IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL **JCPC/2025/0116**

ON APPEAL FROM THE SUPREME COURT OF MAURITIUS

BETWEEN

OGD SERVICES HOLDINGS LIMITED

Appellant

AND

NORSCOT RIG MANAGEMENT PVT LIMITED (MAURITIUS)

Respondent

OGD'S WRITTEN CASE

CONTENTS

I. INTRODUCTION 3

II. BACKGROUND 5

III. ISSUES ON APPEAL 5

A. Issue 1: Damages-Based Agreements and English Law 5

A(i) The relevant legislation 6

A(ii) DBAs as a class. 9

A(iii) Coherence of the class of DBAs 11

A(iv) Extrinsic aids to interpretation 12

A(v) The common law prior to the making of the Original Section 58AA 16

A(vi) Conclusion on issue 1 17

B. Issue 2: Mauritian Public Policy 17

B(i) The applicable public policy is that of Mauritius. 17

B(ii) Recognition and enforcement of the Final Award would offend the public policy of judicial comity in Mauritius. 17

C. Issue 3: The Effect of the Fifth Partial Award and the Final Award ... 20

C(i) An enforcing jurisdiction retains the right to decline enforcement notwithstanding arbitral finality 20

C(ii) There is no abuse of process that would disentitle OGD from relying on the Litigation Funding Agreement's illegality under English law 21

C(iii) The absence of expert evidence on English law does not disentitle OGD from relying on the Litigation Funding Agreement's illegality under English law 23

IV. CONCLUSION 25

I. Introduction

1 The issues that have been set out for the determination by the Board relate to whether the Mauritian courts should enforce an international commercial arbitration award holding that Norscot was entitled to its legal costs of US$ 3,565,814 on an indemnity basis. These costs stem from Clause 8.1 of a litigation funding agreement dated 5 May 2011 (the "**Litigation Funding Agreement**") entered into between Norscot Rig Management Pvt Limited ("**Norscot**") and Woodsford Litigation Funding Limited ("**Woodsford**"), under which Norscot was entitled to the higher of three times of the amount advanced by Woodsford or 35% of Norscot's total recovery. Having incurred costs of GBP 647,086.49, the reason why Norscot's obligation under the Litigation Funding Agreement came to US$ 3,565,814 was because that amounted to 35% of the total recovery of US$10,188,039. [MHB/20/295] [MHB/19/255/281] and [MHB/19/263/14]

2 The issues in this appeal raise questions of general importance under Mauritian law. The Board is asked to decide whether Mauritian courts should enforce an award of litigation funding costs, derived entirely from a contract that was illegal and unenforceable under its own governing law, that being the law of a State friendly to Mauritius. In doing so, the answer will clarify the role of comity within Mauritius's international public policy.

3 In summary, OGD's case is that:

(1) Following the UK Supreme Court's judgment in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28 ("***PACCAR***"), the Litigation Funding Agreement is a damages-based agreement ("**DBA**") within section 58AA of the Courts and Legal Services Act 1990 (the "**CLSA**"). As the section stood in 2011, every DBA was unenforceable, save only a compliant employment DBA. The Litigation Funding Agreement was not an employment DBA. It was therefore illegal and unenforceable under English law from its inception. [MHB/72/1194] [MHB/57/1013]

(2) The funding costs awarded to Norscot are nothing more than the price of that unlawful bargain. Recognising and enforcing such a funding costs award would require the Mauritian courts to give effect to an obligation that English law prohibits. The public policy exception in Article V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "**New York Convention**") exists for cases of exactly this kind. That is because giving effect to the illegal and unenforceable Litigation Funding Agreement would be contrary to the principle of comity between friendly States, which forms an integral part of the international public policy of Mauritius. [MHB/93/1776]

(3) Neither the finality of the Fifth Partial Award and the Final Award, nor the absence of English law expert evidence before the Supreme Court of Mauritius, nor any misplaced suggestion of abuse of process, disentitles OGD from relying on the Litigation Funding Agreement's illegality before the Board. What is being determined is a pure question of law, which causes no prejudice to Norscot.

4 These issues arise in a critical and developing area of Mauritian law. Through its accession to the New York Convention on 19 June 1996, Mauritius positioned itself as a centre for international arbitration and proceeded to enact the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001 and the International Arbitration Act 2008. As an international financial centre through which investment flows into Africa and Asia, it is also a frequent forum for enforcement against assets held there. To that end, the standing of Mauritius as an enforcement jurisdiction depends as much on the integrity of the public policy exception, as on the strength of the rule in favour of enforcement. [MHB/80/1398] [MHB/87/1594]

5 For completeness, OGD clarifies that it is no longer pursuing the reasoning set out in the second sentence of [7(a)] in the Grounds of Appeal to the extent that it makes a reference to Section 58AA of the CLSA as amended in 2013 and the 2013 DBA Regulations. OGD shall limit its reliance on *PACCAR* to assert that the Litigation Funding Agreement is contrary to the Courts and Legal [MHB/2/14]

Services Act 1990 (version as of 2011), with such illegality directly flowing from *PACCAR*. [MHB/57/1013]

II. Background

6 The factual and procedural history is set out in [1-30] of the amended Statement of Facts and Issues, dated 25 August 2026 and the Annex thereto. [MHB/4/24]

7 On 6 November 2023, the Supreme Court of Mauritius declined to set aside a provisional order that recognised and enforced a London-seated ICC arbitral award under which OGD was ordered to pay Norscot's litigation funding fees, together with interest and related legal costs (the "**Final Award**"). [MHB/7/101] [MHB/19/160]

8 OGD's primary case on this appeal is that in light of *PACCAR*, Norscot's Litigation Funding Agreement is illegal and unenforceable, and that therefore, the recognition and enforcement of the Final Award (insofar as it seeks to give effect to the illegal Litigation Funding Agreement and award the said litigation funding fees), would be contrary to the public policy of Mauritius.

