JCPC/2025/0116

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THE SUPREME COURT OF MAURITIUS

BETWEEN:

OGD SERVICES HOLDINGS LIMITED

Appellant

AND

NORSCOT RIG MANAGEMENT PVT LIMITED
(MAURITIUS)

Respondent

RESPONDENT'S WRITTEN CASE

26 October 2026

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I. INTRODUCTION

1. This Written Case is filed on behalf of the Respondent, Norscot Rig Management Pvt Limited (Mauritius) ("**Norscot**"), in answer to the Written Case of the Appellant, OGD Services Holdings Limited ("**OGD**"),[1] filed on 12 October 2026 ("**OGD WC**").

2. The agreed facts of this appeal are set out in the Statement of Facts and Issues filed on 12 August 2026 (and amended on 25 August 2026) ("**SFI**"). References are also made to the Reproduced Record filed on 12 August 2026 ("**RR**") in the format: [**RR/Tab Number/Page Number/Paragraph Number**].

3. This appeal concerns the recognition and enforcement in Mauritius of a final and binding arbitral award rendered nearly ten years ago in a London-seated ICC arbitration (the "**Arbitration**"). By a Final Award dated 30 November 2016, and an addendum to the Final Award dated 2 February 2017 (the "**Final Award**"), the Sole Arbitrator, Sir Philip Otton, awarded Norscot, among other things, the costs of litigation funding which it had obtained to pursue the Arbitration (the "**Litigation Funding Costs**"). OGD now seeks to resist enforcement of the Final Award on the ground that the underlying litigation funding agreement was allegedly illegal and unenforceable under English law, and that enforcement of the Final Award would therefore be contrary to the public policy of Mauritius.

4. A brief account of the relevant factual and procedural background is necessary to place OGD's arguments in their proper context.

   (i) On 5 May 2011, Norscot entered into a litigation funding agreement (the "**LFA**") with a litigation funder. Under the LFA, the funder was entitled, in the event of Norscot's success in the Arbitration, to receive the greater of (a) three times the

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[1] OGD was formerly known as Essar Oilfields Services Limited. **[SFI, para. 4]**

amount advanced by it; or (b) 35% of Norscot's total recovery. **[SFI, para. 11(a)]**

(ii) On 17 December 2015, the Sole Arbitrator issued the Fifth Partial Award (the "**Fifth Partial Award**"), in which he determined that Norscot was entitled to recover its Litigation Funding Costs from OGD as "*other costs*" under Sections 59 and 63 of the Arbitration Act, 1996 and Article 31(1) of the ICC Rules. **[RR/3/437/81]** In reaching that conclusion, the Sole Arbitrator considered OGD's arguments based on maintenance and champerty, which he described as "*out-dated*". **[RR/3/439/86]** He also made serious findings concerning OGD's conduct, including that it had sought "*to drive Norscot 'from the judgment seat'*", had deliberately caused or substantially contributed to Norscot's impecuniosity, and had left Norscot with no credible alternative source of funding. **[RR/3/440-441/89-91]** Having also considered the terms of the LFA, which he found reflected "*standard market rates*", the Sole Arbitrator determined that the Litigation Funding Costs should be awarded on an indemnity basis, leaving only their quantum to be determined subsequently. **[RR/3/441-442/92-96]**

[MHB/25/576/81]

[MHB/25/578/86]

[MHB/25/579-580/89-91]

[MHB/25/580-581/92-96]

(iii) OGD challenged the Fifth Partial Award before the English High Court under section 68 of the Arbitration Act, 1996. That challenge was dismissed, and permission to appeal was refused. **[RR/3/468-482; RR/3/484; SFI, para. 12]**

[MHB/26/607-621

MHB/27/623

(iv) Subsequently, by the Final Award, the Sole Arbitrator quantified the Litigation Funding Costs which he had already determined were recoverable under the Fifth Partial Award. In particular, he awarded Norscot USD 3,565,814, representing 35% of its recovery under the terms of the LFA. **[RR/2/63/137]** The Sole Arbitrator recorded that OGD had raised no specific objection either to the amounts claimed or to the basis on which they had been calculated. **[RR/2/60-61/132-135]** He was satisfied that the costs had been incurred and that Norscot's calculations were accurate. **[RR/2/61-62/136]** OGD did not challenge the Final Award before the English courts.

