**IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT**
**OF THE REPUBLIC OF SINGAPORE**

**[2022] SGHC(I) 6**

Originating Summons No 5 of 2020

Between

Lao Holdings NV

… *Plaintiff*

And

The Government of the Lao People's Democratic Republic

… *Defendant*

Originating Summons No 6 of 2020

Between

Sanum Investments Limited

… *Plaintiff*

And

The Government of the Lao People's Democratic Republic

… *Defendant*

# JUDGMENT

[Civil Procedure] — [Costs] — [Principles]

## TABLE OF CONTENTS

# Lao Holdings NV
# v
# Government of the Lao People's Democratic Republic and another matter

**[2022] SGHC(I) 6**

Singapore International Commercial Court — Originating Summonses Nos 5 and 6 of 2020
Quentin Loh JAD, Vivian Ramsey IJ and Douglas Jones IJ
15 October 2021

13 April 2022

**Quentin Loh JAD, Vivian Ramsey IJ and Douglas Jones IJ:**

## Introduction

1 This is our judgment on the issue of costs in SIC/OS 5/2020 and SIC/OS 6/2020 ("OS 5" and "OS 6" respectively, and "the Applications" collectively), following our dismissal of the Applications to set aside an International Centre for Settlement of Investment Disputes ("ICSID") arbitration award and a Permanent Court of Arbitration ("PCA") award respectively in *Lao Holdings NV v Government of the Lao People's Democratic Republic and another matter* [2021] 5 SLR 228 ("the Judgment"), and in HC/SUM 5593/2019 and HC/SUM 5579/2020 ("the Sealing Applications" collectively).

## Background

2 The facts relating to the dispute between the parties have been canvassed extensively in the Judgment. In the following, we restate only the material facts, and highlight aspects of this long-standing dispute that are relevant to the issue of costs. Unless otherwise specified, we adopt the same terms as defined in the Judgment.

### *Background to the dispute*

3 The plaintiffs in OS 5 and OS 6 respectively are Lao Holdings NV ("LH") and its wholly-owned subsidiary, Sanum Investments Ltd ("Sanum"). The plaintiffs had partnered with a Laotian conglomerate, ST Group Co Ltd ("ST Group") and its related entities and individuals to conduct business in the Laotian gaming and hospitality industry. By late 2011, relations between the plaintiffs and ST Group had deteriorated substantially, resulting in litigation in Laos and a disruption to the plaintiffs' business. Subsequently, the plaintiffs pursued claims against ST Group in a separate set of arbitration proceedings at the Singapore International Arbitration Centre (what we referred to as the "ST SIAC Arbitration" in the Judgment). Those proceedings spawned a series of proceedings in the Singapore courts as well, resulting in the decisions in *Sanum Investments Limited v ST Group Co, Ltd and others* [2020] 3 SLR 225, *ST Group Co Ltd and others v Sanum Investments Ltd and another appeal* [2020] 1 SLR 1 and *ST Group and others v Sanum Investments Limited* [2022] SGCA 2.

4 Additionally, the plaintiffs claimed that officials from the Government of the Lao People's Democratic Republic ("GOL"), the defendant in the Applications, had reneged on earlier commitments and conducted themselves in

an arbitrary and discriminatory fashion, enriching themselves and ST Group at the plaintiffs' expense. As such, on 14 August 2012, the plaintiffs initiated two arbitrations against GOL (the "BIT Arbitrations"): (a) LH initiated the ICSID Arbitration under the Laos-Netherlands BIT; and (b) Sanum initiated the PCA Arbitration under the Laos-PRC BIT. In the BIT Arbitrations, LH and Sanum raised various allegations concerning GOL's conduct in relation to various projects that they had embarked upon. In response, GOL raised a threshold defence that their claims should not be entertained given the evidence of bribery, corruption, and embezzlement, in addition to arguing that the plaintiffs' claims lacked merit.

5 While no specific finding has been made on the amounts due from GOL (since the BIT Tribunals ruled against the plaintiffs on all their claims), it is worth noting that on the plaintiffs' own case, the relief that they would have been entitled to would be in excess of US$690m (for LH)[1] and US$891m (for Sanum),[2] as indicated in the relief requested in their pleadings for the BIT Arbitrations. These figures show that at least US$1.58bn – a sum that did not include what would likely have been substantial interest – was at stake in this dispute.

### *Procedural history*

6 Although we were concerned, in the Applications, with what may be considered the tail-end of the parties' dispute, it is important to see the proceedings before us in the light of the almost decade-long saga that has transpired between the parties. As we will come to below, this has an impact on

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1 Joint Bundle of Documents ("JBOD") at p 532.

2 JBOD at p 1506.

how we view the reasonableness of the costs incurred in the Applications. We reproduce here a timeline of key events that we had set out in our Judgment at [14]:

| S/N | Date | Event |
|---|---|---|
| 1. | 14 August 2012 | LH and Sanum file their respective Notices of Arbitration |
| 2. | 9 August 2013 | GOL files jurisdictional objection in the PCA Arbitration |
| 3. | 13 December 2013 | PCA Tribunal finds that it has jurisdiction |
| 4. | 10 January 2014 | GOL files HC/OS 24/2014 to challenge the PCA Tribunal's ruling on jurisdiction |
| 5. | 15 June 2014 | The plaintiffs and GOL enter into the Settlement Deed, together with a Side Letter executed on 18 June 2014 |
| 6. | 19 June 2014 | Consent orders are signed by the BIT Tribunals to suspend the BIT Arbitrations |
| 7. | 4 July 2014 | The plaintiffs file applications in the BIT Arbitrations alleging that GOL had materially breached the Settlement Deed's terms ("the First Material Breach Applications") |
| 8. | 20 January 2015 | The Singapore High Court releases judgment in HC/OS 24/2014: *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] 2 SLR 322 ("*GOL v Sanum (HC)*"), disagreeing with the PCA Tribunal on its ruling on jurisdiction |

| S/N | Date | Event |
|---|---|---|
| 9. | 10 June 2015 | The First Material Breach Application is dismissed by the ICSID Tribunal (the PCA Arbitration was held in abeyance given the High Court's decision in *GOL v Sanum (HC)*) |
| 10. | 26 April 2016 | LH files a second application in the ICSID Arbitration to revive the proceedings on the basis of GOL's material breaches of the Settlement Deed |
| 11. | 29 September 2016 | The Singapore Court of Appeal reverses the High Court's decision and reinstates the PCA Tribunal's ruling on jurisdiction: *Sanum Investments Ltd v Government of Lao People's Democratic Republic* [2016] 5 SLR 536 ("*Sanum v GOL (CA)*").<br>Sanum files a second application in the PCA Arbitration to revive the proceedings on grounds mirroring LH's 26 April 2016 application. |
| 12. | 15 December 2017 | The BIT Tribunals (respectively) grant both applications to revive the proceedings. The BIT Arbitrations are revived. |
| 13. | 15 May 2018 | GOL files a formal application to adduce additional evidence to the BIT Tribunals ("GOL's Application for Additional Evidence") |
| 14. | 30 May 2018 | The plaintiffs file submissions objecting to GOL's Application for Additional Evidence |
| 15. | 25 June 2018 | BIT Tribunals decide to admit all the evidence relating to GOL's allegations of bribery, corruption and fraud: PCA Tribunal's Procedural Order No 9 ("PCA PO 9") and ICSID Tribunal's Procedural Order No 11 ("ICSID PO 11") |

| S/N | Date | Event |
|---|---|---|
| 16. | 16 July 2018 | The plaintiffs file an application to introduce further material to rebut GOL's newly-admitted evidence ("Application for Rebuttal Evidence") |
| 17. | 31 July 2018 | BIT Tribunals allow the Application for Rebuttal Evidence in part: PCA Tribunal's Procedural Order No 12 ("PCA PO 12") and ICSID Tribunal's Procedural Order No 14 ("ICSID PO 14") |
| 18. | 10 August 2018 | GOL applies to introduce, *inter alia*, the witness statement of Mr Angus Roderick Noble ("Noble WS"), owner and CEO of MaxGaming Consulting Services Limited (Macau) ("MaxGaming") |
| 19. | 29 August 2018 | BIT Tribunals allow the Noble WS to be admitted: PCA Tribunal's Procedural Order No 13 ("PCA PO 13") and ICSID Tribunal's Procedural Order No 15 ("ICSID PO 15") |
| 20. | 3–7 September 2018 | Merits hearing of the BIT Arbitrations (heard by BIT Tribunals jointly) in Singapore |
| 21. | 17 July 2019 | Proceedings in the BIT Arbitrations are declared closed |
| 22. | 6 August 2019 | BIT Tribunals issue the BIT Awards dismissing the plaintiffs' claims and ordering the plaintiffs to pay costs |
| 23. | 6 November 2019 | The plaintiffs file applications to set aside the BIT Awards in the Singapore High Court in HC/OS 1389/2019 and HC/OS 1390/2019 |

7 We highlight that the BIT Awards dismissing the plaintiffs' claim also included orders that (a) LH pay US$1,293,720.27 to GOL for the latter's lawyer fees and expenses and US$481,662.95 as the latter's share of arbitration costs

(to reimburse GOL for the advance that it had paid);[3] and (b) Sanum pay US$1,313,252.31 to GOL for the latter's legal costs and US$465,000 as the latter's share of arbitration costs (similarly, as reimbursement for the advance that GOL had paid).[4] The aggregate sum of legal costs for the BIT Arbitrations due to GOL was therefore just over US$2.6m. For completeness, we note that the arbitration costs amounted to around US$1.735m[5] and US$1.773m[6] for the ICSID and PCA Arbitrations respectively, for a total of around US$3.5m, all of which was ordered to be borne by the plaintiffs.

8 It is apparent from the above that the Applications represent a culmination of more than nine years of arbitral and court proceedings, in which the plaintiffs have resolutely sought to vindicate the wrongs allegedly done to them, while GOL has, with no less vigour, sought to defend itself against these allegations. What began as two notices of arbitration in August 2012 spawned proceedings in Singapore (up to the Court of Appeal) on the issue of the PCA Tribunal's jurisdiction, additional proceedings within the BIT Arbitrations concerning GOL's material breaches of the Settlement Deed (the first of which, it might be noted, failed), and various procedural disputes, leading up to the issuance of the comprehensive BIT Awards dismissing the plaintiffs' claims. The appeal against our decision in the Judgment is still pending. The Applications, therefore, can be understood to be among one of the plaintiffs' last possible avenues of recourse in their attempts to seek relief against GOL, and, conversely, if GOL were to be successful in resisting the Applications,

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3 JBOD at p 166, para 294.

4 JBOD at p 1056.

5 JBOD at p 166.

6 JBOD at p 1055.

what may be the end of this lengthy and costly saga for GOL. We do not think it is an overstatement at all to say that the stakes were very high in these Applications.

9 On 6 November 2019, the plaintiffs also filed the Sealing Applications, consisting of the following two substantive prayers: (a) that the proceedings in OS 5 and OS 6 be heard otherwise than in open court ("Prayer 2"); and (b) that the court file for OS 5 and OS 6 be sealed and no inspection thereof be allowed by any member of the public ("Prayer 3"). Prayer 2 was granted by consent in HC/ORC 2667/2020 and HC/ORC 2668/2020 (both dated 18 May 2020), together with an interim order that the affidavits in OS 5 and OS 6 would not be available for inspection by any third party pending the disposal of the Sealing Applications.

