of recoverability may incentivise recourse to justice.

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Further, it is contended that recoverability promotes a more complete justice for the fundee. These considerations are said to apply with equal force to both curial and arbitral proceedings.

Whether the Tribunal engaged with the issue of public policy

45 As a preliminary issue, during the hearing, Mr Liang repeatedly brought us to various points in the Award in which the Tribunal referred to *Maryani Sadeli v Arjun Permanand Samtani* [2015] 1 SLR 496 ("*Maryani*"), where the Court of Appeal discussed costs of court proceedings as a matter of policy in the context of the indemnity principle, and to *Senda International v Kiri Industries Ltd* [2023] 1 SLR 96 ("*Senda*"), which clarifies that although the indemnity principle is relaxed in arbitration proceedings, it does not mean that a party is entitled to recover all costs, as proportionality remains relevant. On that basis, the Applicants contended that the Tribunal was engaging with public policy and that was the foundation for the Majority's formulation of the applicable public policy in the TPF Decision.

46 We disagree with the Applicants' submissions. The mere fact that the Majority referenced policy factors in the course of its analysis does not mean it was articulating, interpreting or determining Singapore's public policy in relation to the recovery of TPF costs. In our view, the cases of *Maryani* and *Senda* were engaged in and discussed by the Majority as part of its analytical exercise in statutory interpretation and in arriving at its ultimate decision on whether it was empowered or authorised to award TPF costs in arbitration proceedings as a matter of Singapore law. In doing so, the Majority had regard to materials such as Parliamentary debates and established canons of statutory interpretation, and referred to policy considerations as part of that interpretive exercise in determining the proper construction of s 12(5) of the IAA and its

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interaction with the applicable procedural rules, including, for example, as discussed in the cited cases, O 59 of the Rules of Court (2014 Rev Ed). Tribunals and courts frequently take policy considerations into account as an interpretive aid, but that is *distinct* from making a pronouncement on public policy itself.

47 It is true that in arriving at their determination, the Majority also expressed views as to the social or public policy considerations bearing upon the recovery of TPF costs.[48] Specifically, the Majority reasoned that the policy considerations underlying the SICC costs regime – which expressly prohibits recovery of TPF costs under O 22 r 1(5) of the Singapore International Commercial Court Rules 2021 ("SICC Rules 2021") – should apply equally to international arbitrations under the IAA administered by the SIAC, given the similarity between the two costs regimes. The Majority further noted that the fundamental rationale of the 2017 Amendments was to legalise TPF so as to provide access to justice for impecunious parties, and not to impose disproportionate costs on the opposing party.

48 The Majority, however, expressed these views in the *different* context of concluding that the 2017 Amendments did not adversely affect the rights of the opposing party as a litigant and did not operate so as to permit the recovery of funding costs from the opposing party.[49] Those observations must therefore be understood in that context, and *not* as a considered or authoritative pronouncement on the public policy of Singapore in relation to TPF costs more broadly. Just as this court cannot be called upon to review the correctness of the Majority's determination on the question of power or authority, neither can it be called upon to review for correctness what the Majority may have said as to

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48 Costs Award at paras 78–88: WS-CLO at CLO-19, pp 1565–1570 of CMB-1.

49 Costs Award at paras 81–82: WS-CLO at CLO-19, pp 1567–1568 of CMB-1.

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social or public policy *in that context*. Thus, while the court decides for itself what the public policy of Singapore is (*BNX* at [94]), there is in our view simply no occasion or need to even engage in that exercise in this case.

The Applicants' suggested public policy

49 At [28] above, we set out what the Applicants contend is the public policy in issue before us. In our view, the "public policy" alleged by the Applicants to be applicable cannot, with respect, be sustained as a matter of *public* policy. To recapitulate, the Applicants articulate the applicable public policy as that of ensuring access to justice for impecunious but deserving parties with meritorious claims in the arbitration.[50] By "meritorious", the Applicants mean parties that have successfully established claims in the arbitration.[51] The Applicants further argue that impecunious parties risk being shut out from vindicating their rights through the use of third-party funding if they are unable to recover their TPF costs.[52]

50 Unsurprisingly, the Applicants seek to illustrate this by their own position. They were impecunious, it is argued, and had to resort to third-party funding in order to vindicate their rights.[53] The Applicants pursued their claim, and prevailed. But the obligation to remunerate the Funder its TPF costs would, on their case, deprive them of the very fruits of that success, reducing what ought to have been a meaningful vindication of their rights to a pyrrhic victory.[54] The Tribunal should therefore, as a matter of policy, be empowered to include

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50 Transcript at p 51, ln 9–10.