[MHB/19/202/137]

[MHB/19/199-200/132-135]

[MHB/19/200-201/136]

(v) Norscot thereafter sought recognition and enforcement of the Final Award in Mauritius. The Supreme Court of Mauritius granted a provisional enforcement order on 22 March 2022 ("**Provisional Order**"). [**RR/3/199-201**] Subsequently, by its judgment dated 6 November 2023, the Court dismissed OGD's application to set that order aside. [**RR/7/524-534**] It is that decision which is now the subject of this appeal (the "**Judgment under Appeal**"). [MHB/23/338-340] [MHB/31/663-673]

5. As is evident from the above, it was the Fifth Partial Award which determined Norscot's entitlement to recover the Litigation Funding Costs from OGD. The Final Award, which is the award Norscot seeks to enforce in Mauritius, did not determine that entitlement afresh. Rather, it quantified the costs which had already been awarded pursuant to the Fifth Partial Award. OGD's present arguments concerning the alleged illegality of the LFA are therefore not directed at the quantification of the costs under the Final Award. They are, in substance, an attempt to reopen the antecedent determination of Norscot's entitlement to recover those costs, notwithstanding the finality of the Fifth Partial Award.

6. Against this background, OGD's appeal is misconceived and should be dismissed, for the following reasons:

(i) First, OGD seeks to advance a materially revised statutory case which falls outside the grounds on which it was granted leave to appeal and which was not advanced in its Notice of Appeal filed on 10 November 2025 ("**NoA**").[2] OGD cannot advance that new case without first obtaining the Judicial Committee's permission. This is discussed in **Section III** below.

(ii) Second, OGD cannot use enforcement proceedings in Mauritius to reopen the final and binding determination of Norscot's entitlement to recover the Litigation Funding Costs made in the Fifth Partial Award. OGD's challenge to the Sole Arbitrator's power to make that award was dismissed by the English High Court, and the Fifth Partial Award has never been set aside. Nor should

[2] As a result, much of OGD's Written Case challenges the Judgment under Appeal on grounds not advanced before the Supreme Court of Mauritius. Consequently, in the event the Board allows those issues to be heard, Norscot's Written Case also addresses matters which were not considered by that Court.

OGD be permitted to advance, for the first time before the Board, a new argument founded on application of English law which was never raised before the Sole Arbitrator, the English courts or the Supreme Court of Mauritius. OGD seeks to justify this on the basis that its argument raises a "*pure point of law*". However, OGD has not established why the Board should depart from its usual practice of declining to entertain new points on appeal. In any event, even if OGD were permitted to advance the argument, a contested issue of fact would remain to be determined. This is discussed in **Section IV** below.

(iii) Third, even if OGD were entitled to advance that argument, it is wrong as a matter of English law. The LFA was lawful and enforceable under English law when it was entered into in 2011. Section 58AA of the Courts and Legal Services Act 1990 ("**CLSA**"), as it stood in 2011 (the "**Original Section 58AA**"), did not render the LFA illegal or unenforceable. The subsequent decision of the UK Supreme Court in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28 ("**PACCAR**"), on which OGD relies, does not establish otherwise. This is discussed in **Section V** below. [MHB/72/1194-1268],

(iv) Finally, and in any event, OGD has failed to establish any basis for refusing enforcement of the Final Award on grounds of Mauritian public policy. Even if the LFA was unenforceable under English law (which is denied), it would not follow that enforcement of the Final Award would be contrary to the international public policy of Mauritius. The public policy exception under Article V(2)(b) of the New York Convention is narrow and exceptional. OGD's reliance on international comity provides no basis for expanding that exception to permit a collateral challenge to a final and binding arbitral award. This is discussed in **Section VI** below.

II. ISSUES TO BE DETERMINED

7. As OGD acknowledges at paragraph 9 of its Written Case, the parties were unable to agree on the precise formulation of the issues for determination by the Board. The SFI therefore records each party's proposed formulation of the issues. Although the formulations and the order in which the issues are presented differ, the issues raised by the parties substantially overlap.