10 The Applications were transferred to the SICC on 14 July 2020. At the pre-trial conference ("PTC") held before the Deputy Registrar, the plaintiffs had argued that the costs regime under O 59 of the Rules of Court (2014 Rev Ed) ("ROC") and Appendix G of the Supreme Court Practice Directions ("Appendix G") should continue to apply, whereas GOL argued that there was no reason why O 110 of the ROC should not apply. The issue of the applicable costs regime was reserved to this court. The material orders are as follow:

> (1) HC/OS 1389/2019 and HC/OS 1390/2019 are to be transferred to the Singapore International Commercial Court pursuant to Order 110 Rules 12 and 58 of the Rules of Court.
>
> (2) In accordance with Order 110 Rules 12(5)(c) and 58(2) of the Rules of Court, after the transfer of HC/OS 1389/2019 and HC/OS 1390/2019 to the Singapore International

> Commercial Court, the parties are to continue to pay the hearing fees and court fees that are payable in the High Court.
>
> (3) The issue whether the High Court costs scale and Order 59 of the Rules of Court should continue to apply to the assessment of costs in respect of proceedings in and arising from HC/OS 1389/2019 and HC/OS 1390/2019, after their transfer to the Singapore International Commercial Court, is reserved to the Singapore International Commercial Court.
>
> …

11 Ahead of the hearings that were fixed for 15 and 16 January 2021, the parties filed and exchanged two sets of submissions for the Applications. On the plaintiffs' side, their written submissions totalled 202 pages in length (excluding the cover pages and tables of contents), with references to 41 authorities. GOL's submissions totalled 231 pages in length (similarly excluding the cover pages and tables of contents), referring to 44 authorities.

12 In terms of affidavits, the plaintiffs filed two affidavits per application, while the defendants filed one affidavit per application. We note here that the plaintiffs' first affidavits in OS 5 and OS 6 were filed on 6 November 2019, and GOL's reply affidavits in each of the Applications were filed in June 2020, *ie*, before the Applications were transferred to the SICC. The parties helpfully prepared an electronic Joint Bundle of Documents ("JBOD") that came to 8,725 pages in length (including the cover page and index), comprising the cause papers in these matters and the total of six affidavits filed by both sides in both Applications.

13 We heard the parties on 15 and 16 January 2021. The matter was fixed for two full days, but parties managed to complete their oral submissions by 2pm on 16 January 2021. This was due partly to the effort that had already been put into the preparation of the written submissions, which we relied heavily

upon, the use of hyperlinks in the written submissions to the various documents in the JBOD and various bundles of authorities, as well as counsel's effort in keeping strictly to their time allocations for the hearing. As we will note below, the mere amount of time used for oral submissions in a case like this is sometimes not a helpful indicator of the amount of work that has been put in – indeed, speaking from our experience, it is in fact when counsel put in *more* work prior to the hearing that such complex hearings can be expedited. Having heard the parties, we reserved our judgment.

14 As noted above, Prayer 3 in the Sealing Applications remained outstanding. Together with Prayer 3, we broached the issue of redaction of the forthcoming written judgment with the parties. The parties filed written submissions on both Prayer 3 and the issue of redaction, and we heard parties orally on 3 September 2021. Having heard parties, we granted orders in terms of Prayer 3 in the Sealing Applications. We also held that the written judgment in OS 5 and OS 6 would not be redacted, and that costs in the applications would be reserved to after judgment was released on OS 5 and OS 6.

15 We handed down the Judgment on 10 September 2021. We turn now to summarise our findings in the Judgment and make some observations on the nature of the Applications.

### *This court's decision in OS 5 and OS 6*

16 The plaintiff had applied to set aside the BIT Awards under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") and the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), on the grounds that:

(a) the BIT Tribunals exceeded their jurisdiction and dealt with matters beyond the express scope of the parties' submission to arbitration (under Art 34(2)(*a*)(iii) of the Model Law) (i) by considering GOL's new allegations of fraud or illegality and admitting the Bribery/Fraud Allegations Material; and (ii) (in relation to the ICSID Tribunal only) considering expropriation claims relating to Paksong Vegas, the Paksan Club and the Thahkahek Club which were not submitted to it and had only been submitted to the PCA Tribunal;

(b) the arbitral procedure in the BIT Arbitrations was not in accordance with the parties' express agreement (under Art 34(2)(*a*)(iv) of the Model Law) as the BIT Tribunals had admitted additional evidence in breach of Section 34 of the Settlement Deed; and/or

(c) the plaintiffs were not afforded a reasonable opportunity to be heard on determinations made in the BIT Awards (under Art 34(2)(*a*)(ii) of the Model Law and/or s 24(*b*) of the IAA).

17 In the Judgment, this court dismissed both OS 5 and OS 6. The key holdings were:

(a) Insofar as the plaintiffs' argument on Art 34(2)(*a*)(iii) of the Model Law pertained to the Tribunals' reliance on new "evidence", this was not a matter that came within that provision: Judgment at [68]. The additional allegations of bribery and fraud forming the basis of the plaintiffs' challenge against the BIT Awards were not "new claims" as they formed part of GOL's existing defence of corruption, bribery, illegality and/or bad faith, and were not new causes of action. They were

also not "new reliefs" as GOL had always sought a dismissal of the plaintiffs' claims: at [70].

(b) While it was true that the expropriation claims in relation to Paksong Vegas, the Paksan Club and the Thakhaek Club were only made in the PCA Arbitration, it was evident that the issues of illegality and bad faith relating to the three projects were raised in the ICSID Arbitration, both in the pleadings and the evidence. The ICSID Tribunal had in mind that it did not have the jurisdiction to consider the issues of expropriation raised in relation to those three projects. It was entitled, however, to consider and make findings on the issues of illegality and bad faith relating to the three projects, which were within its jurisdiction as part of GOL's defence: Judgment at [104], [106] to [108].

(c) By referring the issue of the interpretation of Section 34 of the Settlement Deed to the BIT Tribunals as part of their submissions on GOL's Application to Admit Additional Evidence, the parties had given the BIT Tribunals jurisdiction to decide that matter. On that basis, the BIT Tribunals' decision on the interpretation of Section 34 would not be a matter which the court could consider *de novo*. In any event, it was not appropriate for the court to do so as the interpretation of Section 34 by the BIT Tribunals involved findings of fact as to foreign law. In the further alternative, the BIT Tribunals did retain the residual power to admit additional evidence in exceptional circumstances, notwithstanding Section 34: Judgment at [130], [142] and [144].

(d) In any event, the plaintiffs had not suffered prejudice. Even though the BIT Tribunals could reasonably have reached a different conclusion on two of the four findings concerning bad faith (the "Four

Findings"), the BIT Tribunals could not have reasonably arrived at a different conclusion on the plaintiffs' conduct in terms of illegality, corruption, bribery and/or fraud. As for the BIT Tribunals' decision on the merits of the plaintiffs' claims, their conclusions were not made on the basis of substantial reliance on GOL's new evidence, and were not tainted by the Four Findings and the finding of manifest bad faith on the plaintiffs' part: Judgment at [235], [262], [276] and [278].

(e) The plaintiffs were afforded a reasonable opportunity to present their case: Judgment at [312], [322]–[323], [339]–[340], [350]–[351], [359], [385], [392], [398] and [400].

18 We make three observations about the Judgment. First, as a general matter, it is apparent that GOL was overwhelmingly successful in the Applications, managing to resist the plaintiffs' arguments almost entirely. This is relevant when we come to the plaintiffs' submissions that the costs award to GOL should be reduced to account for the issues on which it was not successful.

19 Secondly, the brief summary above should not disguise the fact that these Applications were on the more complex end of the spectrum of arbitration cases that come before the Singapore courts. In this regard, the parties' submissions were both extensive – ranging over a number of different grounds and involving various principles of law (including novel issues) – and intensive, requiring a great deal of detailed attention to the procedural history of the BIT Arbitrations as well as to the facts of the underlying dispute as they were discussed by the BIT Tribunals. We highlight certain aspects of the parties' arguments and, consequently, the Judgment that exemplify this complexity:

(a) In relation to the plaintiffs' argument that the BIT Tribunals had acted in breach of the parties' agreement on procedure by admitting new evidence, GOL argued that the plaintiffs had waived reliance on Section 34 of the Settlement Deed. This argument required close attention to be paid to the procedural history of the BIT Arbitrations (see the Judgment at [156]–[196]) in the light of the legal threshold for waiver.

(b) As part of the plaintiffs' contention that the BIT Awards should be set aside on the basis of the BIT Tribunals' alleged breach of the parties' agreed arbitral procedure, the plaintiffs also had to show that they had been prejudiced by the admission of new evidence. This required a close scrutiny of the BIT Tribunals' reasoning when it came to the Four Findings on bad faith, as well as the BIT Tribunals' reasoning on the merits of the plaintiffs' claim, in order to assess whether the admission of new evidence had an impact on the BIT Tribunals' conclusions. While it is true that this court was not asked (and could not have been asked) to determine the correctness or otherwise of the BIT Tribunals' conclusions (as in an appeal from a lower court's judgment), this nevertheless was a detailed exercise, and took up a substantial portion of the parties' submissions as well as this court's Judgment (see the Judgment at [207]–[281]).

(c) The plaintiffs' arguments on natural justice, *ie*, whether they were afford a reasonable opportunity to be heard, were made in such a way that focused this court's attention on the minutiae of the BIT Arbitrations and the BIT Tribunals' reasoning. They had mounted six complaints against the BIT Awards on this basis (see the Judgment at

[289]), and both parties made extensive submissions on each of these six complaints. For example, the plaintiffs had submitted that the BIT Tribunals had failed to give them a reasonable opportunity to be heard on whether an arbitral tribunal could disentitle an investor from treaty relief on the basis of bad faith alone, established on a balance of probabilities. As our recounting of the parties' arguments and our own analysis shows, this argument required a very careful perusal of the arbitral record, including the parties' respective submissions in the BIT Arbitrations and the BIT Tribunals' approach to the issue (see the Judgment at [361]–[401]).

20 Thirdly, as alluded to above, the parties had submitted extensively on the novel issue of whether arbitral tribunals had a duty to review evidence of corruption. While this was ultimately not necessary for our determination, the parties had made submissions on various arbitrations and academic authorities in the course of these proceedings, and we considered these in coming to our decision (see the Judgment at [152]–[154]). Furthermore, the fact that this was an investor-state dispute brought to the fore some of the key public interest concerns that surround such disputes. Certainly, GOL, as a government, had a keen interest in advocating for its position concerning the role of arbitral tribunals when faced with allegations, not just on the facts of this case but also as a matter of principle. As we will elaborate below, the specific nature of investor-state disputes is something that this court should take cognisance of in determining the appropriate costs order.

**The parties' positions on costs**

21 We summarise broadly here the parties' respective positions on costs, and deal with their detailed arguments in the course of our analysis. The plaintiffs take the following position on the issue of costs:

(a) GOL should be entitled to S$71,921.17 (all-in) in respect of OS 5 and OS 6, as the costs award should take into account Appendix G. The plaintiffs also submit that any costs order be subject to the terms that the costs be paid to GOL's solicitors on their undertaking to repay the sums to the plaintiffs in the event that the appeal against the Judgment (in CA/CA 55/2021) is successful.

(b) In relation to the Sealing Applications, the plaintiffs are entitled to their costs as the successful party, which would be S$12,000 plus S$836.59 in reasonable disbursements.

22 GOL takes the following position:

(a) GOL should be paid S$400,000 in costs and S$31,212.07 in disbursements for OS 5 and OS 6.

(b) There should be no order as to costs for the Sealing Applications.

23 It suffices to note at this point that the parties' positions are very far apart, and are based on dramatically different assumptions and approaches to the issue of costs. A careful analysis of the principles and rationale underlying costs orders in the SICC will therefore be essential in our determination of which position to prefer.

**Issues to be determined**

24 As such, the following issues arise for determination on the question of costs are as follows:

(a) In relation to OS 5 and OS 6:

(i) What is the applicable approach?

(ii) How much should the plaintiffs pay to GOL as costs for OS 5 and OS 6?

(iii) Should the costs order in OS 5 and OS 6 include a term that the costs be paid to GOL's solicitors?

(b) What order as to costs should be made for the Sealing Applications?

**Costs of the Applications**

25 We begin with a consideration of the approach that this court should take to the issue of costs, and in doing so, make certain observations on the issue of costs in the SICC more generally. Having done so, we then apply this approach to the facts of this case.