III. Issues on Appeal

9 There is a lack of agreement as to precisely how the issues that arise in this appeal should be formulated.

10 The submissions below focus on those issues that have been articulated by OGD. OGD's Issues 1 and 2 correspond with Norscot's Issues 2 and 3. OGD's Issue 3 broadly corresponds with Norscot's Issue 1, but Norscot raises an additional point (regarding the absence of expert evidence of English law before the Supreme Court of Mauritius); this is addressed in Section III.C below.

A. Issue 1: Damages-Based Agreements and English Law

11 OGD's formulation of Issue 1 (which broadly corresponds with Norscot's Issue 2) reads as follows:

> "*Whether, following the UK Supreme Court's judgment in R (on the application of PACCAR Inc and others) v Competition Appeal*

Tribunal and others [2023] UKSC 28, the Litigation Funding Agreement is illegal and/or unenforceable as a matter of English law."

12 A summary of OGD's case on this point is set out below:

(a) In light of *PACCAR*, it is now known that the Litigation Funding Agreement (which entitled Woodsford to the higher of 35% of Norscot's total recovery or three times the sums advanced) is a DBA within the meaning of section 58AA of the CLSA.

(b) The Litigation Funding Agreement was made on 5 May 2011, after section 58AA of CLSA in its original form came into force on 7 April 2010 ("**the Original Section 58AA**"), but before the coming into force of what, in substance, is the current section 58AA ("**the Amended Section 58AA**") (this being on 1 April 2013). [MHB/20/284] [MHB/57/1013] [MHB/57/1017]

(c) The enforceability of the Litigation Funding Agreement therefore falls to be determined by reference to the Original Section 58AA.

(d) The Original Section 58AA was predicated on the footing that DBAs, as a class and as defined, were unenforceable. It made provision for compliant DBAs relating to employment matters to be enforceable, but made no such provision for any other type of DBA.

(e) The Litigation Funding Agreement was accordingly unenforceable when made, and continues to remain so.

A(i) The relevant legislation

13 The first task is to identify the relevant legislation.

14 The Litigation Funding Agreement was made in 2011, and as such, the Original Section 58AA was in force, this having come into force from 7 April 2010, after having been inserted by section 154(2) of the Coroners and Justice Act 2009, which received Royal Assent on 12 November 2009. [MHB/54/997]

15 In so far as is material, the Original Section 58AA provided as follows: **[MHB/57/1013]**

> "*(1) A damages-based agreement which relates to an employment matter and satisfies the conditions in subsection (4) is not unenforceable by reason only of its being a damages-based agreement.*
>
> "*(2) But a damages-based agreement which relates to an employment matter and does not satisfy those conditions is unenforceable.*
>
> "*(3) For the purposes of this section — (a) a damages-based agreement is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that (i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and (ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained;[...]*
>
> "*(4) The agreement (a) must be in writing; (b) must not provide for a payment above a prescribed amount or for a payment above an amount calculated in a prescribed manner; (c) must comply with such other requirements as to its terms and conditions as are prescribed; and (d) must be made only after the person providing services under the agreement has provided prescribed information.*
>
> "*(5) Regulations under subsection (4) are to be made by the Lord Chancellor and may make different provision in relation to different descriptions of agreements.*
>
> ...

> "*(8) Nothing in this section applies to an agreement entered into before the coming into force of the first regulations made under subsection (4).*"

16 The "*first regulations made under subsection (4)*" were the Damages-Based Agreements Regulations 2010 (SI 2010/1206), which were made on the day on which the Original Section 58AA came into force, namely, 7 April 2010. **[MHB/58/1028]**

17 Three features of the Original Section 58AA should be noted:

(a) *Firstly*, whilst its operative provisions, namely, subsections (1) and (2), were confined to DBAs relating to employment matters, the definition of a DBA in subsection (3)(a) was not so confined; **[MHB/57/1013]**

(b) *Secondly*, that definition, namely, that in subsection 3(a), was materially the same as the definition in the Amended Section 58AA; and

(c) *Thirdly*, the provisions that permitted enforceable DBAs in employment matters are predicated on the basis that DBAs, as defined and as a class generally, are unenforceable.