8. Norscot has organised its submissions by reference to the heads of argument that counsel propose to advance at the hearing, consistently with paragraph 5.17 of the Practice Directions of the Judicial Committee of the Privy Council, 2026 ("**PDs**"). In doing so, Norscot addresses each of the issues identified in the SFI and sets out its position on their determination.

9. In addition to the issues identified in the SFI, Norscot raises a preliminary objection to OGD's attempt to advance a materially revised statutory case under section 58AA of the CLSA without having obtained permission to do so. Norscot submits that, if this preliminary objection is upheld, the appeal must fail, and the Board would not need to determine any of the substantive issues identified by the parties. Norscot therefore addresses the preliminary objection first, before turning, in the alternative, to the substantive issues.

10. For completeness, the Conclusion to this Written Case sets out Norscot's proposed answers to each of the issues as formulated by both OGD and Norscot in the SFI.

III. PRELIMINARY OBJECTION: OGD CANNOT BE PERMITTED TO ADVANCE ITS REVISED CASE UNDER SECTION 58AA

11. OGD asks the Board to overturn the Supreme Court of Mauritius's decision refusing to set aside the Provisional Order. Yet the case which OGD now seeks to advance is materially different from that for which it obtained leave to appeal. In its Written Case, OGD has abandoned the statutory case pleaded thus far, and substituted a materially

different case, without seeking permission to amend those grounds. This, for reasons explained below, is impermissible.

12. Following the Judgment under Appeal, OGD applied to the Supreme Court of Mauritius on 22 November 2023 for leave to appeal to the Board, pursuant to section 42(2) of the International Arbitration Act, 2008 ("**IAA**") and Sections 81(1)(b) and 81(2)(a) of the Constitution of Mauritius.[3] This application was supported by an affidavit of Mangesh Jayram, which identified at paragraph 5(a) the basis of OGD's contention that the LFA was illegal and unenforceable under English law: **[RR/9/541/5(a)]** [MHB/33/680/5(a)]

> "*The 35% recovery awarded was an unenforceable and illegal recovery since it was claimed and awarded pursuant to an unenforceable and illegal Damages Based Agreement contained in Clause 8 of the Litigation Funding Agreement that was governed by English law and subject to English exclusive jurisdiction (see Clause 35 of ANNEX 4). In particular, as a matter of English law, as now held by the recent English Supreme Court decision of R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others [2023] UKSC 28 (Judgment of 26 July 2023) such an arrangement is a Damages Based Agreement falling within s.58AA of the Courts and Legal Services Act 1990 ('CLSA') (as amended in 2013) and is unenforceable and illegal unless it complies with the requirements of s.58AA CLSA and the Damages Based Agreements Regulations 2013 (SI 2013/609) issued pursuant to s.58AA CLSA, which it did not comply with* […]"
>
> (emphasis added)

[3] Norscot notes, for completeness, that the statutory right of appeal in the present proceedings arises under section 4(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001 (the "**2001 Act**"), rather than section 42(2) of the IAA, on which OGD relied in its application for leave to appeal. Section 42(2) concerns appeals from final decisions of the Supreme Court under the IAA, whereas the present proceedings concern enforcement of an arbitral award made in London and are governed by the 2001 Act. Section 4(3) of the 2001 Act expressly provides for an appeal as of right to the Board, consistently with section 81(1)(d) of the Constitution of Mauritius. Norscot therefore takes no objection to OGD's right of appeal on account of its reliance on an incorrect statutory provision.