***The applicable approach***

*The distinction between pre- and post-transfer costs*

26 In our discussion of the applicable approach, we begin with the distinction between pre- and post-transfer costs that often arises in the context of SICC proceedings. This distinction is material to cases that were first filed in the High Court (or the General Division of the High Court, as the case may be),

and which are then transferred pursuant to O 110 r 12 and/or r 58 of the ROC (the latter applying to proceedings relating to international commercial arbitration). As the Court of Appeal noted in *CBX and another v CBZ and others* [2022] 1 SLR 88 ("*CBX*") at [17]:

> … [I]t bears mention that there are two types of cases that are heard in and determined by the SICC. The first is a case that emanates from a fresh filing in the SICC Registry. Such a case is from its inception governed by O 110 of the ROC and thus subject, always and only, to the costs regime established by Rule 46. Secondly, there is the case that is filed initially in the Registry of the High Court. This category of case is subject to the ROC generally (excluding O 110) and the applicable costs regime established by O 59, and the award of costs is subject to the guidance of Appendix G. At least, O 59 applies until and unless the case is transferred to the SICC pursuant to the powers vested in the Registrar.

27 The applicable principles relating to this distinction were recently set out by the Court of Appeal in *CBX* as follows:

(a) In relation to pre-transfer costs, the Court of Appeal held (*CBX* at [28]):

> … in the absence of any order made by the Registrar handling the transfer PTC that Appendix G is entirely disapplied or there is consent from both the parties to such disapplication, in our view Appendix G *will continue to be the guide for the assessment of pre-transfer costs*. …
>
> [emphasis added]

It is for the party asking the court to depart from Appendix G to provide justification for doing so. This is because "[t]he policy reasons behind the adoption of Appendix G for cases filed in the High Court do not cease to apply to steps taken there simply because it is later considered appropriate to transfer the case to the SICC for adjudication"

(*CBX* at [28]). O 110 r 46 of the ROC is *inapplicable* to pre-transfer costs (*CBX* at [29]).

(b) In relation to post-transfer costs, O 110 r 46 of the ROC would generally apply. In applying O 110 r 46, the court may have regard to Appendix G, although the role it has "will depend on the circumstances of the case" (*CBX* at [28]). In *CBX* itself, the Court of Appeal held that, on the facts of that case, Appendix G "should have remained one of a number of factors which should have been kept in mind when considering the very high amounts of costs" that the successful parties were asking for (*CBX* at [39]). We will return to the question of how post-transfer costs should be assessed below.

As the Court of Appeal observed, given this difference between pre-transfer and post-transfer costs, costs should be assessed in two distinct stages (*CBX* at [40]). This follows from the very different approaches to costs in the High Court generally and the SICC that have been briefly described above.

28 In the present case, GOL argues that this court should take the pre- and post-transfer costs together, rather than split them up for consideration, because Appendix G should not apply at all to this case.[7] The plaintiffs argue that Appendix G should apply to the pre-transfer costs, and should remain a relevant factor in the assessment of the post-transfer costs.[8]

29 In our judgment, it is appropriate to maintain a distinction between pre- and post-transfer costs. This is because the considerations as to whether

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7 GOL's Submissions on Costs at paras 7–16.

8 Plaintiffs' Submissions on Costs at paras 7–8.

Appendix G ought to apply, and if so, the *extent* to which the guidelines should be followed, differs when it comes to pre- and post-transfer costs. This follows from the Court of Appeal's guidance in *CBX* at [40]. In relation to pre-transfer costs, we disagree with GOL that Appendix G should have no application *at all* (which is what GOL's submissions appear to amount to). As the Court of Appeal observed in *CBX* at [28], the costs guidelines in Appendix G are *always* a starting point when it comes to pre-transfer costs; and the issue is whether Appendix G should be *departed* from. A departure from Appendix G consisting in a higher quantum of costs does not mean that Appendix G should be wholly disregarded. The question is only whether the circumstances of the case "support a lesser degree of dependence on Appendix G for the pre-transfer costs" (*CBX* at [28]). As the Court of Appeal summarised at [29]:

> … In relation to such costs, Appendix G would be the starting point and then a judge would need to decide whether there were factors that justified a higher assessment of the costs …

We are bound by this pronouncement of principle by the Court of Appeal and, in any event, respectfully agree with this approach to pre-transfer costs.

30 We therefore proceed, in this case, to consider both pre- and post-transfer costs distinctly, in the light of the different approach to each segment of the proceedings. Having said that, we turn to consider in greater detail the approach to post-transfer costs. Before doing so, it is worth clarifying the scope of the Court of Appeal's judgment in *CBX*. *CBX* was one of two appeals that had been filed in that matter. The other, CA/CA 136/2020, was the appeal from the SICC's judgment. *CBX* was an independent appeal, on the basis that even if the SICC's judgment on the merits was upheld, the SICC's order on costs should be varied in any event (see *CBX* at [7]). As it turned out, the Court of Appeal

allowed the appeal in CA/CA 136/2020, and so naturally allowed the appeal in *CBX* and set aside the SICC's costs order below.

31 In *CBX*, the question of *principle* that occupied the Court of Appeal was the approach to be taken to pre-transfer costs (see *CBX* at [28]–[29]). When it came to the quantum of the costs, the Court of Appeal considered both the pre- and post-transfer costs. In relation to the post-transfer costs, the Court had the following to say (at [39]–[41]):

> 39 Our view is that the facts of this case do not justify a wholesale rejection of Appendix G for post-transfer costs. Instead it should have remained one of a number of factors which should have been kept in mind when considering the very high amounts of costs [, $150,000 (all-in),] that the Sellers were asking for. We do agree with the Judge that he was entitled to assess costs in accordance with Rule 46 for the post-transfer period and that a figure of $35,000 all-in for both pre- and post-transfer costs would have been unreasonably low in the circumstances.
>
> 40 As we have stated, the Judge should have adopted a two-stage process in the assessment of costs. If he had done so, he would no doubt have asked the Sellers to break down their costs into pre- and post-transfer segments. We do not have such estimates. Instead, the Judge having adopted the Sellers' requested figure of $150,000 for the whole proceedings then proceeded as a countercheck to work backwards. He decided that on the basis of two counsel spending 40 hours each at their respective senior and junior rates, the post-transfer work would have cost $61,600. He deducted this figure and a further $23,000 for disbursements from the $150,000 and came up with $65,400 for the pre-transfer work, ie, the drafting and filing of the Sellers' affidavits. The Judge considered that none of these figures was excessive or exorbitant or disproportionate in the circumstances.
>
> 41 We have no quarrel with the award to the Sellers of the disbursements they incurred and would not interfere with this figure. Bearing in mind, however, that if the whole of the costs were assessed with an eye on Appendix G the total figure put forward by the Buyers was $35,000, in our view a sum of $25,000 would have been closer to the mark for the pre-transfer stage. In itself, that sum is considerably higher than the normal figure of $24,000 under Appendix G for an originating

> summons matter taking two days and where there is no cross-examination. But it does reflect the complexity of the work required in order to attack an arbitration award under the International Arbitration Act (Cap 143A, 2002 Rev Ed) and in this case three awards were involved. We use two days because counsel on both sides estimated that was how long the hearing would take and it was only because of the extensive pre-hearing preparation that the Judge himself did (in relation to reading of the papers, the submissions and authorities) that he was able to complete the hearing within four hours. Then, for the post-transfer stage, the Judge's sum of $61,600 and his basis for arriving at that sum could be adopted as a starting point for the assessment of reasonable costs, although it would always remain open to the court to consider whether there should be any reduction of that sum in the light of the substantially lower figure which would have been recoverable under Appendix G had the case remained in the High Court. Bearing in mind that this is now a theoretical exercise and we will shortly be asked to assess the Buyers' costs before the Judge, we do not wish to posit a final figure. Suffice it to say, that the likely result of the exercise would be lower by a significant enough amount than the $127,000 (excluding disbursements) which the Judge awarded the Sellers for their legal costs.

The Court of Appeal also observed that *CBX* itself "was not very different in its features from others of its ilk heard in the High Court over the years" (*CBX* at [42]).

32 We observe that the Court of Appeal's views were very fact-specific and involved a close consideration of the case in question. Its observations should not (as the plaintiffs appear to argue) be taken as setting out a general principle that Appendix G should be accorded *significant* weight in assessing post-transfer costs. Even in *CBX*, the Court of Appeal only ventured to state that Appendix G remained *relevant*, without specifying the exact weight to be given to Appendix G. As for the Court of Appeal's observations at the end of [41] that the likely result was that the costs would be significantly lower than $127,000 (excluding disbursements) that the SICC had awarded, this must be seen in the light of the Court of Appeal's view that the SICC had erred in its approach to

the pre-transfer costs, thus warranting a larger reduction in pre-transfer costs. Further, the Court of Appeal did not come to a firm landing on whether or not the post-transfer costs, assessed at around $61,600 by the SICC, *should* be reduced at all with reference to Appendix G. All that the Court stated was that: "it would always remain open to the court to consider whether there should be any reduction of that sum in the light of the substantially lower figure which would have been recoverable under Appendix G had the case remained in the High Court" (at [41]). In our view, the Court of Appeal in *CBX* was in fact opening the door, at least in relation to post-transfer costs, to developing further the principles that the SICC should consider in determining how to assess costs under O 110 r 46 of the ROC. It is to this that we now turn.

*Costs in the SICC*

(1) Considerations relating to costs in civil procedure generally

33 The question of how costs should be dealt with in the SICC must be considered against the background of costs in Singapore civil procedure more generally, both because the debates so far have centred on whether and to what extent Appendix G (developed for use more generally in the High Court) should apply in the SICC, and because the SICC is part of the Singapore court structure.

34 We begin with the Court of Appeal's account of the principles underlying the rules concerning costs in civil proceedings in *Maryani Sadeli v Arjun Permanand Samtani and another and other appeals* [2015] 1 SLR 496 ("*Maryani*") at [29]–[34]:

> 29 The starting point must be to appreciate that in all manner of litigation, legal costs are an inevitable expense to both the party bringing the action and the party defending it. It is therefore impossible, at least from a practical standpoint, for an individual's general right of access to the law to be divorced

from the rules and principles governing the costs of litigation. In this regard, a legal system's rules on costs (which include how legal costs should be recovered in litigation) are necessarily a matter of social policy. …

30 One fundamental aspect of our scheme of costs recovery is a cost-shifting rule which dictates that the successful litigant is ordinarily indemnified by the losing party for the legal costs incurred as between the successful party and his solicitor. This is commonly referred to as the principle that costs should generally follow the event, and is also known as the indemnity principle (although it should be noted that the term "indemnity principle" is also confusingly used to refer to the principle that prevents a party from recovering more by way of costs from an opponent than he is obliged to pay to his own lawyers (see the Jackson Report at p 53)).

31 The indemnity principle, however, does *not* result in an indemnity in the full or literal sense. The legal costs recoverable by the successful party from the losing party are more often than not less than the actual legal fees incurred as between the successful party and his solicitor. This is because the indemnity principle is also subject to a series of rules governing how recovery of costs is quantified, and those rules operate such that a *full* indemnity for legal costs is only recoverable by parties to litigation in exceptional circumstances (for example, where there is a contractual agreement between the parties to this effect).