51 Transcript at p 51, ln 13–25.

52 AWS at paras 2 and 10.

53 WS-DTI at paras 25(d) and 84–94; Transcript at p 50, ln 23–30.

54 WS-DTI at para 10(b).

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the Applicants' TPF costs within the scope of any costs recovery awarded in their favour.

51 In our view, the above formulation posited by the Applicants to be the applicable public policy is deficient at the threshold, for the following reasons.

52 The first is that the purported public policy is impermissibly narrow in scope. "Public" policy in its orthodox common law sense necessarily refers to principles which engage, if not the entirety of the public, at least a substantial segment thereof. On the contrary, the class relied upon here and the policy in relation to such a class – namely, impecunious but deserving arbitrants seeking, in particular, the recovery of TPF costs – is manifestly limited and specific. A policy so confined cannot properly be characterised as "public" in nature.

53 This is well in accordance with the established distinction between public policy in the strict legal sense, and the broader invocation of policy considerations in judicial reasoning. The mere fact that a court or other authoritative source may refer to "policy" or even "public policy" in explicating the rationale of a rule or statute does not mean that such considerations are coterminous with public policy as a free-standing legal doctrine in the context of setting aside an award.

54 Second, and in that same vein, the Applicants' formulation of their purported public policy risks eroding the distinction between public policy and social policy. The objective relied upon, namely the facilitation or improvement of access to justice for a defined class of impecunious parties, is a matter of *social* policy. It does not, in our view, rise to the level of a fundamental principle of public policy recognised to be such at common law or as the phrase is understood to mean under Article 34 of the Model Law.

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55 In those circumstances, the Applicants' case fails at the anterior stage of the analysis. In our judgment, the Applicants' asserted policy simply does not meet the threshold requirement of constituting "public policy" in the relevant legal sense in order to fall within the ambit of Article 34(2)(*b*)(ii) of the Model Law, and thus their arguments cannot proceed or succeed on that footing.

56 The conclusion we have reached above renders it unnecessary for us to engage with any antecedent inquiries, including, for example, whether the Applicants were as a matter of fact impecunious. Nonetheless, the Applicants' case would in any event fail for the following reasons.

57 In essence, the Applicants invite this court to determine the Public Policy Issue by reference to the fruits of success in their case. In our view, that approach is misconceived. The fruits of success in any particular case, including the present, cannot, without more, sustain the proposition advanced *ie*, that the TPF Decision is in conflict with Singapore's public policy. In the Arbitration, the Applicants sought a buyout at a sum considerably exceeding US$14,736,000;[55] for example, in the Applicants' closing submissions, a buyout figure of approximately US$65m was advanced – unfortunately for the Applicants, the amount awarded by the Majority fell far short of that figure.[56] Be that as it may, it was the availability of third-party funding that enabled the Applicants to bring the claim in the first place.

58 Further, if for argument's sake, the Majority had agreed with the Applicants and awarded them the amount claimed of US$65m as the Buyout

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55 Applicants' Submissions on the Tribunal's Queries and Issues dated 20 January 2025 at para 42: WS-DTI at DTI-1, Tab 69, p 5734.

56 Applicants' Closing Submissions dated 10 November 2023 at para 92: WS-DTI at DTI-1, Tab 69, pp 5421–5422.

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Price (but disallowed the TPF costs), it could hardly be said then that the TPF Decision was contrary to public policy or that the Applicants would have only obtained a pyrrhic victory. Thus, it appears to us that the real grievance of the Applicants is to the outcome of the TPF Decision relative to the Applicants' ultimate recovery of damages – but that outcome, in our view, does not engage or conflict with the public policy of Singapore. It is instead simply the product of a risk any party engaged in dispute resolution takes – that it may not eventually obtain the monetary recovery it seeks or which it anticipated to receive at the commencement of proceedings.

59 In addition, given that third-party funding is permissible in proceedings before the SICC, it would be unprincipled to confine the suggested public policy to arbitrations alone.

VV v VW

60 In light of the Applicants' attempt to confine the relevant public policy considerations to the arbitral context, we turn to the Respondents' submission that an arbitral tribunal's determinations on costs are entirely insulated from public policy scrutiny and that any alleged conflict between the Costs Award and public policy is therefore "a non-starter".[57] In support of this proposition the Respondents relied on *VV v VW* [2008] 2 SLR(R) 929 ("*VV*").[58]

61 In *VV*, it was argued that the arbitral tribunal's costs award contravened the public policy of Singapore because it was wholly disproportionate to the amount in dispute. Justice Judith Prakash (as she then was) rejected that argument. She observed that although there exists a general public policy

[57] 1R2R-WS at paras 11–23.

[58] Transcript at p 133, ln 11–p 134, ln 26.