18 In *PACCAR*, the Supreme Court construed section 58AA, holding that the words "claims management services" encompass the provision of litigation funding. It is worth noting that the Amended Section 58AA was re-amended **[MHB/57/1020]** in 2015 and then again in 2018. The first of these amendments, namely, to add **[MHB/57/1024]** a new subsection (11), is not relevant for present purposes. The second, in **[MHB/57/1021]** 2018, was a consequential amendment to subsection 7; its effect was to cross- **[MHB/57/1025]** reference the definition of "claims management services" to section 419A of the Financial Services Act 2000 (as amended) rather than to the very similar definition in the Compensation Act 2006. Lord Sales noted, however, that nothing turns on that amendment (at [33]). **[MHB/72/1206]**

19 As such, the reasoning in *PACCAR* applies equally to all iterations of section 58AA. The effect of this is that the Litigation Funding Agreement is, and always has been, a DBA within the meaning of the Original Section 58AA. **[MHB/57/1013]**

20 The question raised by Issue 1 is what consequence that classification carried under the Original Section 58AA.

A(ii) DBAs as a class.

21 The Original Section 58AA was predicated on the basis that DBAs, as a class and as defined, were neither lawful nor enforceable.

22 The legislative history of the Original Section 58AA was explained by Lord Sales in the following way (see *PACCAR* at [27]): **[MHB/72/1205]**

> "*A new section 58AA was inserted into the CLSA 1990 by section 154 of the Coroners and Justice Act 2009 … to introduce DBAs and make them enforceable subject to the satisfaction of certain conditions. As originally introduced section 58AA was limited to employment claims. However, that limitation was removed by section 45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 … with effect from 19 January 2013.*"

23 The Original Section 58AA created a new statutory class of contract, namely, DBAs. It provided a means by which enforceable DBAs, relating to employment claims, could be executed. It was not until the coming into force of the Amended Section 58AA that a means by which other types of enforceable DBAs could be made was introduced.

24 Specifically, subsection (1) of the Original Section 58AA provided that an employment DBA that complied with certain requirements was "not unenforceable by reason *only of its being a damages-based agreement*" (emphasis added). That formulation presupposes that, absent statutory sanctuary, a DBA — be it a contract of retainer or a litigation funding agreement — was unenforceable. If it were otherwise, the words in emphasis would be otiose. **[MHB/57/1013]**

25 Here, it is also instructive to note the history of section 58(1) of CLSA, which is the legislation governing conditional fee agreements. **[MHB/56/1000]**

26 The statutory scheme for conditional fee agreements was enacted in 1990, but the enabling delegated legislation did not come into force until 1995. Even then, it was for only a limited range of proceedings known as "specified proceedings" (see the Conditional Fee Agreements Order 1995, SI 1995/1674).

27 In *Thai Trading Co v Taylor* [1998] Q.B. 781, the Court of Appeal held a conditional fee agreement that did not fall within that class of proceedings to be enforceable on broad public policy grounds; that approach was followed in *Bevan Ashford v Geoff Yeandle (Contractors) Ltd* [1999] Ch 239.

28 Doubts about that approach were expressed in *Hughes v Kingston upon Hull City Council* [1999] Q.B. 1193. That approach was then rejected in *Awwad v Geraghty & Co* [2001] Q.B. 570 ("***Awwad***"), in which Schiemann LJ said this (at 593): **[MHB/53/989]**

> "*I share Lord Scarman's reluctance to develop the common law at a time when Parliament was in the process of addressing those very problems. It is clear from the careful formulation of the statutes and regulations that Parliament did not wish to abandon regulation altogether and wished to move forward gradually. I see no reason to suppose that Parliament foresaw significant parallel judicial developments of the law ... I would therefore hold that acting for a client in pursuance of a conditional normal fee agreement, in circumstances not sanctioned by statute, is against public policy.*"

29 It is submitted that the same reasoning ought to apply to the Original Section 58AA. In 2011, that is when the Litigation Funding Agreement in question was made, Parliament had defined a new statutory class of agreement; that class had been defined widely (see subsection 3(a)), but Parliament had chosen to provide statutory sanctuary for only one subset of that class, that is, agreements relating to employment matters. Put otherwise, Parliament had chosen to move forward gradually.

30 Indeed, as Lord Phillips MR observed in *R (Factortame Ltd) v Secretary of State for Transport (No 8)* [2002] EWCA Civ 932 at [36], "*where the law* **[MHB/70/1148]**

expressly restricts the circumstances in which agreements in support of litigation are lawful, this provides a powerful indication of the limits of public policy in analogous situations." Agreements within the statutory class, but outside the sanctioned subset are, by parity with *Awwad*, unenforceable.

A(iii) Coherence of the class of DBAs

31 It is submitted that it is inherently improbable that Parliament created a class of contracts, namely, DBAs, that was so heterogeneous that some members of that class were unlawful, some were heavily regulated, and others were entirely lawful and not in need of any regulation at all. This, however, is precisely the conclusion that is reached if Section 58AA is read in such a way as to permit share-of-the-damages agreements not relating to employment matters to continue to be governed solely by the common law.

32 It is far more likely that Parliament intended to create a single homogeneous class of agreements that would be lawful only to the extent provided for by legislation.