32 The Judge explained that this was a result of the policy considerations which inform the indemnity principle. As the Judge aptly observed, 'while compensation is the immediate effect of applying the indemnity principle, the ultimate policy of the indemnity principle is rooted not in compensation but in enhancing access to justice' (see the Judgment at [156]). The exact way our rules on costs operate and the reasons why these rules enhance access to justice were set out comprehensively by the Judge at [153]–[176] of the Judgment, and we endorse his views on them entirely. …

33 We nonetheless underscore the Judge's views by reiterating that any legal system's scheme for costs recovery in litigation is driven by social policy. …

34 Ultimately, *our* legal regime on costs recovery is calibrated in a manner such that full recovery of legal costs by the successful part is the exception rather than the norm. What we need to bear in mind is that this state of affairs is not something which exists to prejudice the winning party in litigation, but is a manifestation of the law's policy of *enhancing*

> *access to justice for all*. Put another way, unrecovered legal costs is something which is part and parcel of resolving disputes by seeking recourse to *our* legal system and all parties who come before our courts must accept this to be a *necessary incidence* of using the litigation process. It is in this light that the general rule must be understood.
>
> [emphasis in original]

35 The central point emphasised by the Court of Appeal in *Maryani* is that rules on the recovery of costs is ultimately a matter of "social policy". Since it is certain that parties who go to the courts will incur legal costs, the question of who is to bear those costs and how much that party should bear are ultimately questions that relate to the policy underlying the legal and judicial system. The answer to these questions will depend, in other words, on the attitude that the particular legal and judicial system takes to a number of competing concerns and considerations. In this regard, "social policy" is not an immutable and abstract object, but must be considered in the light of the goals and constraints of each particular system of civil justice. For example, the spectre of bankruptcy when a person loses his case in court due to crippling levels of costs is something that many a legal system will hold in the balance as it is directly related to the principle of access to justice; litigation cannot be the privilege of the well-heeled. Further, within a single system of civil justice in a country or territory, as in the Singapore legal system generally, one would expect there to be different policies governing specific areas and institutions within that legal system. This is not only unexceptional, given the wide variety of areas that the law touches upon and the diversity of the means by which disputes may be resolved, but is also necessary and useful. A clear example of this is the vast difference in approaches that have emerged in the family justice system when compared with the civil justice system more generally: see Sundaresh Menon, Chief Justice, "Through the Eyes of a Child", Keynote Address at the 8th Family

law & Children's Rights Conference: World Congress 2021 (12 July 2021) at paras 4 and 6. We will return to the question of social policy as it applies in the context of the SICC below.

36 In the context of costs generally, the general principle is the "indemnity principle" (see *Maryani* at [30]). As the High Court explained in *Then Khek Koon and another v Arjun Permanand Samtani* [2014] 1 SLR 245 ("*Then Khek Koon*") at [153], this consists of two component rules: (a) a costs-shifting rule; and (b) a quantification rule. The court described these rules as follows (at [154]):

> The cost-shifting component of the indemnity principle dictates that the costs of civil litigation should ordinarily follow the event, the 'event' being the outcome of the litigation: O 59 r 3(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). But costs which have been shifted must also be quantified. The quantification component of the indemnity principle dictates that the winner is entitled to recover a sum which indemnifies him for the fees and disbursements he has to pay his own solicitors.

37 The underlying policy of the indemnity principle is to *compensate* the winner, *ie*, to make "the vindicated winner whole for the costs of what he has shown, by the court's judgment, to be unmeritorious litigation" (*Then Khek Koon* at [155]). In other words, the successful litigant has shown that he should not have been put to the cost of either bringing the proceedings to vindicate a legal right (as in the case of a successful plaintiff) or defending himself in proceedings against a claim by another (as in the case of a successful defendant). However, *compensation* alone is not the ultimate objective – compensation is *justified* by the policy of enhancing access to justice: "[t]he indemnity principle facilitates a meritorious litigant's pursuit of justice by ensuring retrospectively

that he attains justice at his opponent's expense rather than his own" (*Then Khek Koon* at [156]).

38 At the same time, the policy of enhancing access to justice cannot be achieved if the indemnity principle does not "hold a balance between the interests of the victor against those of the vanquished" (*Then Khek Koon* at [158]). For this reason, "the indemnity principle must not only set a *floor* on the winner's entitlement to recover costs, it must also set a *ceiling* on the loser's liability to pay costs" [emphasis in original] (*Then Khek Koon* at [158]). In addition, apart from the parties to the actual dispute, the indemnity principle must also address the interests of potential litigants, as the indemnity principle may also have a *deterrent effect*. This effect arises because at the very outset, when considering whether to commence or continue litigation, a party faces not just the risk of failing in the substantive claim (or its defence of a claim) but also the risk of paying the legal costs for each set of independently represented parties (*ie*, in the usual two-party case, his own costs and his adversary's costs). This risk may deter potential litigants who may have a meritorious claim but are "unwilling or unable to take on that worst-case risk", and such a "risk-averse litigant is almost always the individual and the impecunious litigant" (*Then Khek Koon* at [160]) or a litigant without a deep enough pocket. Put bluntly, "[a]n indemnity principle which has no regard for its deterrent effect therefore risks *denying* access to justice" [emphasis in original] (*Then Khek Koon* at [160]). In order to address these risks, the indemnity principle is modified, both in terms of the cost-shifting rule and the quantification rule. In the present context, we do not need to address the cost-shifting rule further, as that is not in issue before us. We turn instead to consider with some detail, the parameters and limits on the quantification rule.

39 The first limit that the High Court identified in *Then Khek Koon* is that "the winner is entitled on taxation not to an *actual* indemnity for his costs but to what the procedural law *defines* to be an indemnity" (*Then Khek Koon* at [163]). The procedural law applies a "double test of reasonableness" (*Then Khek Koon* at [164]):

> (a) The default quantification rule is the standard basis of taxation (see O 59 r 27(2)). On a taxation of costs on the standard basis, the receiving party recovers a *reasonable* amount in respect of all costs *reasonably* incurred, with any doubts about reasonableness resolved in favour of the *paying* party.
>
> (b) By way of exception to the default standard basis of taxation is the indemnity basis of taxation (see O 59 r 27(3)). On a taxation of costs on an indemnity basis, the receiving party recovers all costs except those which are *unreasonable* in amount or those which have been *unreasonably* incurred, with any doubts about reasonableness resolved in favour of the *receiving* party.
>
> [emphasis in original]

40 Even costs taxed on an indemnity basis, however, do not reach the full amount of costs that a solicitor is entitled to be paid by his own client, what the High Court in *Then Khek Koon* referred to as the "latent limit" on the quantification component (at [166]). The costs that a solicitor is entitled to (referred to often as "solicitor-and-client costs" or "S&C costs") are, in the first instance, a matter of a solicitor's entitlement under contract, but are ultimately subject to the court's control through its jurisdiction to tax a solicitor's bill, assisted by three presumptions as explained in *Then Khek Koon* at [170]:

> … The first two presumptions are that an item of costs is presumed to have been reasonably incurred or to be reasonable in amount if the client expressly or impliedly approved either the incurring of that item of costs or its quantum (see O 59 r 28(2)(*a*) and (*b*)). The third presumption is that an item which is 'of an unusual nature' is presumed to be unreasonable unless the solicitor advised the client that that item may not be

> recoverable on a taxation between the parties (see O 59 r 28(2)(*c*)).

41 In general, there is a "small but appreciable margin between the quantum of costs which a loser has to pay a winner assessed on the indemnity basis and the costs which the winning party has to pay his own solicitor" (*Then Khek Koon* at [171]).

42 However what amounts to a "small but appreciable margin" is somewhat elastic. In the decades past, a rule of thumb was that solicitor and client costs were one third or one half more than party and party costs, (depending on the reputation and skill of the lawyer retained). Reality also requires us to note that there are cases where a litigant decides that a case carries, for example, such grave reputational risk or other considerations that the litigant decides it must engage the best possible advocate to prosecute its case or its defence. In such cases, where success must be achieved, what a litigant has to pay his lawyer can come up to multiples of what is eventually awarded by a court.

43 The overall effect of these rules is that there is a "four-point scale". At the lowest end is costs on a standard basis, in the middle is costs on an indemnity basis, and the third is what a solicitor is entitled to be paid by his own client (*ie*, S&C costs). The fourth was also called "indemnity costs" but it was on the basis of a contractual provision between the parties for one party to indemnify the other party, (usually a bank or a beneficiary under a guarantee), for the full costs and disbursements incurred by the legal action. It follows that "a successful litigant is almost always out of pocket for an appreciable part of his costs" on the first of the three scales (*Then Khek Koon* at [173]). The margin between S&C costs, indemnity basis costs, and standard basis costs reflects the reality that (*Then Khek Koon* at [175]):

> [R]easonableness, quite understandably, is taken to mean different things in different contexts; all in order to advance the procedural law's policy of enhancing justice for all. What the procedural law considers reasonable on the exceptional indemnity-basis taxation is not necessarily what it considers reasonable on the default standard-basis taxation or what it considers reasonable for a client to pay his own solicitor.

44 A perception grew in the High Court that there was a large range of costs being awarded for what seemed to be comparable cases. We use the word "perception" because not all taxations or awards of costs came with published reasons. What appeared to be similar or comparable cases would, in many cases, exhibit differences when one was able to drill down into the facts and issues put forward by the parties, the judgement and reasons for the taxed items. Costs are notoriously fact sensitive not only to the issues raised in a case but also how they were run at trial. It was in this context of a need for some uniformity in costs awards in the High Court that the guidelines in Appendix G were formulated to provide some consistency in the awards of costs. As Appendix G provides at para 2:

> The Costs Guidelines have been approved for publication by the Judges of the Supreme Court. They are intended to provide a general indication on the quantum and methodology of party-and-party costs awards in specified types of proceedings in the Supreme Court, taking into account past awards made, internal practices and general feedback.

45 It would therefore appear that the ranges of costs provided in Appendix G reflect the underlying considerations of policy that inform the rules of costs more generally in O 59 of the ROC. The appropriateness or otherwise of referring to Appendix G would therefore depend on whether, and to what extent, the approach to the issue of costs in the SICC ought to resemble the approach taken in the High Court under O 59 and in the civil justice system generally in Singapore.

46 It should be emphasized that in appropriate cases in the High Court, Appendix G is departed from and a much higher level of costs can be awarded. Even applying the double attenuation described at [39] above, costs in these cases are significant, but not exorbitant. One example is *Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others* [2013] 1 SLR 636, (a case involving challenges to arbitral awards under the Model Law), where the costs at the High Court level, on a standard basis, were taxed at S$250,000 (and Section 2 costs at S$1,500) with disbursements at S$35,723.58 making a total of S$287,223.58. The costs at appellate level, on a standard basis, but with a certificate for 3 solicitors, were taxed at S$200,000 (and Section 2 costs at S$3,000) with disbursements at S$99,325.12 making a total of S$302,325.12. The opposing parties were represented by Queen's Counsel.

47 In a second example, involving a complex building contract dispute over an allegedly defective façade of a building, where two large granite panels weighing over 100 kg each, fell off the façade, the owners of the building sued the main contractor, the domestic façade subcontractor, the architect and two sets of consultant engineers. When it came to costs, Appendix G, was clearly inapplicable and put aside by all parties (see *Millenia Pte Ltd (formerly known as Pontiac Marina Pte Ltd) v Dragages Singapore Pte Ltd (formerly known as Dragages et Travaux Publics (Singapore) Pte Ltd) and others (Arup Singapore Pte Ltd, third party)* [2019] 4 SLR 1075 and the oral judgment on costs dated 8 March 2021). The trial was held over multiple tranches and spanned some 59 days and involved 16 expert witnesses from various disciplines. On appeal, the Court of Appeal dismissed the appeals and awarded costs of S$100,000 to one party and S$180,000 to another party. On taxation, where certificates for three solicitors were, save for one party, granted – we need only mention some of the costs awards to illustrate the point – the main contractor and its façade

subcontractor were liable to the owners for costs of S$2,772,500; experts fees came to well over S$1,000,000. One set of consultant engineers was awarded costs of S$1,600,000 and the other consultant engineer was awarded S$2,000,000.

48 Another, more recent example, is the case of *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2018] SGHC 101 and the appeal therefrom in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695. We refer to these as *China Machine* generally. *China Machine* concerned an application to set aside an arbitral award. We do not, for our purposes, need to set out the details of this matter, except to note that it was a complex matter – one indication of this is that the High Court's judgment extended to 232 paragraphs in length, while the Court of Appeal's judgment was 175 paragraphs long. In both the High Court and Court of Appeal, certificates were given for three counsel. The award itself was for around US$200m, with arbitration costs of around US$20m, while the entire dispute concerned close to US$1bn. The parties proceeded to taxation of the costs on a standard basis in the High Court and Court of Appeal (in HC/BC 54/2021 and HC/BC 56/2021 respectively). For the High Court proceedings, the claimed amount of S$920,000 was allowed (in taxation parlance, as Section 1 costs), whereas for the Court of Appeal proceedings, the Section 1 costs were taxed at S$395,000. It goes without saying that every case is determined on its own terms – we refer to *China Machine* presently to note that even under O 59, the costs orders can be very substantial, *if justified*.