13. OGD's case, therefore, was that following *PACCAR*, the LFA constituted a damages-based agreement ("**DBA**") within the meaning of section 58AA of the CLSA "*as amended in 2013*" (the "**Amended Section 58AA**"), and was unenforceable because it did not comply with the amended provision and the Damages-Based Agreements Regulations 2013 ("**2013 Regulations**"). On 13 May 2025, the Supreme Court of Mauritius granted OGD conditional leave to appeal to the Board, followed by final leave on 15 September 2025. OGD subsequently filed its Grounds of Appeal on 10 November 2025, which were issued by the Registry on 17 November 2025. Importantly, OGD maintained precisely the same statutory case in paragraph 7(a) of its Grounds of Appeal, expressly relying on the Amended Section 58AA and the 2013 Regulations. **[OGD's Grounds of Appeal, para. 7(a)]**

14. On 12 December 2025, Norscot filed its Grounds of Objection to OGD's appeal ("**Norscot's Objections**"). In those objections, Norscot expressly identified the fundamental difficulty with OGD's reliance on the 2013 statutory regime. At paragraph 3.3, Norscot submitted:

> "*It is undisputed that the LFA was entered into on 5 May 2011. It therefore predates the coming into force of these statutory provisions (which admittedly do not operate with retrospective effect)*".

15. It was against this background that, in its Written Case served on 12 October 2026, OGD expressly abandoned the statutory basis on which it had previously sought to impugn the LFA. At paragraph 5 of its Written Case, OGD states:

> "*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 Services Act 1990 (version as of 2011), with such illegality directly flowing from PACCAR.*"

16. This is a material change in OGD's case. Having been confronted with the difficulty that the 2013 statutory regime postdated the LFA, OGD now seeks to abandon its reliance on that regime and substitute a different statutory case based on the Original Section 58AA. As explained in Section V(D) below, the amendments introduced in 2013 substantially altered the statutory framework governing DBAs. The Original Section 58AA contained operative provisions concerning DBAs relating to employment matters. The 2013 amendments extended the operative statutory regime to DBAs more generally. OGD's original case rested on the alleged failure of the LFA to comply with the amended statutory regime. Its present case rests on the materially different proposition that the Original Section 58AA already rendered non-employment DBAs unenforceable, notwithstanding the limited scope of its operative provisions. Yet, notwithstanding the express objection raised by Norscot in December 2025, OGD has not applied for permission to amend its Grounds of Appeal. Instead, it has sought to substitute a different statutory basis for its case simply by announcing that change in its Written Case.

17. The Judicial Committee (Appellate Jurisdiction) Rules 2024 ("**JCPC Rules**") and the Practice Directions regulate the amendment of grounds of appeal. Rule 35(6) of the JCPC Rules provides that a notice of appeal may be amended with the permission of the Registrar. PD 4.5 similarly provides that amendments to grounds of appeal may be permitted where the Registrar is satisfied that they would assist the determination of the appeal without unfairly prejudicing the respondent or causing undue delay. Further, PD 4.23 prescribes the procedure by which an appellant who has obtained permission to appeal from the court below may seek permission to rely on additional grounds, including grounds not previously advanced, by making a procedural application under Rule 35.

18. OGD's failure to follow the prescribed procedure is not a mere technical irregularity. Had OGD applied under Rule 35 for permission to amend its Grounds of Appeal, JCPC Rule 35(4) would have entitled Norscot to oppose that application by filing a notice of objection. The proposed amendment would then have been considered in accordance with Rule 35(6) and PD 4.5, including whether it would unfairly prejudice Norscot or cause undue delay. Norscot would have opposed the application on substantive grounds, including that OGD was seeking to introduce a materially different case involving

questions of English law which had never been considered by the Supreme Court of Mauritius. Norscot would also have submitted that these were questions on which the Board would benefit from the analysis of the Supreme Court of Mauritius, particularly given that English law is foreign law for the purposes of the present appeal.

19. Nor are these matters necessarily capable of determination as pure questions of law on the existing record. OGD's revised case raises questions concerning the interpretation and application of English statutory and common law, potentially requiring consideration of the terms of the LFA and other documentary evidence. These include, depending on the applicable statutory framework, questions concerning the applicability of the 2010 Regulations and compliance with any relevant requirements, and, if the operative provisions of the Original Section 58AA did not apply, whether the LFA was nevertheless unenforceable as champertous under English common law. These are matters which could have informed both Norscot's opposition to the proposed amendment and the Board's determination of whether permission should be granted and, if so, on what terms. By seeking to introduce its revised statutory case directly through its Written Case, OGD has deprived Norscot of the opportunity to oppose its admission through the procedure prescribed by the JCPC Rules, and bypassed the scrutiny which that procedure requires.