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interest in maintaining control over litigation costs, the proportionality principle "is not formally entrenched in relation to taxation of costs in court" (at [28]).

62 Justice Prakash then went on to distinguish arbitration from court proceedings, noting that the position is materially different in the arbitral context. In particular, it is not part of Singapore's public policy to require that costs incurred in private dispute resolution processes, such as arbitration, be assessed according to any specific principle, including proportionality (at [31]).

63 At [31], she explained:

> … There is no public interest involved in the legal costs of parties to one-off and private litigation. Such litigation sets no precedents and binds no one apart from the immediate parties. The immediate parties are parties to the arbitration because they had a pre-existing contractual relationship by which they had decided (probably, though not always, with the benefit of legal advice) that disputes arising under the contract would be settled in this way outside the judicial system. There is no issue of such parties having been fortuitously involved in litigation as is often the case in court where claims arise not only out of contract but also out of tort and non-commercial relationships. The concern that has been expressed by judges and others as to keeping the costs of litigation in proportion to the circumstances of the case has been a concern that related to court litigation and a general rubric of "access to justice". From a policy perspective, this concern does not extend to private arbitrators despite personal misgivings at the quantum of any costs award in such litigation. I do not think that the amount of costs awarded by an arbitrator to a successful party in arbitration proceedings could ever be considered to be injurious to the public good or shocking to the conscience no matter how unreasonable such an award may prove to be upon examination. …

64 At the heart of this reasoning is that no issue of public interest or public policy arises where parties, by agreement, submit to arbitration the determination of the quantum of costs to be awarded by the tribunal; such an arrangement is quintessentially private.

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65 In the present case, however, an additional consideration arises by reason of legislative intervention permitting third-party funding. As explained above at [35], third-party funding agreements were historically void as being contrary to the public policy of prohibiting maintenance and champerty. They have since been rendered permissible in defined and limited circumstances, in furtherance of the countervailing public policy favouring access to justice.

66 The extent of that relaxation, and whether it encompasses the access to justice considerations invoked by the Applicants, may engage the public interest and considerations of public and social policy.

67 Nevertheless, we should not lose sight of the fact that this case is, in substance, a straightforward commercial dispute between two private parties. The mere fact that the issue of third-party funding or recovery of TPF costs may attract public interest or be of general importance does not, without more, elevate it into a matter of Singapore public policy. It is therefore misplaced for counsel for the Applicants to rely on *VV* and use the pronouncements there to support its case. To suggest otherwise is to conflate curiosity or significance with the far more exacting threshold required to invoke public policy as the phrase is understood to mean under Article 34(2) of the Model Law.

68 We add that the Applicants themselves referred to *VV* for the proposition that there is no public policy constraint on the extent of costs recovery for the winning party in an arbitration. As we understand it, this submission was advanced in support of the proposition that the parties' agreement in Rule 37 of the SIAC Rules should be given full and unqualified effect, and is not to be confined or restrained in the manner concluded by the Majority. However, that submission is directed to the correctness of the Majority's determination on the merits, with which we are not presently concerned.

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69 It does not appear to have been appreciated by the Applicants that the very proposition they advance engages, and indeed lends support to, the Respondents, who also cite *VV* in support of their case. On the reasoning in *VV*, the absence of any operative public policy constraint can only be explained on the basis that no *relevant* public policy is engaged at all. In other words, if no limitation founded upon public policy arises, it is because public policy has no application in the circumstances.

There is no public policy conflict

70 We return to the suggested public policy and the question of whether any conflict in fact arises between the TPF Decision and this alleged public policy.

71 Access to justice is, generally speaking, a recognised head of public policy. It informed the 2017 Amendments permitting third-party funding: the Applicants referred us to the Second Reading of the Civil (Amendment) Bill (Bill No 38/2016) which became the 2017 Amendments, where Assistant Prof Mahdev Mohan, speaking in favour of the Bill, said that it will "promote legal representation, and facilitate access to justice in commercial and investment arbitration, which would otherwise be sacrificed". The question of what costs a successful party can recover from the unsuccessful party is ultimately a policy matter within the policy consideration of access to justice: see for example *Maryani* at [29] and *Lao Holdings NV v Lao People's Democratic Republic* [2023] 4 SLR 77 at [63]. And as a general proposition, access to justice may be advanced where a funded party is enabled to commence proceedings to vindicate its rights, is encouraged to do so by the prospect that its third-party funding costs may be recoverable, and, if successful, obtains a more complete

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measure of redress (at least from the perspective of the funded party) through such recovery.