(2) Costs in the context of the SICC

(A) THE NATURE OF CASES AND PARTIES BEFORE THE SICC

49 In coming to costs in the context of the SICC, we begin by considering the nature of cases that would be heard by this international commercial court. The jurisdiction of the SICC is governed by s 18D of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA"), which reads as follows:

> **Jurisdiction of Singapore International Commercial Court**
>
> **18D.**—(1) The Singapore International Commercial Court shall have jurisdiction to hear and try any action that satisfies all of the following conditions:
>
> (*a*) the action is international and commercial in nature;
>
> (*b*) the action is one that the General Division may hear and try in its original civil jurisdiction;
>
> (*c*) the action satisfies such other conditions as the Rules of Court may prescribe.
>
> (2) Without limiting subsection (1), the Singapore International Commercial Court (being a division of the General Division) has jurisdiction to hear any proceedings relating to international commercial arbitration that the General Division may hear and that satisfy such conditions as the Rules of Court may prescribe.

50 There are, therefore, two broad categories of cases that the SICC may hear: (a) cases that are international and commercial in nature ("international commercial cases"); and (b) proceedings relating to international commercial arbitration ("international commercial arbitration cases").

51 In relation to international commercial cases, O 110 r 7(1) of the ROC supplements s 18D(1) of the SCJA with requirements that must be satisfied in relation to proceedings that are *commenced* in the SICC:

> **Jurisdiction (O. 110, r. 7)**

> **7.**—(1) For the purposes of section 18D(1)(*c*) of the [SCJA], the other conditions that the action (not being proceedings relating to international commercial arbitration that the Court has jurisdiction to hear under section 18D(2) of the [SCJA]) must satisfy are as follows:
>
> > (*a*) the claims between the plaintiffs and the defendants names in the originating process when it was first filed are of an international and commercial nature;
> >
> > (*b*) each plaintiff and defendant named in the originating process when it was first filed has submitted to the Court's jurisdiction under a written jurisdiction agreement; and
> >
> > (*c*) the parties do not seek any relief in the form of, or connected with, a prerogative order (including a Mandatory Order, a Prohibiting Order, a Quashing Order or an Order for Review of Detention).

52 When it comes to *transfer* cases that are international and commercial in nature, the requirements are slightly modified under O 110 r 12(4) of the ROC, as follows:

> (4) Subject to paragraph (3B), a case may be transferred from the General Division to the Court only if the following requirements are met:
>
> > (*a*) the General Division considers that —
> >
> > > (i) the conditions in Rule 7(1)(*a*) and (*c*) are met; and
> > >
> > > …
> > >
> > > (iii) it is more appropriate for the case to be heard in the Court;
> >
> > (*b*) either —
> >
> > > (i) a party has, with the consent of all other parties, applied for the transfer in accordance with Rule 13; or
> > >
> > > (ii) the General Division, after hearing the parties, orders the transfer on its own motion.

It follows that for transfer cases, the action and claim must still be international and commercial in nature. In general, subject to the power of the General Division to transfer the case on its own motion after hearing parties, the parties will have agreed for the SICC to hear the dispute. For completeness, we note that O 110 r 12(3B) of the ROC deals with the situation where the Choice of Court Agreements Act (Cap 39A, 2007 Rev Ed) applies and there is an exclusive choice of court agreement designating the High Court or General Division as the chosen court. In such a case, O 110 r 12(3B)(*b*) of the ROC effectively requires the consent of all the parties before the case can be transferred to the SICC.

53 The terms "international" and "commercial" are, helpfully, defined in O 110 rr 1(2)(*a*) and (*b*) of the ROC, in the following manner:

> (2) In this Order, unless the context otherwise requires —
>
> (*a*) a claim is international in nature if —
>
> (i) the parties to the claim have their places of business in different States;
>
> (ii) none of the parties to the claim have their place of business in Singapore;
>
> (iii) at least one of the parties to the claim has its place of business in a different State from —
>
> (A) the State in which a substantial part of the obligations of the commercial relationship between the parties is to be performed; or
>
> (B) the State with which the subject matter of the dispute is most closely connected; or
>
> (iv) the parties to the claim have expressly agreed that the subject-matter of the claim relates to more than one State;
>
> (*b*) a claim is commercial in nature if —

> (i) the subject matter of the claim arises from a relationship of a commercial nature, whether contractual or not, including (but not limited to) any of the following transactions:
>
> (A) any trade transaction for the supply or exchange of goods or services;
>
> (B) a distribution agreement;
>
> (C) commercial representation or agency;
>
> (D) factoring or leasing;
>
> (E) construction works;
>
> (F) consulting, engineering or licensing;
>
> (G) investment, financing, banking or insurance;
>
> (H) an exploitation agreement or a concession;
>
> (I) a joint venture or any other form of industrial or business cooperation;
>
> (J) a merger of companies or an acquisition of one or more companies;
>
> (K) the carriage of goods or passengers by air, sea, rail or road;
>
> (ii) the claim relates to an in personam intellectual property dispute; or
>
> (iii) the parties to the claim have expressly agreed that the subject matter of the claim is commercial in nature;

54 Turning to international commercial arbitration cases, O 110 rr 57 and 58 of the ROC addresses the SICC's jurisdiction over such cases:

> **Jurisdiction to hear proceedings under International Arbitration Act (O. 110, r. 57)**
>
> **57.**—(1) For the purposes of section 18D(2) of the [SCJA], the only condition that any proceedings relating to international commercial arbitration that are commenced by way of any originating process must satisfy is that those proceedings must

be proceedings that the General Division may hear under the International Arbitration Act.

(2) For the purposes of determining whether any proceedings are 'proceedings relating to international commercial arbitration' under section 18D(2) of the [SCJA] —

(*a*) the arbitration is international only if it is international within the meaning of section 5(2) of the International Arbitration Act;

(*b*) a court may consider the interpretation of 'commercial' in the UNCITRAL Model Law on International Commercial Arbitration, as stated in the note † in Article 1(1) of that Model Law set out in the First Schedule to the International Arbitration Act; and

(*c*) a commercial arbitration —

(i) includes, but is not limited to, an arbitration arising out of an investment, whether arising out of any contract, treaty, statute or other instrument; and

(ii) may include an arbitration between a State (or any constituent subdivision or agency of a State) and a national of another State.

**Transfer from General Division to Court (O. 110, r. 58)**

**58.**—(1) Any proceedings relating to international commercial arbitration, that are commenced in the High Court before 2 January 2021 or the General Division by way of any originating process, may be transferred from the General Division to the Court only if —

(*a*) the General Division considers that the condition in Rule 57(1) is met; and

(*b*) either —

(i) a party has, with the consent of all other parties, applied for the transfer in accordance with Rule 13; or

(ii) the General Division, after hearing the parties, orders the transfer on its own motion.

55 We note that the approach taken to the terms "international" and "commercial" under O 110 rr 57(2)(*a*) and (*b*) of the ROC respectively appear

consistent with the definition of those terms in O 110 r 1(2) of the ROC, although they are not identical. Unlike international commercial cases, however, there is no requirement under O 110 r 57(1) of the ROC that the parties agree to the jurisdiction of the SICC for such a case to be commenced in the SICC. For transfer cases, parties may consent to the transfer and apply on that basis under O 110 r 13, or the General Division may order the transfer on its own motion after hearing parties.

56 We have set out these provisions at length to demonstrate clearly what types of cases the SICC has been established to hear. The scope of these types of cases also determine, to a large extent, the types of parties that come before the SICC. In general, it is only to be expected that parties to international commercial cases and international arbitration cases would be relatively sophisticated. Many, if not most, of them will be companies, and those who are individuals would generally be better-resourced and better-advised than the run-of-the-mill litigant. While the SICC's jurisdiction is *not* expressly limited to companies or sophisticated individuals, the subject-matter jurisdiction of the SICC would generally mean that parties to such disputes fall into that category. Even for transfer cases (where there is no exclusive choice of court agreement) and where the General Division can order a transfer of its own motion without the parties' agreement, in practice, the General Division will have to hear parties and be satisfied that the conditions for transfer are met (see [52] above). In effect, it would generally be the case that parties *agree* to submit to the SICC's jurisdiction. It is therefore not an unrealistic assumption that most cases will involve parties who come to the SICC with eyes wide open.

(B) THE RULES ON COSTS IN THE SICC

57 We turn now to the rules on costs in the SICC which currently apply, and which apply to this case. These rules are set out in O 110 r 46 of the ROC. The fundamental principle, in relation to proceedings in the SICC is as follows (in O 110 r 46(1) of the ROC):

> The unsuccessful party in any application or proceedings in the Court must pay the reasonable costs of the application or proceedings to the successful party, unless the Court orders otherwise.

58 This is dramatically different from the rules as to costs under O 59 of the ROC. As noted above, O 59 costs are subject to a double attenuation, whether on the standard or indemnity basis (the difference between these two bases being the burden of proof). By contrast, under O 110 r 46(1) of the ROC, there is only one reference to reasonableness. As the SICC recently observed in *Kiri Industries Ltd v Senda International Capital Ltd and another* [2022] 3 SLR 174 ("*Kiri*") at [73]–[77], in light of the specific considerations applying to proceedings in the SICC which we will elaborate on below, this should be understood to mean that there is only a *single attenuation* – as long as the costs are reasonably incurred, a successful party should be compensated for those costs. Indeed, the express disapplication of O 59 by O 110 r 46(6) of the ROC indicates very clearly that a different costs regime applies in the SICC (see *CPIT Investments Ltd v Qilin World Capital Ltd and another* [2018] 4 SLR 38 ("*CPIT*") at [15]).

59 In coming to an assessment of "reasonable costs" under O 110 r 46(1) of the ROC, the SICC Practice Directions provide in para 152(3) a list of circumstances that the court may consider:

(a) the conduct of the parties, including in particular –

(i) conduct before, as well as during the application or proceeding;

(ii) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; and

(iii) the manner in which a party has pursued or contested a particular allegation or issue;

(b) the amount or value of any claim involved;

(c) the complexity or difficulty of the subject matter involved;

(d) the skill, expertise and specialised knowledge involved;

(e) the novelty of any questions raised;

(f) the time and effort expended on the application or proceeding.

60 As the SICC summarised in *Kiri* at [66]:

> In short, 'reasonable costs' allows the court to look at all the facts and circumstances in a given case to determine the appropriate quantum of costs to be awarded. Skill, expertise and specialised knowledge coupled with the novelty of the issues raised are important considerations. It is, by design, a more generous and flexible regime, that may in appropriate circumstances mirror the approach to costs in international arbitration: see *CPIT* at [15]; *Quoine* at [12]; the SICC Committee's Report. The broad nature of this inquiry was observed by the court in *CBX* at [9]:
>
> > Thus, the question of amount of costs that a successful party should recover is at large and the judge is tasked to determine what is 'reasonable', a determination which can be guided by many factors moving far beyond the type of proceeding, the number of hearing hours and

> the kind of transcription service employed (though these factors will also be relevant, of course).