33 This is especially so given the fact that from the perspective of a client, a DBA that is a contract of retainer may achieve substantially the same result as a DBA that is a litigation funding agreement, namely, nothing is payable if the claim fails, but a percentage of the proceeds is payable if it succeeds. Indeed, if share-of-the-damages litigation funding agreements were lawful, it would, from the client's perspective, be possible *precisely* to replicate the effect of a DBA that was a contract of retainer; this could be done by the expedient of using the funding to pay the whole of the solicitor's fees. It is submitted that it is inherently improbable that Parliament intended to allow the effect of the Original Section 58AA to be capable of being sidestepped in this way.

34 Even if one looks solely at the position as it was when the Original Section 58AA was made, it is submitted that all DBAs, including litigation funding agreements, were to be treated the same in the sense that they were unenforceable save to the extent that legislation provided otherwise. If it were otherwise, it is difficult to see why Parliament would have taken the trouble to include them within the definition of DBA in the first place.

35 Indeed, it is submitted that subsequent events confirm this. It is clear from the wording of subsection (5) of the Original Section 58AA that Parliament contemplated that further legislation would be made "*in relation to different descriptions of agreements*". This is precisely what happened. The Amended Section 58AA and the Damages-Based Agreements Regulations 2013 were made a mere four years later, and the effect of that legislation was to heavily regulate all share-of-the-damages agreements in litigation generally. It is submitted that this confirms that Parliament had a plan to "*move forward gradually*" (to use Schiemann LJ's words at p. 593). [MHB/57/1013] [MHB/59/1037] [MHB/53/989]

36 For all these reasons, it is submitted that the correct reading of the Original Section 58AA is that it created a new, broadly defined class of contracts known as DBAs. Save to the extent that legislation provided otherwise, all members of that class of contracts were unenforceable, including share-of-the-damages litigation funding agreements.

A(iv) Extrinsic aids to interpretation

37 The Board will not need reminding of the principles in *Pepper v Hart* [1993] A.C. 593, which permits the use of certain ministerial speeches where legislation is ambiguous. It is, however, worth recalling what Lord Hodge said in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3 at [30]: [MHB/71/1180]

> "*Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty ...*"

38 So, materials such as reports and consultation papers may be of assistance for the purpose of determining the purpose of legislation. This may be so even where there is no ambiguity in the legislation. In this regard, it is worth noting that in *PACCAR* (at [56]), Lord Sales even went so far as to take into account a report produced by the Better Regulation Task Force, that being an independent group set up to advise the government. **[MHB/72/1213]**

39 It is also worth noting that Lord Sales said that "*[i]t is legitimate to refer to Explanatory Notes which accompanied a Bill in its passage through Parliament*" (see *PACCAR* at [42]), and that he expanded upon this point at [58] and [59]. Moreover, at [44] and [46], Lord Sales noted that it is permissible to take delegated legislation into account where it was made contemporaneously with the primary legislation. **[MHB/72/1209]** **[MHB/72/1214-1215]** **[MHB/72/1210, 1211]**

40 With the above in mind, it is submitted that the following extrinsic aids to interpretation show that under the Original Section 58AA, DBAs were *not* to be permitted outside the employment context:

(a) ***Explanatory Notes to the primary legislation (2009)***: The Explanatory Notes to the Coroners and Justice Act 2009 had the following to say (at paragraph 701, with added emphasis): "*Section 154 provides for the regulation of damages-based agreements in respect of claims relating to employment matters. It does this by inserting a new section 58AA into the Courts and Legal Services Act 1990.* Damages-based agreements cannot be used in court proceedings *but are commonly used by solicitors and claims managers in cases before an employment tribunal.*" **[MHB/55/999]**

(b) ***Explanatory Notes to the 2013 delegated legislation (2013)***: The third paragraph of the Explanatory Note to the Damages-Based Agreement Regulations 2013 says the following (with added emphasis): "*Prior to amendment by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c.10), section 58AA of the Act only provided for the regulation of DBAs used in employment* **[MHB/61/1051]**

matters. The effect of the amendment, subject to exceptions, is to permit *and regulate the use of DBAs in all civil litigation*."

(c) ***Explanatory Memorandum to the 2013 delegated legislation (2013)***: The Explanatory Memorandum to the Damages-Based Agreement Regulations 2013 says this (at paragraph 4.3): "*Section 45 of the LASPO Act amends section 58AA to permit the use of DBAs in all areas of civil litigation, and to enable the Lord Chancellor to regulate their use*". The policy background is set out in paragraph 7, and under the heading "Civil litigation", and in this regard, paragraph 7.1 says this: "*[u]ntil now, damages-based agreements have not been permitted in litigation before the courts…*" **[MHB/60/1043]** **[MHB/60/1044]**

41 Even ministerial speeches, which are admissible if there is ambiguity, and other external aids, suggest that wide definition of DBAs was intended to enable Parliament (not the courts) to extend the regime in future:

(a) ***Consultation (2009):*** The Ministry of Justice Consultation Paper, *Regulating Damages-based Agreements* (CP 10/09, July 2009), stated that DBAs "*are not permitted in litigation*" and that "*[w]e have no current plans to extend the use of DBAs more widely, but it makes sense to include a provision to allow for this should that be considered to be in the public interest*" (see pages 3-4). **[MHB/67/1095-1096]**