20. The Practice Directions also expressly address the introduction of new arguments in support of existing grounds of appeal. PD 4.20 provides that where an appellant seeks to rely on an argument which was not considered by the court below, that fact must be identified at the start of the precis, and in the grounds of appeal, which should explain why the argument was not raised in the earlier proceedings and why the Board should entertain it. Thus, even where a new argument falls within the general scope of an existing ground of appeal, the appellant must identify and justify its introduction. Although OGD identified in its Grounds of Appeal that it sought to rely on *PACCAR*, it did not identify or justify the materially different statutory case concerning the Original Section 58AA which it now seeks to advance.

21. These requirements reflect the established principle that an appellant cannot materially alter its pleaded case merely by advancing different arguments in its written submissions.

In *Gover v Propertycare Ltd* [2006] EWCA Civ 286, at [10]-[13], Buxton LJ held that the appellate court's jurisdiction was constrained by the grounds of appeal and the permission granted. He further observed that a departure from the case advanced below should be clearly identified and permission sought, and declined to entertain a new argument for which no such permission had been obtained. Similarly, in *Hickey v Secretary of State for Work and Pensions* [2018] EWCA Civ 851, at [73]-[75], Hickinbottom LJ emphasised that the procedural requirements governing appeals are "*not mere aspirations*", and that an appellant wishing to add to or amend its grounds must make a formal application for permission to do so. In particular, he observed: [MHB/85/-1573-1574/10-13] [MHB/86/-1591-1593/73-75]

> "*The appeal court's jurisdiction is constrained by the scope of the grounds of appeal and of the permission that has been granted* […] *Therefore, where an appellant who has obtained permission to appeal wishes to rely upon a ground of appeal for which he has not previously sought permission to appeal, he must seek permission to amend his grounds of appeal under CPR rule 52.17.* […] *Grounds of appeal cannot be covertly amended, for example by including changes to them in the skeleton argument.* [...] *where an appellant proposes substantial changes to the grounds of appeal from those upon which he has obtained permission to appeal but has made no application – or no reasonably prompt application – to amend, he should not expect an appeal court to be sympathetic. Appeal courts have a variety of sanctions at their command should a party fail to comply with important mandatory procedural rules that apply to appeals*."
>
> (emphasis added)

22. OGD has not followed the prescribed procedure. Its formal Grounds of Appeal, filed in November 2025, expressly relied on the Amended Section 58AA and the 2013 Regulations. Following Norscot's objection to that case in December 2025, OGD has now sought to substitute a materially different statutory case based on the Original Section 58AA. OGD has not applied for, much less obtained, permission to amend its Grounds of Appeal. Instead, it has purported to effect this change through paragraph 5 of its Written Case. Norscot submits that this is impermissible. If OGD's revised case

constitutes a materially different ground of appeal, it cannot be advanced without permission to amend. Even if characterised as a new argument supporting its existing public policy ground, OGD cannot simply introduce that argument in its Written Case without addressing the procedural requirements governing arguments not considered below.

23. Furthermore, by November 2025, when OGD filed its formal Grounds of Appeal, *PACCAR* had been available for more than two years. Nevertheless, OGD chose to advance a case expressly based on the Amended Section 58AA and the 2013 Regulations. As noted above, Norscot specifically objected to that reliance in December 2025, pointing out that the LFA predated those provisions. Yet, OGD did not seek to amend its grounds. It waited until October 2026 – less than two months before the hearing – to announce, in its Written Case, that it was abandoning the original statutory basis of its appeal and would instead rely on the Original Section 58AA. Whatever explanation OGD may offer for not advancing its present argument before *PACCAR* was decided, that explanation cannot justify its failure to advance that argument in its Grounds of Appeal, or to seek permission to amend those grounds after Norscot had identified the difficulty with its original case.

24. The Board should therefore uphold Norscot's preliminary objection and decline to entertain OGD's revised statutory case. Insofar as OGD's appeal depends on establishing the alleged unenforceability of the LFA under the Original Section 58AA, the appeal must consequently fail.