72 However, while enabling an impecunious litigant to pursue proceedings through third-party funding is one matter, whether the costs of such funding are recoverable is a distinct question altogether. Adopting the phrase "shock the conscience" as a shorthand for the high threshold required to establish conflict with public policy under Article 34(2)(*b*)(ii) of the Model Law, the question arises: does it *shock the conscience* if the fundee – here, the Applicants – is incorrectly told that their third-party funding costs are not recoverable from the Respondents? In our view, the answer is no. This is so for the following reasons:

(a) In the relaxation of the rules against maintenance and champerty, while the 2017 Amendments legalise *obtaining* third-party funding, they do not say that the TPF costs are recoverable from the unsuccessful party; the Applicants accept that no Ministerial or governmental statements at the time contained any such intimation. Whatever that means for a decision on whether or not TPF costs are recoverable, as to which we express no view, their recoverability was not expressly mandated by the legislature. The Applicants further submit that levelling the playing field between Singapore and other leading arbitral seats such as London also informed the 2017 Amendments, and at the time, recovery of TPF costs had been allowed in London-seated arbitrations. Thus, an express reference by the Singapore legislature in the Parliamentary debates on the recoverability of TPF costs was unnecessary. In our view, that is too tenuous a connection to make. The general reference to levelling the playing field did not translate into evidence that Parliament intended, by the 2017 Amendments, to allow TPF costs to be recoverable from the unsuccessful party.

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(b) Access to justice is compatible with less than full recoverability of legal costs: in this regard, it is sufficient to refer to the discussion in *Senda* at [45]–[50]. It is commonplace that less than a litigant's actual costs are recoverable, even in arbitration proceedings.

(c) Access to justice is to justice between the Applicant and its counterparty *ie*, the Respondents. Thus, regard must also be had to the Respondents' interests. In a nutshell, access to justice is not a one-way street. If TPF costs are recoverable from the unsuccessful party, the unsuccessful party will be exposed to paying more when sued by an impecunious fundee than if sued by a claimant with means, even when (although contrary to what the Applicants say is their position in this case), the defendant is in no way responsible for the claimant's impecuniosity. And that unsuccessful party will in turn be in thrall to the level of recompense to the funder, as agreed between the claimant and the funder, albeit subject to the limit of reasonableness. Again, whatever that might mean for a decision as to whether or not TPF costs are in fact recoverable, there are valid considerations against them being recoverable.

(d) More specifically, Singapore's public policy of access to justice is compatible with TPF costs being irrecoverable. For example, recovery of TPF costs is prohibited under the SICC costs regime – see O 22 r 1(5) of the SICC Rules 2021.The point here being that when Singapore law proscribes the recovery of such costs in relation to one significant area of commercial legal practice (*ie*, SICC proceedings), it cannot credibly be said that the inability to recover TPF costs from the unsuccessful party shocks the conscience, violates Singapore's most basic notions of morality and justice or is injurious to the public good.

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73 Having regard to all these matters, particularly the last, we do not think it can be said to shock the conscience even if the Majority was incorrect in determining that the Tribunal did not have the power or authority to award the Applicants their TPF costs. In our judgment, the TPF Decision in the Costs Award does not conflict with the public policy of Singapore as envisaged by Article 34(2)(*b*)(ii) of the Model Law. Accordingly, there is no basis upon which the TPF Decision ought to be set aside or remitted to the Tribunal.

74 It is crucial for us to re-emphasise that the law contemplates a finding of conflict with public policy only where the result is so egregious that it "shocks the conscience", "offends fundamental notions of morality and justice" or is "injurious to the public good" – these phrases are not separate definitions as such but expressions which clearly convey how high the bar is set. In practice, this high threshold is ordinarily engaged in cases involving serious wrongdoing – such as illegality, corruption, bribery or awards procured by fraud (*PT Asuransi* at [59]). By way of illustration, a contract formed for an unlawful and morally repugnant purpose – such as trafficking in human beings, to take an extreme example, would unquestionably engage concerns of public policy in its true sense.

75 Against that backdrop, the present case is far removed from such egregious, conscience shocking or offensive examples. Here, the Majority, in the ordinary course of an arbitral dispute, determined the allocation of costs – deciding which categories of costs were recoverable and which were not. It is difficult to see how such a determination could be said to shock the conscience, offend fundamental notions of morality and justice, or be viewed as injurious to the public good. The TPF Decision concerns, at most, the proper classification and recoverability of certain costs associated with the claim made in the Arbitration; it does not implicate any form of illegality or moral turpitude of the

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kind that the public policy ground of challenge, as enshrined in Article 34(2)(*b*)(ii) of the Model Law, is designed to address.