(b) ***House of Lords debate on the primary legislation (2009):*** On the 4th day of debate of the Coroners and Justice Bill, Lord Bach (the Parliamentary Under-Secretary of State for the Ministry of Justice) sought to introduce an amendment that, if passed, would have resulted in section 58AA making no distinction between employment matters and other matters; that amendment was ultimately withdrawn, but Lord Bach had this to say (HL Deb 29 October 2009, vol 713, col 1280): "*[DBAs] are not currently permitted in court proceedings and these amendments do not seek to change this*". **[MHB/62/1054]**

(c) ***Third Reading of the primary legislation in the House of Lords (2009)***: Likewise, on the Third Reading of the Coroners and Justice

Bill, Lord Bach had this to say (HL Deb 5 November 2009, vol 714, col 407): "*Unlike conditional fee agreements, damages-based agreements are not permitted in court proceedings and the amendments do not change this.*" He went on to say this (*ibid*, col 408): "*These amendments do not extend beyond employment matters that may go to the employment tribunal. In particular, any potential extension of damages-based agreements to civil litigation would require further consideration by us at a later date.*" [MHB/63/1058] [MHB/63/1059]

(d) ***House of Lords debate on the delegated legislation (2010)***: When debating a motion to approve the draft Damages-Based Agreements Regulations 2010, Lord Bach said this (HL Deb 25 March 2010, vol 718, col 1152): "*I emphasise that damages-based agreements are not permitted in court proceedings or litigation and that the regulations will not change this.*" He went on to say this (*ibid*, at 1153): "*The Courts and Legal Services Act 1990, as amended, controls the use of damages-based agreements to claims that are capable of being heard by the employment tribunal.*" [MHB/64/1062] [MHB/64/1062]

(e) In the same speech, and in response to Sir Rupert Jackson's recommendation that contingency fees be allowed in civil litigation, Lord Bach said this (HL Deb 25 March 2010, col 1154): "*... [F]resh primary legislation would be required, should the Government decide to implement that recommendation ... any proposals on extending the use of contingency fees to litigation would be subject to full public consultation and legislative scrutiny by Parliament.*" [MHB/64/1063-1064]

(f) ***Written Answer in the House of Commons on the delegated legislation***: In a Written Answer to a question regarding contingency fee agreements, Jonathan Djanogly (Justice Minister) said this (HC Deb 17 November 2010, col 860W): "*Sir Rupert Jackson... suggested that CFAs should be reformed and that DBAs should be permitted in litigation as an additional funding mechanism. That is what we are consulting on.*" [MHB/74/1311]

(g) ***Reports and Impact Assessments (2009-10):*** To the same effect are the 14th Report of Session 2009–10 of the House of Lords Merits of Statutory Instruments Committee and the Ministry of Justice Impact Assessment of 15 November 2010. [MHB/51/926] [MHB/68/1099]

42 It is accepted that some of the materials referred to above post-date the making of the Original Section 58AA (see, in particular, the material referred to in paragraphs 40(b), 40(c), 41(f) and 41(g) above), but it is submitted that when read as a whole, it can be seen that Parliament intended to deal firstly with DBAs in the employment matters, and then with DBAs in civil matters. In particular, the materials clearly indicate that when the Original Section 58AA was made, Parliament intended to restrict enforceable DBAs to those in employment matters pending further consultation and deliberation.

A(v) The common law prior to the making of the Original Section 58AA

43 When the Original Section 58AA received Royal Assent in November 2009, the law on litigation funding was in a nascent state.

44 Litigation funding, including the use of share-of-the-damages agreements, was starting to become an accepted means of financing litigation. This was by reason of the decision of the Court of Appeal in *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655 ("***Arkin***"). [MHB/52/938]

45 *Arkin* is often regarded as being authority for the proposition that in certain circumstances, share-of-the-damages litigation funding agreements are not champertous; that may be so, but the issue that the Court of Appeal decided was somewhat different, namely, whether a non-party costs order should be made against a funder. In any event, *Arkin* did not address the question of whether share-of-the-damages litigation funding agreements were DBAs, not least because *Arkin* was decided not only before the Original Section 58AA was made, but even before the first reading of the Coroners and Justice Bill.

46 As such, the Court of Appeal was not asked to deal with the issue raised by this appeal. In particular, a share-of-the-damages litigation funding agreement may avoid a finding of champerty, but it will still be presumed to be

unenforceable by reason of it being an unregulated DBA for the purposes of the Original Section 58AA.

A(vi) Conclusion on issue 1

47 For all these reasons, it is submitted that the answer to the question posed by Issue 1 is that the Litigation Funding Agreement is unenforceable under English law, and that this was by reason of the operation of the Original Section 58AA.

B. Issue 2: Mauritian Public Policy

48 OGD's formulation of Issue 2, which broadly engages with Norscot's Issue 3, reads as follows: "*Whether the recognition and enforcement of an award of costs which stem from an agreement that is illegal and/or unenforceable would be contrary to the public policy of Mauritius*."

B(i) The applicable public policy is that of Mauritius.