IV. OGD SHOULD NOT BE PERMITTED TO RELY ON THE ALLEGED UNENFORCEABILITY OF THE LFA TO RESIST ENFORCEMENT OF THE FINAL AWARD

25. Norscot's Issue 1 / OGD's Issue 3 concerns whether OGD is entitled, in this appeal against enforcement of the Final Award, to rely on the alleged illegality or unenforceability of the LFA under English law, having regard to the finality of the Fifth Partial Award and the Final Award, and the absence of expert evidence of English law before the Supreme Court of Mauritius. Norscot submits that the answer is no.

26. This issue is distinct from Norscot's preliminary objection addressed in Section III above. Even if OGD were entitled to advance its revised statutory case under the Original Section 58AA, Norscot submits that the Board should decline to entertain it. OGD seeks to reopen Norscot's entitlement to recover the Litigation Funding Costs, which was finally determined in the Arbitration, by advancing an argument of English law which it failed to raise before the Sole Arbitrator, the English courts, and the Supreme Court of Mauritius. There are no exceptional circumstances justifying its introduction for the first time before the Board.

27. The starting point is the finality of the arbitral awards. As noted above, in the Fifth Partial Award, the Sole Arbitrator determined that Norscot was entitled to recover the Litigation Funding Costs, having considered OGD's objections based on maintenance and champerty, the circumstances in which Norscot obtained funding and the reasonableness of the LFA's terms. [**SFI, para. 11(a)**] OGD subsequently challenged the Sole Arbitrator's power to award those costs before the English High Court, but that challenge was dismissed. [**SFI, para. 12**] The Final Award quantified the Litigation Funding Costs recoverable by Norscot, and OGD did not challenge that award before the English courts. Although the Sole Arbitrator was not asked to determine the argument now advanced under the Original Section 58AA, OGD seeks to deploy that argument to resist enforcement of a costs liability which was finally determined in the Arbitration and has not been set aside by the courts of the seat.

28. The Board's settled practice is to refuse permission for new grounds or arguments to be raised for the first time before it, save in "*exceptional circumstances*": *St Nicholas Grammar School Ltd v Arnulphy* [2022] UKPC 23, at [3]; *Director General, MRA v de Senneville* [2025] UKPC 57, at [29] ("***de Senneville***"). This practice reflects the fundamental principle of finality in litigation. As the Board explained in *The Special Tribunal v Estate Police Association* [2024] UKPC 13, at [22], parties are expected to advance their entire case at first instance, and it is generally unjust that a party which has successfully defended a case advanced on one basis should be required to answer a materially different case on appeal. An appellate court therefore approaches the introduction of new arguments with considerable caution.

[MHB/101/1889/3]

[MHB/84/1564-1565/29]

[MHB/104/1953/22]

29. There are no exceptional circumstances in the present case. The Original Section 58AA, on which OGD now relies, was already in force when the LFA was entered into on 5 May 2011. [**OGD WC, para. 14**] OGD therefore had several opportunities to advance its present argument. It could have done so before the Sole Arbitrator, when it challenged Norscot's entitlement to recover the Litigation Funding Costs, including on grounds of champerty. It could have raised the point in its subsequent challenge to the Fifth Partial Award before the English High Court. It could also have advanced the argument before the Supreme Court of Mauritius in the proceedings concerning recognition and enforcement of the Final Award. At none of those stages did OGD contend that the Original Section 58AA rendered the LFA unenforceable.

30. OGD attempts to justify its failure to advance the argument earlier by reference to the timing of the UK Supreme Court's decision in *PACCAR*. It contends that the decision brought about a 'change' in English law which could not have been considered by the Sole Arbitrator or the courts before which the earlier proceedings were conducted. [**OGD WC, paras. 60, 66**] This submission is misconceived. *PACCAR* concerned the interpretation of existing statutory language. It did not enact a new prohibition against litigation funding agreements. In particular, the contention now advanced by OGD concerning the effect of the Original Section 58AA is a question of statutory interpretation which could have been raised by reference to the legislation already in force. The subsequent delivery of *PACCAR* does not, without more, explain why OGD failed to advance that contention earlier.