76 Counsel for the Applicants cited *G v N* in support of its case[59] (see [26] above). That was a case before the Hong Kong courts where the issue was whether two awards, founded on an allegedly incorrect interpretation and application of Hong Kong's public policy on the defence of illegality, should be set aside for being contrary to public policy under the Hong Kong equivalent of Article 34(2)(*b*)(ii) of the Model Law. The Applicants submit that that was precisely a case where the court intervened to remit the decision to the Tribunal for reconsideration.

77 However, that case is distinguishable from the present application before us. In *G v N*, the tribunal had made no error of law and simply applied the law on illegality in Hong Kong as it stood when the award was rendered. The court intervened on the tribunal's decision only because there was a supervening change in the law between the award and the court proceedings challenging the award, and because the result would have allowed the wrongdoer to retain benefits under an otherwise illegal contract. This is arguably a situation that might shock the conscience. Further, the case involved somewhat exceptional circumstances of a supervening change in the law which justified curial intervention, even though the arbitrators' reasoning was unimpeachable at the time it was made. In contrast, there are no such features on the facts before us, and thus the same reasoning that was applied in *G v N* cannot be applied here.

78 Similarly, the Applicants rely on *AJU v AJT* [2011] 4 SLR 739 ("*AJU*") as authority binding on us that a tribunal's determination on legality is fully

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[59] AWS at paras 18–20; Transcript at p 150, ln 3–14.

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reviewable by the court. Specifically, the Court of Appeal commented at [62] that "since the law applied by the [t]ribunal was Singapore law, the question that arises is whether, if a Singapore court disagrees with the [t]ribunal's finding that the Concluding Agreement is not illegal under Singapore law, *the court's supervisory power extends to correcting the [t]ribunal's decision on this issue of illegality*. In our view, the answer to *this question* must be in the affirmative as the court cannot abrogate its judicial power to the [t]ribunal to decide what the public policy of Singapore is and, in turn, whether or not the Concluding Agreement is illegal (illegality and public policy being … mirror concepts in this regard), however eminent the Tribunal's members may be" [emphasis added].

79 In our view, the reliance by the Applicants on this passage is misplaced, and places emphasis on the passage quoted above out of context. *AJU* concerned the risk of enforcing an award founded on a contract that might in fact be illegal under the law of Singapore. It is against that background that the court recognised a power of review – to prevent an award from being enforced in a manner contrary to public policy. The concern, therefore, was with false negatives on illegality (namely, where a tribunal wrongly *upholds* a contract).

80 Nothing in *AJU* suggests that this reasoning was to be applied symmetrically to cases where a tribunal finds a contract to be *illegal*. In such case, there is no comparable risk of enforcing something contrary to public policy and thereby shocking the conscience of the public. An erroneous finding of illegality does not, without more, engage the same public policy concerns as an erroneous finding of legality.

81 Accordingly, the Applicants' attempt to characterise *AJU* as drawing no distinction between decisions on legality and illegality must fail. Properly

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understood, *AJU* is concerned with the court's role in safeguarding against enforcement of illegal contracts, and does not go so far as to support a curial re-opening of *all* arbitral findings on illegality, irrespective of what the tribunal's decision is on that question.

82 For the foregoing reasons, we disagree with the Applicants on the Public Policy Issue and would dismiss the application grounded upon Article 34(2)(*b*)(ii) of the Model Law.

The Arbitral Procedure Issue

83 Key to the Applicants' submissions on this issue is Rule 37 of the SIAC Rules,[60] and we repeat here that Rule 37 provides that the Tribunal "shall have the authority to order in its Award that all or a part of the legal or other costs of a party be paid by another party".

84 The Applicants' submission ran as follows. The parties had agreed on the application of the SIAC Rules. The SIAC Rules, including Rule 37, were part of the agreed arbitral procedure. SIAC's PN 01/17 says that the tribunal "may take into account the existence of any External Funder" in apportioning costs of the arbitration and that the tribunal "may take into account the involvement of an External Funder in ordering in its award that all or a part of the legal or other costs of a Disputant Party be paid by another Disputant Party". Therefore, it is said, "other costs" in Rule 37 includes TPF costs, and the parties had agreed that the Tribunal could order the payment of TPF costs. In finding that they did not have power or authority to do so, the Majority had thereby failed to adhere to the parties' agreement as to procedure.[61] Thus, the TPF

60 Transcript at p 102, ln 13–15.

61 AWS at paras 52–57.

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Decision was the result of the Majority not adhering to the arbitral procedure agreed by the parties, and is liable to be set aside under Article 34(2)(*a*)(iv) of the Model Law.

85 The Respondents countered that, from PN 01/17 or otherwise, the Parties' agreement on the application of the SIAC Rules read with PN 01/17 did not extend to an agreement between the Parties that these rules permitted the recovery of TPF costs.[62] But it is not, in our view, necessary to wade into that arena. For at least two reasons, it is our view that the Applicants' submissions cannot be accepted.