61 The broad discretion of the SICC in ordering "reasonable costs", however, must clearly be exercised judiciously. Attempts have been made in the jurisprudence to formulate an approach to assist parties and courts in this exercise. The most recent attempt can be found in *Kiri*, where the SICC held that post-transfer costs in that case "should be higher than indemnity costs in the High Court, yet should still not amount to solicitor-and-client costs" (*Kiri* at [68]). As this approach represents a culmination of the authorities that have arisen on the interpretation of O 110 r 46 of the ROC, we focus our attention on the court's analysis in *Kiri* here:

> 75 In the High Court, one of the key considerations is access to justice for all litigants, regardless of the depth of their pockets. This consideration pervades an inquiry into the costs of proceedings in the High Court. This is reflected in the guidance laid out in Appendix G, which is meant to keep costs affordable in order not to impede access to justice. Also pertinent in this regard is the fact that case law on O 59 has recognised that a party will not recover all the costs of their litigation: *Maryani Sadeli v Arjun Permanand Samtani* [2015] 1 SLR 496 at [34]. Instead, in the context of O 59 (*Basil Anthony Herman v Premier Security Co-operative Ltd and others* [2012] 2 SLR 616 at [5]):
>
> > … [the] purpose of the exercise of assessing costs is to ensure that the receiving party is given a *fair* amount of money towards compensating the costs he expended in pursuit of his case. It is not to compensate him for every cent he expended even if they were reasonably expensed. It is in the *public interest* to keep costs within reasonable limits.
>
> These considerations are reflected in the aforementioned double attenuation in O 59 r 27.
>
> 76 On the other hand, it has been observed that, in the SICC, '[a] successful commercial litigant *should not be out of pocket if it has prosecuted its claim or defence sensibly* and, more specifically, *without enhancing the cost of the litigation as a means of seeking to oppress the losing party*.': see *Quoine* at

> [10]–[13]. This accords with the very nature of the SICC, and the disputes that are generally brought before it, namely international commercial disputes. The parties will often be large commercial entities with the financial resources to prosecute and defend claims, much more so than the average litigant in the High Court. Thus, concerns of access to justice are not at the forefront, and accordingly, in the SICC, there is less of a need to attenuate the amount of costs awarded.
>
> [emphasis in original]

62 At the same time, although the lessened emphasis on access to justice in the SICC justifies costs awards that would exceed the indemnity costs awarded in the High Court, this does not necessarily justify S&C costs being ordered. The SICC in *Kiri* noted that this was because (a) O 110 r 46 of the ROC did not provide for this; and (b) "the touchstone of reasonableness is present … to act as a safeguard to prevent parties from indiscriminately incurring costs and thereby oppressing the other side" (*Kiri* at [79]). This safeguard preserves the efficiency of dispute resolution in the SICC (*Kiri* at [80]):

> … In as much as successful parties in the SICC are entitled to receive reasonable compensation for costs properly incurred, it does not follow that they are entitled to their full costs and expenses if aspects of the litigation, or the litigation as a whole, were not sensibly prosecuted, or if costs were incurred for the purpose of oppressing the losing party, resulting in enhancement of the costs: see *Quoine* at [12]. That would not lend to the efficient resolution of complex commercial disputes of an international character which is the central tenet of the SICC. Indeed, it would be the antithesis of efficiency to allow a party to conduct a campaign of litigation by attrition and still recover what were essentially wasted costs. …

63 We respectfully agree with the reasoning of the court in *Kiri*. As we began by observing at [35] above, the question of what costs a successful party will be able recover from the unsuccessful party is ultimately a question of policy. Different areas of legal practice, and, certainly, different courts which adjudicate different matters may have to reflect a different emphasis or different

policy considerations, including questions of social policy for domestic courts in order to be effective and fair to the parties involved. This is due to a combination of various factors, including the nature of disputes that come before the courts, the nature of persons and entities that are parties to those disputes, the expectations of those parties, and the role of the formal, judicial dispute resolution mechanism in the context of the parties' relationships and, more generally, in the landscape of options for dispute resolution.

64 The policy concerning costs has to be assessed in light of the unique characteristics of the SICC which require broader considerations than those which apply to the Singapore High Court. In the context of international commercial disputes, issues of the welfare of the community or society in Singapore, including access to justice in the domestic courts and that justice should not be a privilege of those with deep pockets, have less relevance to corporations or individuals engaged in international commerce. For those parties, access to the SICC to have their disputes resolved by a court with the reputation which Singapore has built up as a dispute resolution hub, is more important as a policy than social policy which applies to the domestic courts in Singapore. Therefore different considerations apply in determining the level of costs that international commercial parties can recover in the SICC.

65 Whilst the policy element of imposing costs on the losing party is common to the High Court and SICC, the quantification of costs in the SICC has deliberately departed from that which applies in the High Court. Whilst O 59 rr 1 to 37 sets out a detailed code which includes taxation of costs, standard and indemnity bases for taxation and S&C costs, the SICC Rules exclude O 59 and include the general principles in O 110 r 46 where the quantification is expressed as "reasonable costs" with a wide discretion given to the court in

assessing what are reasonable costs in any particular case. In the commercial context of the SICC, legal costs are part of the expenses that may be incurred in the pursuit of commercial objectives. When it comes to dispute resolution, these costs have to be weighed against the value or benefit that the pursuit or defence of the case would yield. Where it is a successful plaintiff, there is no reason why the plaintiff should be made to effectively *reduce* the value of its legal right (which is vindicated in the legal proceedings) by the costs of pursuing the vindication of that right. Put another way, the plaintiff should not, in general, be required to forego part of its entitlement by having to bear the costs of pursuing that relief.

66 In relation to international commercial disputes, many of which are more complex in law and fact, parties would generally spend *more* on legal representation than in other contexts. This is also generally justified by the generally larger amounts at stake in these disputes. While this varies from case to case, we find that this is an important part of the background in which the issue of costs in the SICC rests. If parties would naturally spend more to vindicate themselves in court proceedings, especially where parties are international entities or sophisticated individuals with exposure to other legal systems and alternative dispute resolution like arbitration or mediation, it would be a justified expectation that the SICC's rules on costs should also be responsive to that reality, without being shackled to the parochial concepts of costs limits in any particular jurisdiction: see also *B2C2 Ltd v Quoine Pte Ltd* [2019] 5 SLR 28 ("*Quoine*") at [14].

67 We have already noted the nature of cases that come before the SICC and that they are narrower in range as compared to cases that come before the High Court. Specifically, whether they are international commercial cases or

international commercial arbitration cases, we have noted the reality that parties will be relatively knowledgeable or at least sophisticated enough individuals or companies, with experience in cross-border transactions. It can be assumed generally as well that the parties' motivations will be commercial (even if secondary motivations may come into play at times). Further, as noted above, in general, parties submit to the SICC consensually, with transfer cases (on the court's own motion) being an exception. Even then, however, experience has shown that parties tend to consent to the transfer of cases to the SICC.

68 For the reasons we have set out above, litigants in the SICC invariably have access to competent legal advice and will have a clearer picture of the risks and rewards of participating in commercial litigation.

69 In addition, we observe that the costs regime in the SICC must also account for a relatively unique feature of commercial litigation: the existence of third-party funding ("TPF"). This establishes a different approach to commercial parties and cases has been adopted. The common law prohibitions against maintenance or champerty as being illegal and/or contrary to public policy (subject to certain exceptions developed in the authorities) have been removed in relation to TPF by s 5B(2) of the Civil Law Act (Cap 43, 1999 Rev Ed) which provides that:

> 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.

70 The TPF framework was initially only applied to international arbitration proceedings, as well as court or mediation proceedings connected with such arbitration proceedings (see r 3 of the Civil Law (Third-Party

Funding) Regulations 2017). In 2021, the regulations were amended by the Civil Law (Third-Party Funding) (Amendment) Regulations 2021, which extended the application of the TPF framework to all arbitration proceedings (including domestic arbitration) and related court proceedings, as well as "proceedings commenced in the Singapore International Commercial Court for so long as those proceedings remain the Singapore International Commercial Court", appeals arising from decisions of the SICC, and mediation proceedings relating thereto.

71 In this light, the limited exceptions to the prohibition against contracts of maintenance or champerty was intended in 2017 to allow the TPF framework to be "tested within a limited sphere by parties of commercial sophistication" (*Singapore Parliamentary Debates, Official Report* (10 January 2017), vol 94 (Indranee Rajah, Senior Minister of State for Law)). The extensions of the TPF framework in 2021 can be seen as a gradual extension of the framework to other proceedings which are commercial in nature and also involve parties of relative sophistication – this is certainly the case for the extension of the TPF framework to SICC proceedings and appeals therefrom. In our judgment, the existence of the TPF framework for SICC proceedings is yet another indication that the nature of the cases and parties that come before the SICC justifies a different approach to costs in the light of O 110 r 46 of the ROC.

72 As Mr Edwin Tong SC ("Mr Tong"), Minister for Community, Culture and Youth and Second Minister for Law noted in his speech at the 3rd Meeting of the Standing International Forum of Commercial Courts on 12 March 2021 at para 7:

> There have been some observable consequences arising from third-party funding across different jurisdictions. It enables meritorious claims to be heard, that litigants may otherwise be

> unable to bring, especially in proceedings where legal costs may be substantial. It meets business needs, as it can also be a tool for companies to manage risk and cash flow.

Mr Tong continued, at paras 9–13:

> 9. Within the broader justice system, funders also take on several roles.
>
> 10. They can assist in filtering vexatious or less meritorious cases from the justice system potentially reducing the caseload of courts. Funders are known to apply very rigorous assessment criteria in deciding whether or not to fund cases. Knowing that a claimant is funded may also discourage defendants from using vexatious or oppressive interlocutory applications to stifle impecunious clients, allowing parties to focus on the substance and merits of their dispute.
>
> 11. As mentioned earlier, funders also serve a public interest by facilitating access to justice.
>
> 12. Next, they potentially assist in bringing about a quicker resolution of disputes, as out-of-court settlements may be more likely in funded cases. Respondents may think twice before continuing to litigate a claim, given that funders, being an objective third party, have assessed the merits of the claimant's case objectively, and will see returns on their investments only if the case succeeds.
>
> 13. Third-party funding may potentially also bring more complex and meritorious cases into the justice system. This can assist with the development of jurisprudence in courts, and also contributes to the vibrancy of the dispute resolution ecosystem.

73 It is of course important to recognise that the primary motivation of funders is commercial and judgements about which cases to fund are based upon assessments of potential commercial gain, and risk. In these circumstances it is fair to assume that only cases assessed as likely to have a commercially acceptable prospect of success are likely to be funded.

74 For completeness, we recognise that the TPF framework applies also to proceedings in the High Court related to international and domestic arbitration. However, in those instances, O 59 of the ROC continues to apply. Even so, we

note that in Appendix G, the costs ranges for matters related to arbitration tend to be *higher* than for other matters. This, we find, is a recognition (within the confines of O 59 of the ROC and the policies articulated in *Maryani* and *Then Khek Koon*) that a differentiated approach to commercial matters can apply but as that issue is not before us, we need say no more about it.

75 For these reasons, in considering the balance of policies analysed in *Maryani* and *Then Khek Koon*, we find that the overriding and primary policy in the SICC is to compensate the successful party, as far as it is reasonable, for costs incurred in the pursuit of a claim or maintenance of a defence that is meritorious. This, of course, is subject to the court's control of the quantum of costs – we agree with the court in *Kiri* that the court's supervision is engaged because of the word "reasonable". An unsuccessful party should only have to bear the reasonable costs incurred by the successful party, for the reasons elaborated on in *Kiri* at [79]–[80].

### (C) THE PROPER APPROACH TO COSTS IN THE SICC

76 Having discussed the applicable rules and principles, we turn to our views on the applicable costs regime in the SICC. At the outset, we should state that we need to carefully distinguish between:

(a) transfer cases, and

(b) cases commenced in the SICC.

The latter poses no problems as costs are clearly awarded in accordance with O 110 of the ROC or the prevailing costs regime in the SICC.

77 As for the former, we need to further distinguish between those transfer cases where:

(a) at the time of transfer, the parties agreed or persuaded the court to order that costs prevailing in the High Court, under O 59 of the ROC will continue to govern the award of costs in the SICC, in which case there can be little doubt that the costs ordered in the SICC will be those prevailing in the High Court as well as Appendix G where applicable;

(b) those cases where the court orders the transfer to the SICC but orders that costs up to the transfer shall be governed by O 59 of the ROC and Appendix G where applicable, but that costs in the SICC shall be governed by O 110 of the ROC, in which case the costs in the SICC, after transfer, is awarded solely under O 110 of the ROC, unless for some unusual or special reason the SICC considers it appropriate to have regard to Appendix G in deciding the reasonableness of costs under O 110 of the ROC; and

(c) those cases where, as here, the court orders that O 59 of the ROC (and where applicable, Appendix G) shall apply up to the point of transfer and costs awarded after transfer shall be left to the discretion of the SICC.

78 In transfer cases falling under [77(c)], the Court of Appeal in *CBX* has laid down some guidelines and we have already referred to this above (see [26]-[32]). In transfer cases under [77(a)] and [77(b)], the position poses no problem.

79 Our views on the costs awarded in the SICC that follow are for those cases under [76(b)], cases that were commenced in the SICC, and under [77(c)], the assessment of that part of the costs after transfer to the SICC.