31. Further, OGD was expressly aware of the potential relevance of *PACCAR* well before the hearing in the Supreme Court of Mauritius. In its written submissions dated 15 June 2023, OGD referred to the then-pending appeal before the UK Supreme Court, asserted that the LFA was a DBA, and anticipated that a decision in favour of the appellants in *PACCAR* would render the LFA unenforceable. [**RR/4/488-489/11**] *PACCAR* was subsequently decided on 26 July 2023, more than three months before the Supreme Court of Mauritius delivered the Judgment under Appeal on 6 November 2023. OGD could have sought permission to place the judgment before that Court and make further submissions concerning its implications, particularly given that it had already drawn the Court's [MHB/28/627-628/11]

attention to the pending decision in *PACCAR*. **[RR/4/488-489/11]** It did not do so. Instead, it allowed the proceedings to conclude without advancing the statutory argument on which it now relies. It cannot now contend that the timing of *PACCAR* constitutes an exceptional circumstance justifying the introduction of that argument for the first time before the Board. [MHB/28/627-628/11]

32. OGD further contends that its present case involves a pure question of law which can be determined without any further inquiry into the facts. **[OGD WC, para. 64]** Even assuming that to be correct (which, for the avoidance of doubt, is denied), it does not follow that the Board should entertain the argument. In *Katra Holdings Ltd v Standard Chartered Bank (Mauritius) Ltd* [2024] UKPC 8, at [55], the Board recognised that it may decline to entertain a new argument even where it raises a pure question of law on agreed or incontrovertible facts, particularly where the Board would have wished to have the views of the courts below. Similarly, in *Ryan-Cox v Cox* [2019] UKPC 32, at [11], the Board confirmed that it would not ordinarily entertain a new point of law without the benefit of the judgments below, even where the relevant facts were undisputed. [MHB/88/1646/55] [MHB/100/1882-1883/11]

33. Those considerations apply with particular force here. OGD asks the Board to determine, for the first time on appeal, whether the Original Section 58AA rendered the LFA unenforceable as a matter of English law and, if so, whether enforcement of the Final Award would violate the international public policy of Mauritius. Neither question was considered by the Supreme Court of Mauritius on the statutory basis now advanced by OGD. Had the argument been raised before that Court, Norscot would have had the opportunity to address the relevant English law, including through such expert evidence as might have been appropriate, and to develop its submissions on the implications for Mauritian public policy. The Board would also have had the benefit of the Mauritius Supreme Court's consideration of those questions. In *Betamax Ltd v State Trading Corporation (Mauritius)* [2021] UKPC 14, at [95] ("***Betamax***"), the Board itself emphasised the importance of having "*close regard to the determination of the Supreme Court*" when considering questions concerning the public policy of Mauritius. That consideration provides a further reason why OGD should not be permitted to advance its present case for the first time before the Board. [MHB/76/1353/95]

34. Consistently with that approach, in *de Senneville*, at [29], the Board declined to entertain a new argument that could and should have been advanced before the Supreme Court of Mauritius, observing that it raised questions of substance on which the Board would have wished to have the views of the local court. The same approach was adopted in *Dhunnoo v Cheekooree* [2025] UKPC 36, at [16]. [MHB/84/1564-1565/29]

35. OGD's reliance on the authorities cited at paragraphs 67(b) and (c) of its Written Case does not assist it. The decisions of the Supreme Court of Mauritius in *Okiyo Maritime Corp v State of Mauritius* [2023] SCJ 486, *Boolell v The Independent Commission Against Corruption* [2023] SCJ 53 and *Augustin v The Independent Commission Against Corruption* [2025] SCJ 485 concern the use of English authorities as persuasive guidance in determining questions of Mauritian law. Nor does the fact that the Board has considered questions of English law in other appeals, including *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd* [2013] UKPC 2, assist OGD. Similarly, *Lea Lilly Perry v Lopag Trust Reg (No 2)* [2023] UKPC 16 recognises that the extent to which expert evidence is required to ascertain foreign law depends upon the circumstances of the particular case. None of these authorities establishes that a party is entitled to advance a new question of foreign law for the first time on appeal, without having raised it before the courts below. [MHB/95/1786-1794] [MHB/77/1359-1372] [MHB/75/1316-1326] [MHB/82/1436-1546] [MHB/89/1649-1670]