86 The first reason is that Rule 37 is, in our view, not procedural. It is not part of the arbitral procedure as referred to in or envisaged by Article 34(2)(*a*)(iv) of the Model Law.

87 The Applicants' submissions rather skirted around this by way of the bald assertion that the SIAC Rules were part of the agreed arbitral procedure, to which were added comments from *Lao Holdings NV v Government of the Lao People's Democratic Republic* [2023] 1 SLR 55 ("*Lao Holdings*") at [96] that it is the "arbitration rules" which "mostly form the content of the parties' agreements as to procedure" and from *Then Khek Koon v Arjun Permanand Samtani* [2013] SGHC 213 at [174] that the issue of costs is grounded in procedural law and not the substantive law that governs the dispute. These snippets are taken out of context and do not support the submission.

88 In our view, better guidance is obtained from the High Court decision in *CEF v CEH* [2021] SGHC 114 ("*CEF (HC)*"). It was contended that the tribunal

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62 1R2R-WS at para 79.

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had failed to adhere to the agreed arbitral procedure because the award, an order for the transfer of property, was not workable and therefore unenforceable. The court considered that it was workable and enforceable, but also that there was no breach of arbitral procedure, saying (at [39]):

> Article 34(2)(*a*)(iv) cannot possibly apply to the *substance* of an award, *ie* to the *outcome* of the arbitral procedure which the tribunal adopted. Extending Art 34(2)(*a*)(iv) to the outcome of the arbitral procedure amounts to an open invitation to the court to look into the merits of the tribunal's analysis underlying its decision and orders. This case is a perfect example. The plaintiffs' complaints about the Transport Order under Art 34(2)(a)(iv) … are in truth complaints about the substance of the Transfer Order, not about the arbitral procedure which the tribunal adopted in arriving at the order. …
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> [emphasis in original]

89 *CEF (HC)* was upheld on appeal: *CEF v CEH* [2022] 2 SLR 918 at [58]–[59].

90 We refer also to *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] 4 SLR 672 ("*PT Perusahaan (HC)*") in which a confined view of a challenge on the arbitral procedure ground was taken. The ground was said, at [39], to contemplate situations of irregularity in the procedural rules agreed between the parties, giving, as examples, "rules on the timelines for submission of answers in response to the request for arbitration, the information required to be provided in the submissions, notification to the parties of the names of the members of arbitral tribunal, *etc*". The examples in *PT Perusahaan (HC)* were not exhaustive but illustrative. Before the Court of Appeal in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*PT Perusahaan (CA)*"), the challenge on the arbitral procedure ground was not maintained (at [28]).

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91 In our view, Rule 37 properly construed is not procedural. It purports to authorise the Tribunal's disposition of costs, not how the Tribunal shall act procedurally in coming to its disposition of costs. Its decision on the disposition of costs and how it arrives at that decision (including its interpretation of a relevant rule) are substantive and not procedural matters. If the Majority was incorrect in its conclusion that the Tribunal had no power or authority to award the TPF costs, that was at most an error as to the outcome which touches on the merits of the decision *ie*, an error of substance and not of procedure.

92 We recognise that there is a decision of the SICC ostensibly standing against this view. In *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2022] 4 SLR 198 ("*Sanum*"), the arbitral tribunal made a costs order in favour of the Government of Lao PDR. One ground of challenge was that this was contrary to the parties' agreed arbitral procedure, because the costs awarded included an amount payable under the Government's fee arrangement in addition to the costs it had actually incurred, whereas under Rule 37, the tribunal could only award costs which had been actually incurred. The ground was given short shrift (at [59]) where the court commented as follows:

> The parties agreed on the application of the SIAC Rules. The Tribunal did not disregard the SIAC Rules but followed those rules on the basis of its interpretation of them and its views and findings on the evidence before it. We do not agree that SIAC Rules r 37 is limited in the way contended for by the Investors. GOL engaged lawyers who incurred time in its defence. The value of that time spent forms part of GOL's costs and comes within r 37. Rule 37 vests arbitrators with a broad discretion to allocate and award costs.

93 Implicitly, the tribunal's disposition of costs pursuant to the authority in Rule 37 was treated as procedural, and part of the agreed arbitral procedure within the ambit of Article 34(2)(*a*)(iv). However, it does not appear from the

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case report that any argument was addressed as regards the scope of what constituted agreed arbitral procedure within the meaning of that Article, and it was not a considered decision on the point. The court in *Sanum* had a clear view that Rule 37 was not limited in the way contended for, and disposed of the challenge on that basis. Accordingly, we respectfully do not regard the decision in *Sanum* as precluding our view expressed above.