49 Under Article V(2)(b) of the New York Convention, recognition and enforcement of an arbitral award may be refused on public policy grounds by reference to the public policy of that enforcing jurisdiction. That is a fundamental tenet of the New York Convention (See: paragraph 19, p. 433, Giuditta Cordero-Moss, 'New York Convention, Article V(2)(b) [Public Policy]', in Herbert Kronke, Patricia Nacimiento, et al. (eds), Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention (Second Edition) (2024), pp. 427 – 492). **[MHB/93/1776]** **[MHB/94/1785]**

50 In this case, OGD accepts that "*it is the public policy in the international context that will matter and not the public policy that would normally apply when challenging a domestic award*", as held in *Cruz City 1 Mauritius Holdings v. Unitech Limited & Anor* [2014] SCJ 100 (p. 24). **[MHB/81/1429]**

B(ii) Recognition and enforcement of the Final Award would offend the public policy of judicial comity in Mauritius.

51 International comity, in the present context, must be understood as the aspect of Mauritius's own public policy which requires that appropriate respect be given to the laws and legal order of a friendly foreign State. Enforcing an award of costs which stem from the illegal Litigation Funding Agreement would offend that policy.

52 In *Betamax Ltd v State Trading Corporation* [2021] UKPC 14 ("***Betamax***") at [95], the Board left open an avenue to consider the illegality of an agreement in enforcement contexts: **[MHB/76/1357]**

> "*Considerations in relation to the scope and extent of public policy in relation to an illegal contract are best considered in circumstances where the illegality is established and its seriousness can be judged in that context. Moreover, a determination of the public policy of the Republic of Mauritius in relation to any such illegality is an issue on which it would be necessary, particularly in relation to public procurement, to have close regard to the determination of the Supreme Court when such an issue actually arises. The Board therefore does not consider it desirable to lengthen this judgment by consideration of this issue.*"

53 The English position on comity, embodied in a line of authorities starting from *Ralli Bros v Compañia Naviera Sota y Aznar* [1920] 2 K.B. 287 and encompassing *Regazzoni v K.C. Sethia (1944) Ltd* [1958] A.C. 301, is apposite in the present appeal. The Board confirmed its application to Mauritius in *Katra Holdings Ltd v Standard Chartered Bank (Mauritius) Ltd* [2024] UKPC 8 ("***Katra***") at [39]: **[MHB/97/1814]** **[MHB/99/1847]** **[MHB/88/1641]**

> "[*W*]*hile the question before the Board is a matter of the interpretation of the Civil Code, it is helpful when considering international comity to look by way of analogy to the approach of the common law in such circumstances. In English law the court will not enforce a contract (i) if the contract necessarily requires an act in a friendly foreign state which would be unlawful by the law of that state or (ii) where the intention of the parties to the contract is to perform*

an act in a friendly foreign state which is illegal by the law of that country, even if the contract could have been performed in a manner which was legal in that country. The first principle is vouched by Ralli Bros v Compañia Naviera Sota y Aznar [1920] 2 KB 287; the second principle by Foster v Driscoll [1929] 1 KB 470. The House of Lords explained that the basis of both principles is international comity..." (emphasis added).

54 By analogy, the above should apply conversely to the present appeal. Just as the English court will not enforce a contract which necessarily requires an unlawful act in a friendly foreign State out of comity, the Mauritian court should not enforce an award which, in turn, treats and enforces an illegal contract governed under the laws of a friendly foreign State as if it is legal and enforceable.

(a) OGD refers the Board to [24]-[25] of *RBRG Trading (UK) Ltd v Sinocore International Co Ltd* [2018] EWCA Civ 838, in particular [25(4)] where Hamblen LJ held that the degree of connection between the claim sought to be enforced and the relevant illegality will be important. Here, the illegality of the Litigation Funding Agreement is not merely collateral to the factual matrix of the Final Award; instead, it is the source of the particular financial liability embodied in the costs component of the award. There is therefore a close and material connection between the underlying illegality and the liability embodied in the award. **[MHB/98/1842]**

(b) The seriousness of the breach of foreign law, as addressed in [38] of *Katra*, is also satisfied. That is because litigation funding was an area that Parliament specifically wished to regulate and the Litigation Funding Agreement fell afoul of such regulation. **[MHB/88/1641]**

55 It is therefore submitted that requiring OGD to pay Norscot's litigation funding costs, being costs incurred under an agreement that is illegal and/or unenforceable under the laws of a friendly State, goes against notions of

comity. Doing so would disregard respect for another State's laws, in a manner that would be contrary to Mauritius's public policy of comity.

C. Issue 3: The Effect of the Fifth Partial Award and the Final Award

56 OGD's Issue 3 broadly engages with Norscot's Issue 1 and reads: "*If Issues 1 and 2 are answered in the affirmative, is the Appellant disentitled to rely on the illegality and/or unenforceability of the Litigation Funding Agreement under English law, having regard to the finality of the Fifth Partial Award and the Final Award.*" Norscot further regards the absence of expert evidence of English law before the Supreme Court of Mauritius as a factor in assessing OGD's entitlement.

57 OGD is not disentitled from advancing its case on Issue 1. First, the finality of the Fifth Partial Award and the Final Award does not preclude the Board from considering the effect of *PACCAR* since no court or tribunal below had the opportunity to do so. Second, the absence of English law expert evidence before the Mauritian Supreme Court is no bar to OGD relying on English law before the Board. Moreover, there has been no abuse of process which could disentitle OGD from now relying on PACCAR. Each ground is addressed in turn.