80 The discretion to award costs in the SICC arises under O 110 of the ROC, as O 110 r 46(6) states expressly that "Order 59 (costs) does not apply to … proceedings in the Court".

81 However, O 110 r 3 of the ROC provides that:

> **Application of Rules of Court (O. 110, r. 3)**
>
> **3**.—(1) Subject to this Order, the provisions of these Rules apply to all proceedings in the Court and all appeals from the Court.
>
> (2) Despite any provision of these Rules but subject to paragraph (3), the Court may, if it considers that doing so is necessary or desirable for the just, expeditious and economical disposal of any proceedings in the Court —
>
> (*a*) make such order as the Court considers just and appropriate; …

This gives the SICC a wide discretion.

82 Further on transfer from the High Court to the SICC, O 110 r 12(5) of the ROC provides that:

> (5) Where a case is transferred —
>
> …
>
> (*d*) the court ordering the transfer may make such consequential orders as it sees fit; and
>
> (*e*) the court to which the case is transferred may make such consequential orders as it sees fit, provided that such orders are not inconsistent with any orders made by the court ordering the transfer.

83 The fundamental purpose of an award of costs in the SICC under O 110 of the ROC is to compensate the successful party for reasonable costs incurred in the legal proceedings. The phrase "reasonable costs" is applicable to all costs, provided that they are reasonable. The qualification that the costs must be reasonable is only intended to provide a means for the court to ensure discipline in the pursuit of the case, as well as to prevent an unsuccessful party from being oppressed by the successful one. It is not intended to incorporate any further attenuation on the basis of considerations of social policy which may be appropriate in domestic courts. The starting point, therefore, in assessing costs in the SICC must be the costs actually incurred by the successful party, *ie*, the costs payable by the successful party to its solicitors, and its experts or consultants where relevant, which is then subject to the single attenuation for reasonableness.

84 In this regard, "reasonableness" is assessed in line with the considerations laid out in the SICC Practice Directions. We would highlight that a consistent thread throughout these considerations is essentially the principle of proportionality. In a narrow sense, proportionality here refers to the proportionality of the costs incurred to the benefit to be obtained (largely based on the quantum in dispute): see *Kiri* at [82]; *Quoine* at [14]. In a broader sense, proportionality is a guiding principle in this assessment – the question is simply what steps a litigant can properly be allowed to take in the pursuit of a particular claim or defence of a particular nature. This will involve consideration of the various factors listed in para 152(3) of the SICC Practice Directions, for example, the complexity of the claim and the novelty of the issues. It will also be a part of the analysis as to whether one party had unreasonably raised certain issues in the proceedings or where there were an excessive number of lawyers or experts.

85 It is clear from the above that O 59 of the ROC and Appendix G do not apply to cases commenced in the SICC where the assessment of costs is dealt with under O 110 r 46 of the ROC. It certainly remains *relevant*, as part of the broader context and to demonstrate the practice of the High Court when it comes to post-transfer costs in cases which are transferred to the SICC from the High Court, but beyond that, it would generally be inappropriate to use Appendix G in quantifying those costs in the SICC so as either to award successful parties costs based on Appendix G or to take account of the levels of costs in Appendix G, when awarding those costs. In the absence of specific application of Appendix G by agreement or in a transfer order, it would be a very rare case indeed where it would be appropriate to use Appendix G to adjust a costs award downwards either as part of or after the assessment of reasonableness under O 110 r 46 of the ROC. We provide some room for flexibility in the very exceptional and therefore rare SICC case where Appendix G assumes relevance because assessment of costs is notoriously fact sensitive. In the majority of SICC cases, it would not be appropriate to use Appendix G as a starting point in assessing post-transfer costs in the SICC, as that is contrary to the principles on which O 110 r 46 of the ROC is grounded.

86 That will certainly be the case where the recently gazetted Singapore International Commercial Court Rules 2021 (the "SICC Rules"), which came into effect on 1 April 2022, apply. Order 22 r 3(1) of the SICC Rules provide as follows:

> Without affecting the scope of the Court's discretion in Rule 2(1), and subject to any provisions to the contrary in these Rules, a successful party is entitled to costs and the quantum of any costs award *will generally reflect the costs incurred by the party entitled to costs, subject to the principles of proportionality and reasonableness*.
>
> [emphasis added]

Attention should also be given to those factors set out in the new O 22 r 3(2)(*a*)-(*j*) of the SICC Rules.

87 In our judgment, O 22 r 3(1) of the SICC Rules merely makes explicit what is already implicit in O 110 r 46(1) of the ROC, which currently applies. It was felt desirable to lay out some of the factors which the SICC would take into account in assessing the costs because the litigants in the SICC may not come from common law jurisdictions or from jurisdictions where only minimal costs are awarded to the prevailing party. The principles and considerations underlying costs have not really changed. We note that it was only natural that parties have sought to rely on an existing reference point in addressing the court on costs in the SICC in the early years of this institution, but it was thought necessary to make clear (both by judicial pronouncement and by clear drafting in the SICC Rules) that the costs regime in the SICC stands on its own and is *sui generis* when compared to the High Court costs regime under O 59 of the ROC.

### (D) COSTS IN INVESTOR-STATE ARBITRATION CASES

88 In applying this approach to costs in the SICC to a case such as the present international investor-state arbitration case, we note that these cases have many of the same characteristics as international commercial arbitration cases. In such cases, there will already have been prior arbitration proceedings. The bulk of such cases will be setting-aside applications, or contested enforcement proceedings – the gist of the more complex of these matters, however, will always be an attack on the award as such. We focus our attention here on such applications, of which *CBX and another v CBZ and others* [2021] 3 SLR 10 (the decision at first instance) is an example. In these circumstances, we think that the history of the arbitration is a material factor in assessing the

appropriate costs. This is because the parties will already have invested significant amounts of money in the arbitration proceedings. Furthermore, there may already be a quantified sum for the relief sought in the arbitration. This must then be assessed in the light of the work done for the SICC proceedings. In this regard, the court will have to consider whether the SICC counsel also represented parties in the arbitration proceedings, although this factor is less important where it is a transfer case and the getting up was done pre-transfer (see *CBX* at [34]).

89 In our view, the costs of the SICC proceedings in international arbitration cases will almost certainly not reach the extent of the arbitration costs awarded (given the more limited scope of court applications), but the parties' commercial expectations, given their participation in arbitration, will justify costs that seek to compensate the successful party almost entirely for the reasonable costs incurred in bringing or meeting such challenges. An additional factor in challenges to arbitral awards is the policy of the finality of arbitration and the need to discourage challenges to arbitration awards for the purpose of delaying the enforcement of arbitral awards. Thus, those who unsuccessfully challenge arbitral awards should not be encouraged by any award for costs which does not appropriately compensate the party responding to such challenges.

90 Cases involving investor-state disputes may generally be at the more substantial end of international arbitration cases. Such cases will involve a state and, typically, a party with deep pockets, and the nature of the claims involved tend to involve higher amounts than many commercial cases. Such disputes are also often long-drawn and, by the time parties come before the court for enforcement or setting aside, parties will have incurred very substantial costs in

the arbitrations. While the facts of each case differ, a court faced with assessing costs in an investor-state dispute will have regard to both the factors generally applicable to international arbitration cases as well as the particular factors which apply to investor-state disputes.

91 Those factors, of course, are part and parcel of the court's discretion as to costs, which must be exercised in the light of all the circumstances of the case, and especially those matters described in para 152(3) of the SICC Practice Directions.

***Assessment of the quantum of costs and disbursements***

92 We now turn to apply these principles to the present case. We begin with a discussion of a general point raised by the plaintiffs, before turning to assess the pre-transfer costs, post-transfer costs, and disbursements.

*Relevance of points on which GOL was not entirely successful*

93 The plaintiffs argue that the court should account for the fact that there were issues on which GOL did not entirely prevail in OS 5 and OS 6.[9] They point to three instances: (a) the court's finding that Mr Anousith's bank statement was a factor on which the BIT Tribunals had based their conclusions on the Alleged Thanaleng Bribe, and so the Tribunals could reasonably have arrived at a different result on this point (Judgment at [220] and [222]); (b) the court's finding that the BIT Tribunals could reasonably have arrived at a different result in relation to the Alleged MaxGaming Fraud (Judgment at [231] and [234]); and (c) the issue of whether the plaintiffs had waived any breach of

9 Plaintiffs' Submissions on Costs at para 13.

Section 34 by their conduct was determined by a majority of two, with one member of the *coram* dissenting (Judgment at [195]–[196]).

94 With respect, these arguments are misplaced. All of these points raised by the plaintiff are relatively minor. In particular, the first two pertain to two specific arguments raised under the rubric of assessing whether the BIT Tribunals' failure to act in accordance with the parties' agreement on procedure occasioned the plaintiffs any prejudice. Our decision was, primarily, that there was no breach of the parties' agreement in the first place – the question of prejudice was not necessary to the decision. Furthermore, even though we agreed with the plaintiffs on those two specific instances, that was not sufficient to convince us to find that there was prejudice in the round, as the plaintiffs could not show that the BIT Tribunals could have arrived at a different conclusion on the broader question of the plaintiffs' illegal, corrupt and/or fraudulent conduct (Judgment at [279]) and, in any event, we did not consider that the findings on the merits would have been affected (at [280]–[281]). As for the final point, the fact remains that the majority held the point against the plaintiffs, and, in any event, the issue is again only relevant *as a further, further alternative* – the primary reason for dismissing the complaint was that we could not consider Section 34 *de novo* (see [17(c)] above), in the alternative, if we could, we would agree with the BIT Tribunals, and in the further alternative, the BIT Tribunals were under a duty to investigate the allegations of corruption. In our view, the points referred to by the plaintiff are all relatively minor points, with no significant effect on costs and in our view no adjustment should be made.

*Pre-transfer costs*

95 We turn to the pre-transfer costs. The plaintiffs submit that GOL's pre-transfer costs should be fixed at S$15,000. GOL has not provided a break-down of its costs submissions based on pre- and post-transfer, but seeks a global sum of S$400,000 in costs. We note here that the manner in which GOL has put forward its submissions in this regard is not satisfactory. While we understand that its position was that the court should take pre- and post-transfer costs together, its failure to provide a breakdown of costs in the alternative has make it harder to discern exactly how much work was done in each segment of the case. Because of this, we have to rely on approximations in our analysis.

96 Whilst, in assessing pre-transfer costs, we take account of Appendix G, bearing in mind that the Appendix G guidelines do not limit the costs that can be awarded in cases, in particular complex investor-state arbitration cases. Appendix G provides for a range of between S$12,000 and S$30,000 per day for contesting originating summonses. Specifically, for arbitration cases, the range provided for the daily tariff is between S$13,000 and S$40,000. OS 5 and OS 6 were heard over one and a half days (although two days were initially fixed). We take two days as the reference point here, since time was saved only by the court's enforcement of strict timelines during the hearing and the prior preparation of counsel and the court: see, *eg*, *CBX* at [41]. Indeed, the length of time taken in oral submissions was not commensurate to the complexity of the present case – it was due only to the preparation done in the written submissions, logistical preparations, and counsels' diligence that the hearing managed to complete earlier than scheduled.

97 In this case, in the absence of a detailed breakdown of costs from GOL, there is some ground for assuming that around half the work was done prior to

the transfer. In a joint case management plan submitted on 20 August 2020 (*ie*, around a month after the transfer PTC) on 14 July 2020, the parties had indicated the following estimated costs:[10]

| Party | Costs up to 20 August 2020 | Total costs estimated |
|---|---|---|
| Plaintiffs | S$230,000 including disbursements | S$400,000 including disbursements |
| GOL | S$180,000 including disbursements | S$370,000 including disbursements |

98 While not entirely fool-proof, this is a helpful indication of how much work was already done by 20 August 2020 relative to the overall work in the case. As such, around half the costs would be a range of S$13,000 and S$40,000. OS 5 and OS 6 would likely be found at the upper end of that range, if Appendix G were to be followed strictly. We turn now to consider the factors raised by GOL to see if there is any reason to depart from Appendix G significantly in this case.