94 The second reason we reject the Applicants' submissions is because even if Rule 37 were procedural, it was for the Majority to determine whether that rule applied and what was required by or authorised under that rule – including the power to determine whether the rule authorised the award of TPF costs or not – and its determination should not be reviewed by this court as it is also a decision pertaining to the merits.

95 In *Lao Holdings*, the following question was posed (at [100]) – when the tribunal has construed a provision of an arbitral agreement providing for an agreed procedure and the construction of that provision is contested, whether that construction is beyond examination by the court. The answer provided by the Court of Appeal (at [102]) is instructive:

> *As a general rule, the court will not revisit a tribunal's construction of an agreed procedure in an arbitral agreement entered into between the parties where the construction is open on the text of the agreement. That is to say, even though there might be more than one construction and the court might think a construction other than that chosen by the tribunal is to be preferred, the court will accept the tribunal's construction.* Where, however, a tribunal, adopts and acts upon a construction of a term, providing for an agreed procedure, *which is simply not open on any view of the text*, then the tribunal cannot be said, on any view, to have adhered to the agreed procedure. It is open to the supervising court in such a case to determine the content of the agreed arbitral procedure.
>
> [emphasis added]

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96 Contrary to the Applicants' submission, and still maintaining the assumption that Rule 37 is procedural, this is not a case where it can be said that only one construction of that rule is open on any view of the text of the rule. The ambit of the authority conferred by Rule 37, including the effect of PN 01/17, was extensively debated and analysed in the Costs Award; it cannot be said that the Majority's conclusion was not open to it on any view of the words of Rule 37. As explained in *Lao Holdings*, in such circumstances, the court will not intervene by going against that construction and determining that the agreed procedure was not followed.

97 The Respondents raise a further argument that the Applicants cannot rely on Article 34(2)(*a*)(iv) because they failed to raise any objections during the Arbitration to the Tribunal's alleged procedural departure, relying on the authority of *AMZ v AXX* [2016] 1 SLR 549 at [102(d)].[63] In light of our decision above, it is unnecessary for us to consider this point.

98 For the reasons given above, we also disagree with the Applicants on the Arbitral Procedure Issue and dismiss the application in so far as it is grounded upon Article 34(2)(*a*)(iv) of the Model Law.

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63 1R2R-WS at paras 74–78.

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An additional basis for dismissing the application

99 The court may, in its discretion, decline to set aside an arbitral award even though one of the prescribed grounds for setting aside has been made out, but only where no prejudice has been sustained by the aggrieved party: *PT Perusahaan (CA)* at [100].

100 The Respondents submit that we should decline to set aside the Costs Award because the Applicants challenge it only to the extent that the Majority determined that the Tribunal did not have the power or authority to award the TPF costs. Yet, the Costs Award was sustained on the *separate* ground that the LFA did not come within the third-party funding permitted under the 2017 Amendments. Therefore, according to the Respondents, there is no prejudice to the Applicants.[64]

101 Since neither of the grounds raised by the Applicants for setting aside the Costs Award has been made out, strictly speaking, we do not need to decide this point. In our view, however, there is some force in the Respondents' submission.

102 We first set out in more detail the Majority's view that the LFA did not come within the third-party funding permitted under the 2017 Amendments. The conclusion is perhaps best seen at [143]–[147] of the Costs Award where, after stating that if the LFA comes within the terms of s 5B(10) of the CLA, it is not contrary to public policy – the Majority continued:[65]

> 143 However, Section 5B(2) requires the funding to be "*for the purpose of funding all or part of the costs of that party*". Any funding by the funder that is not for such purpose would, by

64 1R2R-WS at paras 11–17.

65 Costs Award at [143]–[147]: WS-CLO at CLO-19, pp 1591–1592 of CMB-1.

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> implication, be contrary to public policy or otherwise illegal, by reason that it is a contract for maintenance or champerty.
>
> 144 In the context of the Funder's Return and CFA uplift, the material question is whether each of them constituted funding for the purpose of funding all or part of the costs of the Applicants.
>
> 145 In the Tribunal's opinion, the answer is clearly "No".
>
> 146 The large substance of the [Applicants'] current TPF claims are not for funds that have been expended by either [the Funder or the English solicitors], as the case may be, for the purpose of funding or part of the cost of the [Applicants]. They are merely returns on the actual funding provided by them, computed by a multiplier in the case of [the Funder], or an uplift in legal fees triggered upon the achievement of certain monetary thresholds, in the case of [the English solicitors].
>
> 147 They also do not fall within the definition of a TPF contract, as provided in Section 5B(10) as follows:
>
> > "third-party funding contract" means a contract or agreement by a party or potential party to dispute resolution proceedings with a Third-Party Funder *for the funding of all or part of the cost of the proceedings* ***in return for a share or other interest in the proceeds or potential proceeds*** of the proceedings to which the party or potential party may become entitled.
> >
> > …
>
> 148 Accordingly, as far as the 1st and 2nd Respondents are concerned, these two claims by the Applicants that have been characterised as costs in this arbitration must fail.
>
> [emphasis in original]