C(i) An enforcing jurisdiction retains the right to decline enforcement notwithstanding arbitral finality

58 Notwithstanding the finality of arbitral awards as between the parties, Article V(2)(b) of the New York Convention provides that an enforcing court may refuse enforcement if doing so would be contrary to the public policy of that country. Mauritius has adopted this approach as an enforcing jurisdiction. For example, in *State Trading Corporation v Betamax Ltd* [2019] SCJ 154, the Mauritian Supreme Court found that a SIAC award is contrary to the public policy of Mauritius and refused enforcement by setting aside the provisional order for the recognition and enforcement of the said award. **[MHB/93/1776]** **[MHB/102/1892]**

59 The Board addressed the aforementioned refusal on appeal in *Betamax*. Its ruling that findings of fact and law fall within the tribunal's remit is, however, distinguishable for the following reasons.

(a) *Betamax* concerned a scenario where the tribunal had already considered the legality of the agreement. Where a tribunal has expressly held that a contract is not illegal, "*... the arbitral tribunal's decision on fact and on law is a decision for the arbitral tribunal, if within its jurisdiction; if it holds that the contract is not illegal, then that decision will be final, in the absence of fraud, a breach of natural justice or any other vitiating factor*" ([52]). **[MHB/76/1346]**

(b) In this case, there has not been nor could there have been, due to the timing of *PACCAR*, a determination by the Sole Arbitrator on the issue of illegality as formulated before the Board. The Sole Arbitrator did not find the Litigation Funding Agreement legal and enforceable under English law – instead, he simply dismissed arguments on champerty and maintenance as being outdated in [86] of the Fifth Partial Award. **[MHB/25/578]**

(c) As there has been no finding on the legality of the Litigation Funding Agreement in relation to Section 58AA of the CLSA, the Appellant cannot be said to be reopening or reviewing a finding of fact and law within the tribunal's remit.

60 In any case, the present appeal falls squarely within the "*exceptional cases, where the court under the Model Law provision may be entitled to review the decision on legality...*" ([52]) (which is submitted to be applicable equally to the New York Convention) owing to the timing of *PACCAR* in relation to the Arbitration and enforcement proceedings. **[MHB/76/1346]**

61 *Betamax* is therefore not prohibitive to the Board's consideration of Issue 1.

C(ii) There is no abuse of process that would disentitle OGD from relying on the Litigation Funding Agreement's illegality under English law

62 That the illegality and/or unenforceability of Norscot's Litigation Funding Agreement with Woodsford was not previously considered by the Sole Arbitrator or by the Mauritian Supreme Court does not prevent the Board from considering it now, nor does this fact raise any abuse of process.

63 The timing of *PACCAR* was beyond the parties' control, being handed down by the UK Supreme Court on 26 July 2023 after both the Final Award of 30 November 2016 and the substantive hearing in the Mauritian Supreme Court on 30 June 2023. Mauritian law also imposed no strict requirement on OGD to have raised the decision before the Mauritian Supreme Court. As a result, *PACCAR*'s legal consequences, as presently contended, were not available to the Sole Arbitrator during the Arbitration, nor to the Mauritian Supreme Court during the enforcement proceedings.

64 The Respondent would also not be prejudiced by the Board's consideration of Issue 1 at this juncture. As held in *The Special Tribunal v The Estate Police Association* [2024] UKPC 13, [23], "*[a]n appeal court may allow a new case to be raised if it involves a pure point of law and the court is satisfied that the other party will not be prejudiced in responding to it. This generally requires the appeal court to be satisfied that it has all the facts bearing on the new case as completely as if the point had been raised at first instance and that the proceedings below would not have been conducted differently in that event*". **[MHB/104/1953]** See also *OWH SE i.L. v RTI Ltd & Ors* [2026] EWHC 1015 (Comm) at [75]-[76]. The illegality of the Litigation Funding Agreement is a pure point of law arising from *PACCAR*, the determination of which does not require further inquiry into the facts as decided in the underlying Arbitration. **[MHB/96/1809]**

65 The Board has allowed new issues on appeal in the past. There are no materially distinguishing factors that warrant departing from the same approach.

(a) In *Katra Holdings Ltd v Standard Chartered Bank (Mauritius) Ltd* [2024] UKPC 8, the Board held that "*it is not unknown for the Board to admit a new argument, not run in the courts below, where it is one of pure law, based on facts which are either agreed or no longer* **[MHB/88/1646]**

susceptible to challenge, and where the point can be fully argued out with no prejudice to the opposing party. But even then the Board may decline to do so where the point of law is one upon which the Board would have wished to have the opinion of the courts below, and in particular the appellate court in the territory where the issue had arisen…" ([55]). The Litigation Funding Agreement's illegality is a purely legal question that can be determined on a fixed factual record.