99 GOL first refers to the previous applications which involved the same parties – HC/OS 24/2014 ("OS 24") which was GOL's application concerning the PCA Tribunals' ruling on jurisdiction, and HC/OS 1439/2017 ("OS 1439") which was GOL's application to enforce an SIAC award involving the same parties and in which the plaintiffs applied in HC/SUM 737/2018 ("SUM 737") to object to enforcement. In OS 24, the parties agreed to fixed costs at S$200,000 (excluding disbursements), and in OS 1439 and SUM 737, the court

10 See GOL's Bundle of Documents (Costs) at Tab 7, p 29.

awarded costs of S$120,000 (excluding disbursements). In GOL's submission, OS 24 and SUM 737 were both less complex than OS 5 and OS 6.

100 In our view, the quantum of S$200,000 agreed by parties in OS 24 has little relevance to the present case, since that was agreed by parties, and it is not apparent what the basis of agreement was. As for SUM 737, we accept that there is force in the argument that the High Court in that case had departed from Appendix G, and awarded higher costs, and provides some guidance as to when the court may be minded to depart from the range in Appendix G.

101 As noted above, the upper end of the range based on Appendix G would be S$80,000 for the two full days of hearings. Given that the work done pre-transfer appears to be around half of the work done, and in the light of the complexity of the case, we conclude that an appropriate costs order would be to fix pre-transfer costs at S$42,000.

102 In the present case, the JBOD comprised some 8,725 pages. While the mere length of the bundle is not necessarily determinative (as the Court of Appeal observed in *CBX* at [35] that parties often simply adduce the entire record of proceedings before the tribunal), it is significant here that there were a number of arguments that turned on the procedural history. Indeed, the arbitral proceedings had a long history, and multiple parallel proceedings, which were referred to in the course of OS 5 and OS 6. The work that counsel had to put in to get up on the case would have been very significant, given the lengthy procedural history and the complexity of the BIT Awards. The central issues relating to the Settlement Deed emerged out of this procedural history. The arguments made by parties also required detailed consideration of the reasoning of the BIT Tribunals, particularly in relation to the question of prejudice. As we

have elaborated above, there were many complaints that could only be resolved by close attention to the record of arbitral proceedings, and indeed, the whole history of the dispute between the parties. Furthermore, there was the presence of a novel issue relating to corruption and illegality (see [17] above).

*Post-transfer costs and disbursements*

103 In coming to post-transfer costs, we begin with the parties' estimates of costs (see [97] above). GOL had estimated that it would incur about S$190,000 more in costs and disbursements after 20 August 2020, which was just around a month after the case was transferred to the SICC. Hence, the estimate of around S$190,000 is a useful starting point for assessing post-transfer costs. This is close to GOL's eventual submission for S$400,000 in costs and around S$30,000 in disbursements, assuming a 50-50 split between pre- and post-transfer costs.

104 We highlight the following factors in the present case, which have already been alluded to above:

(a) The substantive dispute in question concerned (on the plaintiffs' estimations) around US$1.58bn, which the plaintiffs would no doubt have sought against GOL in separate proceedings if the BIT Awards were set aside. At stake was also the legal expenses and arbitration costs in the BIT Arbitrations, amounting to around US$2.6m and US$3.5m respectively, for a total of US$6.1m.

(b) These Applications are at the tail-end of the parties' dispute, and, as noted above, among the last chances that the plaintiffs had to continue their claims against GOL, while, for GOL, it was a chance to bring the

saga to an end definitively (if no other claims could be found). Given the lengthy history of the case (extending over nine years), both parties justifiably had a lot at stake in the continuation or ending of the dispute.

(c) The work done for the case, given the nature of the arguments raised and the complexity of the history and underlying dispute, was significant. This is evidenced by the length of the JBOD as well as the submissions tendered. There was also the novel issue of an arbitral tribunal's duty to inquire into evidence of corruption, as well as the public interest surrounding that issue.

105 The plaintiffs referred us to various precedents to argue that the post-transfer costs should be fixed at S$35,000. We do not find these precedents to be helpful in the present case.

(a) The plaintiffs submitted that in *CJM and others v CJT* [2021] 5 SLR 222 ("*CJM*") both sides were represented by Senior Counsel, the substantive hearing was scheduled for a full day, and the documentation was voluminous while the facts were complex. In that case, the court awarded S$85,000 (all-in), broken down into S$25,000 for pre-transfer costs and S$45,000 for post-transfer costs. In that case, however, as the breakdown of the defendant's post-transfer costs at [11] of *CJM* shows, the successful parties' solicitor-and-client costs amounted to S$97,800, of which it sought S$45,000 (less than half of the costs actually incurred). In that regard, in the present case, the estimates provided in the joint case management plan (see [97] above), showing a very high quantum for solicitor-and-client costs, which would mean a corresponding increase in the costs to be awarded to meet (in part) the costs of litigation.

(b) The plaintiffs also cited *CBX* as a costs precedent. That case involved an application to set aside three awards, which was transferred from the High Court to SICC. The seller's lawyers had not been involved in the arbitrations, and had to keep abreast of on-going parallel proceedings. There were issues of foreign law with expert evidence raised. The affidavits totalled around 4,700 pages. The amount involved was US$525m, plus compound interest of 15%, more than €5m, and nearly US$800,000 in arbitration costs. The plaintiffs argue that the Court of Appeal considered that the total amount would be significantly lower than the S$127,000 (excluding disbursements) that was awarded by the SICC. However, as we have already observed above at [30], the scope of the Court's decision must be considered. It is not clear how much of the reduction from S$127,000 would have come from a reduction of the post-transfer as opposed to pre-transfer costs. As it was not necessary to do so, the Court of Appeal did not provide guidance as to how the post-transfer costs would be assessed.

(c) The plaintiffs then point to *BYL and another v BYN* [2020] 4 SLR 204, in which the application was to set aside a single award. The amount at stake was S$144m, and the successful defendant had sought S$235,000 in costs. While the case involved issues of foreign law, the court awarded only S$82,500 (all-in). However, this case is easily distinguishable on the facts. The amount at stake was much less than in the present case. Further, a perusal of the substantive judgment in *BYL and another v BYN* [2020] 4 SLR 1 shows that the material issues in that case were not as complex or multi-faceted as those that were raised in the present case.

(d) In *BXS v BXT* [2019] 5 SLR 48 ("*BXS*"), the costs order covered the application to set aside an arbitration award, an application to strike out the setting aside application, and an application for an extension of time to file a reply affidavit in the setting aside application. The award was for approximately S$4m and US$647,000 in costs (plus interest). 3,278 pages of documents were filed, with 105 authorities and seven court attendances. The SICC awarded costs of S$40,000 (all-in). However, the quantum of costs in that case was assessed with Appendix G as a starting point, even in respect of post-transfer costs, given the judge's view of the parties' understanding of the applicability of Appendix G post-transfer at the time of the transfer PTC (see *BXS* at [14]). In this case, there would be no such reliance on Appendix G as a starting point in relation to post-transfer costs.

106 Having regard to GOL's estimates for its costs (at S$190,000 (all-in)) and its submissions, and in the light of the factors identified above, we find that a costs order approximating the costs actually incurred (which we assume to be around S$200,000 given a 50-50 split between pre- and post-transfer costs) would be justified. In this case, GOL has also sought S$31,212.07 in disbursements. Although there is some disagreement over the correctness of that sum given an affidavit filed under solicitor's cover, we do not think that the objection is ultimately warranted or needs further attention. In the round, we fix the post-transfer costs at S$180,000 (all-in).

***Inclusion of a condition in the costs order***

107 The plaintiffs seek, in addition, a condition to be imposed in the costs order that the costs should be paid to GOL's solicitors on their undertaking to repay the sums to the plaintiffs in the event that the plaintiffs appeal against the

Judgment in CA/CA 55/2021 is successful. While it is true that a court can impose such a condition, this is not the correct avenue for the plaintiffs to seek such a condition to be imposed. Instead, the plaintiffs should file a separate application if they desire, supported with the necessary affidavit setting out the bases for the condition sought, and giving GOL the chance to file a reply affidavit as well. Indeed, GOL has not had a chance to respond to this request, since the costs submissions were exchanged rather than filed sequentially. The court is not presently in a position to determine this request. Therefore, we make no order as to this request, without prejudice to the plaintiffs filing a formal application if they desire after the costs order is made.

**Costs of the Sealing Applications**

108 We turn then to the costs of the Sealing Applications. The plaintiffs seek costs in their favour of S$12,000 plus disbursements of S$836.59. GOL argues that no order as to costs should be made, as the plaintiffs succeeded in the sealing application while GOL succeeded on the issue of redaction.

109 We agree with the plaintiffs that an order for costs should be made in their favour. First, the Sealing Applications were the only *formal* applications involved, and did not cover the issue of redaction, but only sealing. The issue of redaction, although related, was raised by the court of its own accord, given the need to consider the appropriate position under the relevant legislation and in the light of the parties' submissions on sealing. In that sense, it should be treated as ancillary to and separate from the Sealing Applications. Secondly, in that light, to the extent that costs were incurred for the redaction issue, on which GOL's position was accepted, we find that the appropriate adjustment would be a reduction of the costs order for the Sealing Applications rather than a denial of costs for the Sealing Applications as a whole.

110 We agree with the plaintiffs that as this is a post-transfer issue (given that the substantive arguments were made post-transfer although the applications were filed pre-transfer), O 110 r 46 of the ROC would apply. We also accept that the parties *did* make submissions on a relatively novel issue as to the extent to which the principle of confidentiality should apply to investor-state arbitrations, even though the court eventually did not rule on that issue.

111 Having regard to the submissions made and the fact that GOL's position on redaction was ultimately accepted, we fix costs of the Sealing Applications at S$8,000 (all-in).

**Assessment of costs**

112 We must pause at this point to state that parties do themselves no favours when submitting on costs without assisting the court with the relevant details. Giving ballpark figures is wrong in principle. Whilst parties may wish to do so in those international arbitration challenges which seldom exceed one day, they may take the risk of rough justice.

113 However, where trials have taken place, *a fortiori* in more complex trials and with tranches, and even for originating summonses that are heard over a few days, we expect counsel to put in more details into their submissions on the level of costs to be awarded. They should be able to break down costs in different broad stages – costs leading up to the filing of Affidavits of Evidence-in-Chief, or at least costs up to trial, costs during the trial and costs after trial (usually submissions). Parties should be able to provide the number of lawyers claimed, their post-qualification experience, their hours and their respective charge-out rates. Where applicable or beneficial, it should also be broken down into stages. Similarly for experts – their time and hourly charge should be

shown, the time should be broken up into stages, like preparation of their reports, the time for the joint experts' conclave and joint expert report and time taken up at the trial. All of them disbursements should be similarly detailed and where possible either agreed between the parties or agreed as to quantum but not as to the principle as to whether they can be claimed or not, *ie*, agreement on "figures as figures". Any information or detail that counsel feel will be relevant and helpful should also be provided. All this is good practice to enable any court or tribunal to come to a proper assessment of costs to be awarded.

**Conclusion**

114 For the foregoing reasons, we fixed the costs of this case as follows:

(a) For the Applications, the plaintiffs are, on a joint and several basis, to pay GOL costs fixed at S$222,000 (all-in).

(b) For the Sealing Applications, GOL is to pay to the plaintiffs' costs fixed at S$8,000 (all-in).

(c) Setting off these sums, the plaintiffs are, on a joint and several basis, to pay GOL S$214,000 as costs of the Applications and Sealing

Applications.

Quentin Loh
Judge of the Appellate Division

Vivian Ramsey
International Judge

Douglas Jones
International Judge

Lin Weiqi Wendy, Chong Wan Yee Monica (Zhang Wanyu), Ling Jia Yu (Lin Jiayu) and Ho Yi Jie (WongPartnership LLP) for the plaintiffs;
Cavinder Bull SC, Lim Gerui, Tan Yuan Kheng (Chen Yuanqing), Lim Qiu Yi Regina and Tan Sih Si (Chen Shisi) (Drew & Napier LLC) for the defendant.

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