103 In the Majority's Reply, the Majority maintained (at [34]) that the LFA "is properly characterised as a commercial investment".[66] Their explanation included that the Funder's contribution is venture capital remunerated by a success-based return disconnected from the legal costs advanced, and that any agreement falling outside s 5B(2) of the CLA "remains potentially subject to the common law doctrines of public policy or illegality". The Funder's return

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66 Majority's Reply at [34]: WS-CLO at CLO-17, pp 1664–1665 of CMB-1.

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"constitutes a reward for risk assumed, rather than part of the cost of funding the proceedings, and therefore falls outside the indemnity principle and the statutory protection afforded under section 5B".

104 The Majority was clearly conscious that their conclusion meant that the LFA was not enforceable because it was caught by the rules against maintenance and champerty, since at [36] of the Majority's Reply they noted that the Funder was not a party to the arbitration and said that, for that reason, they expressed no opinion "on the enforceability of the LFA against the Applicants in the context of the finding that the LFA is not TPF as defined".[67]

105 When this is appreciated, the Respondents' submission is in our view well-founded. The determination that the Applicants would not be awarded their TPF costs was both *general*, in that the High Court did not have that power under s 12(5) of the IAA and Rule 37 did not give the Tribunal that authority, and *specific* to the Applicants, in that the LFA in question did not come within the third-party funding permitted under the 2017 Amendments. Therefore, as was said at [148] of the Costs Award, the claim to the TPF costs "must fail".[68]

106 Thus, *even if* the Tribunal had decided that it had the power or authority to award TPF costs, the Applicants' TPF costs *would not* be awarded because the LFA was unenforceable as contrary to the common law rules against maintenance and champerty. While the Majority was non-committal as to its effect as between the Applicants and the Funder, it would not be given effect *as against the Respondents*. As a result, even if the Majority decided that it was

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67 Majority's Reply at [36]: WS-CLO at CLO-17, p 1665 of CMB-1.

68 Costs Award at [148]: WS-CLO at CLO-19, p 1592 of CMB-1.

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empowered to order TPF costs under Rule 37, it could not reasonably have made any difference to the TPF Decision.

107 The Applicants responded that, in applying to set aside the Costs Award to the extent that the Majority determined that the Tribunal did not have the power or authority to award them their TPF costs, they had identified the "Impugned Paragraphs" which they sought to set aside, and those paragraphs included the paragraphs concerning the Majority's characterisation of the LFA. We do not think that this answers the Respondents' submission. The identified paragraphs, while also part of the Majority's determination as to power or authority, contained an independent basis for the Majority's refusal to award the TPF costs.

108 The Applicants also submitted that the Majority's findings on the nature of the LFA were "inextricably linked" with their decision that they lacked the power or authority to award TPF costs. The development of their submission was in truth a challenge to the findings, but did not recognise or answer the resultant unenforceability. As we pointed out above, that unenforceability stands as an independent and sufficient basis on its own for the refusal of the Applicants' claim for TPF costs. Thus, if necessary for our decision, we would have found that the Applicants' setting aside application would fail on this ground as well.

Conclusion

109 For all of the foregoing reasons, we dismiss the application in its entirety. If the parties are unable to agree on costs (both as to liability and quantum) within 21 days from the date of this judgment, written submissions should be filed and exchanged by the parties within a further seven days thereafter. The written submissions are not to exceed five pages excluding costs

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schedules and authorities. No further submissions are to be tendered unless otherwise directed or permitted by us, and our decision on the costs to be awarded will be notified to the parties separately.

S Mohan
Judge of the High Court

Roger Giles
International Judge

Anselmo Reyes
International Judge

Liang Hanwen Calvin and Yu Kexin (Duxton Hill Chambers) (instructed), Zhuo Jiaxiang, Asiyah binte Ahmad Arif and Nilesh Khetan (Providence Law Asia LLC) for the applicants;
Poon Kin Mun Kelvin SC, Avinash Vinayak Pradhan, Divyesh Menon, Timothy James Chong Wen An and Ku Chern Ying Vanessa (Rajah & Tann Singapore LLP) for the first and second respondents;
Sim Chong (Sim Chong LLC) for the third respondent (on watching brief).

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