(b) In *Succession Paul de Maroussem v Director General, Mauritius Revenue Authority* [2011] UKPC 30, the Board allowed an "*entirely new point*" on the basis that it is "*of some general importance to the tax system in Mauritius*" ([14]). At stake in this appeal are the principles of international public policy, comity and the enforcement of foreign arbitral awards in Mauritius, all of which are of general importance to the development of this jurisdiction's legal system. **[MHB/103/1939]**

(c) The exceptional timing of *PACCAR* and the general importance of issues it had resulted in set OGD's case apart from *St Nicholas Grammar School Ltd v Armulphy* [2022] UKPC 23 (at [3]) and *Director General, MRA v de Senneville* [2025] UKPC 57 (at [29]), where the Board declined to hear new arguments on appeal as no exceptional grounds were made out. **[MHB/101/1889]** **[MHB/84/1564-1565]**

(d) Any determination of the Litigation Funding Agreement's illegality would not be purely academic. Such a decision would directly affect OGD's liability, if any, to satisfy the Final Award.

66 No previous tribunal or court could have considered the change in the law brought about by *PACCAR* due to the timing of the judgment. The exceptionality of these circumstances justifies the Board's consideration of new issues on appeal.

C(iii) The absence of expert evidence on English law does not disentitle OGD from relying on the Litigation Funding Agreement's illegality under English law

67 The Respondent's Issue 3 suggests that OGD cannot now rely on English law when no expert evidence on the point was put before the Mauritian Supreme Court. That objection is misplaced.

(a) As a matter of practice, there is no absolute bar on raising points of English law without expert evidence, given the common law heritage of the Mauritian legal system, and the accessibility of English legislation and reported authorities.

(b) As the Mauritian Supreme Court held in *Okiyo Maritime Corp. v The State of Mauritius* [2023] SCJ 486, if counsel "*finds foreign judgments on the provisions of the law similar to our domestic law applicable in the matter at hand, he can refer the court to those authorities for guidance*" (p. 8). This approach of considering English law authorities has been consistently accepted by the Supreme Court. See for example, *Boolell v The Independent Commission Against Corruption & Others* [2023] SCJ 53 (pp. 6, 8-9) and *Augustin v The Independent Commission Against Corruption* [2025] SCJ 485 (p. 4). **[MHB/95/1793]** **[MHB/77/1364, 1366-1367]** **[MHB/75/1319]**

(c) The Board has also decided on English law in previous cases. For example, in:

(i) *Cukurova Finance International Ltd & Anor v Alfa Telecom Turkey Ltd* [2013] UKPC 2, where the contract between the parties involved share charges governed by English law with express reference to English statute (being the Financial Collateral Arrangements (No. 2) Regulations 2003, SI 2003 No 3226); and **[MHB/82/1436]**

(ii) *Lea Lilly Perry and another v Lopag Trust Reg and another No 2* [2023] UKPC 16, where the Board decided that " ... *if the foreign legal system is a common law system which adopts a similar approach to legal reasoning and statutory interpretation to that of English law, the English judge at first instance is entitled and required to bring to bear his or* **[MHB/89/1655]**

her knowledge of the common law and the rules of statutory construction in analysing the foreign law. So too is the appellate court." [12].

68 However, without prejudice to OGD's primary position that the Board is entitled to determine the English law issues as arising from *PACCAR*, should the Board decide that such issues should first be considered by the Mauritian judiciary, OGD respectfully requests in the alternative that the present appeal be remitted back to the Mauritian Supreme Court for reconsideration, specifically reconsideration in the light of OGD's case advanced in this appeal concerning the public policy concerns behind recognising and enforcing the Final Award. The availability of remittal was confirmed in *Mauritius Telecom Ltd & Ors v Emtel Ltd* [2024] UKPC 9, where the Board, upon the parties' agreement, remitted the case back to the Mauritian Court of Civil Appeal for determination of issues the Mauritian court had not yet dealt with ([329(d)]). **[MHB/92/1773]**

IV. Conclusion

69 **OGD's Issue 1**: (1) following *PACCAR*, the Litigation Funding Agreement is a DBA; (2) being made on 5 May 2011, its enforceability is governed by the Original Section 58AA; (3) the Original Section 58AA presupposed that DBAs were unenforceable as a class and sanctioned only compliant employment DBAs; (4) applying *Awwad*, the common law could not properly be developed in parallel so as to render other DBAs enforceable; (5) the Litigation Funding Agreement was therefore unenforceable under English law.

70 **OGD's Issue 2:** (1) comity is part of Mauritius's international public policy as held in *Katra*; (2) enforcing an award of costs which stems from an illegal and unenforceable agreement governed by the laws of a friendly State goes against comity; (3) enforcement should therefore be refused as Mauritius's international public policy of comity would otherwise be violated.

71 **OGD's Issue 3**: (1) the finality of the Fifth Partial Award and the Final Award does not preclude the Board from considering the illegality of the Litigation Funding Agreement in enforcement proceedings as no tribunal or court below

had the opportunity to do so; (2) *Betamax* is distinguishable as the Sole Arbitrator never determined the Litigation Funding Agreement's legality; (3) no abuse of process arises, since the timing of *PACCAR* was beyond the parties' control and the Respondent suffers no prejudice from the Board deciding a pure point of law; (4) the absence of English law expert evidence before the Mauritian Supreme Court is no bar to reliance on English law before the Board; (5) OGD is accordingly not disentitled from relying on the Litigation Funding Agreement's illegality, but in the alternative the appeal should be remitted to the Mauritian Supreme Court.

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