36. Nor does OGD's alternative request for remittal to the Supreme Court of Mauritius assist it. [**OGD WC, para. 68**] OGD had ample opportunity to advance its present argument before that Court and subsequently to include it in its Grounds of Appeal. Having failed to do so, OGD should not be permitted to obtain a remittal merely to pursue a revised statutory case which it could and should have advanced earlier. OGD's reliance on *Mauritius Telecom Ltd v Emtel Ltd* [2024] UKPC 9 is misplaced. In that case, the Board remitted the matter to the Mauritius Court of Civil Appeal because that Court had determined only some of the grounds of appeal originally raised before it, and the parties agreed that the remaining grounds should be determined on remittal (at [329(d)]). That is plainly different from the present case, where OGD seeks a remittal to advance a materially different case which it failed to raise before the Supreme Court of Mauritius, and to which Norscot does not consent. Indeed, in *Mauritius Telecom*, the Board itself [MHB/92/1685-1773]

deprecated the belated introduction of a defence which could and should have been raised earlier, holding that it constituted an abuse of process, at [325]-[326]. Remittal in the present circumstances would unnecessarily prolong proceedings concerning the enforcement of an arbitral award which has been final and binding for nearly ten years,[4] and undermine the principles of finality governing both international arbitration and appellate proceedings, and also run contrary to the objectives enshrined in the UNCITRAL Model Law: *Peepul Capital Fund II LLC v Vsoft Holdings LLC* [2019] UKPC 47, at [55]. [MHB/92/1772/325-326]

37. Nor can OGD rely on Norscot's decision not to oppose its application for final leave to appeal before the Supreme Court of Mauritius. Contrary to OGD's suggestion in paragraph 13 of its Grounds of Appeal, that decision did not amount to waiver of Norscot's objection to the introduction of points not advanced before that Court. The appeal was available as a matter of right, and Norscot's non-opposition to the formal grant of leave cannot be construed as consent to OGD advancing new grounds or arguments. Indeed, on 12 December 2025, Norscot expressly objected to OGD's reliance on grounds not advanced before the Supreme Court of Mauritius. **[Norscot's Objections, paras. 4-6]**

38. For these reasons, Norscot submits that OGD should not be permitted to rely on the alleged unenforceability of the LFA under the Original Section 58AA to resist enforcement of the Final Award. OGD's entitlement to contest the recovery of the Litigation Funding Costs was exercised in the Arbitration, and the resulting awards are final and binding. The new statutory argument was never advanced before the Sole

[4] The procedural history of OGD's application for leave illustrates both the prejudice already caused to Norscot by delay and the undesirability of prolonging these enforcement proceedings further. OGD applied for leave on 22 November 2023. By 15 January 2024, Norscot had made clear that it did not oppose the grant of leave and opposed only OGD's application for a stay of execution. Norscot thereafter repeatedly sought to have the uncontested application for leave determined separately from the contested stay application, including through joint requests made with OGD. Those efforts were unsuccessful, and leave was not granted until 13 May 2025, approximately eighteen months after OGD's application had been made. To avoid further delay to the determination of the appeal, Norscot ultimately withdrew its opposition to the stay. Throughout that period, Norscot remained unable to enforce the benefit of a final and binding arbitral award rendered nearly ten years ago. Norscot respectfully submits that this history, and the prejudice occasioned by the resulting delay, weigh strongly against any course that would defer enforcement yet further.

Arbitrator, the English courts or the Supreme Court of Mauritius, and no expert evidence concerning that argument was placed before the latter Court. There are no exceptional circumstances justifying its introduction for the first time before the Board. Accordingly, Norscot's Issue 1 should be answered in the negative, and OGD's Issue 3 should be determined in Norscot's favour.

V. THE LFA IS ENFORCEABLE UNDER ENGLISH LAW

39. Norscot's Issue 2 / OGD's Issue 1 concerns whether following *PACCAR*, the Litigation Funding Agreement is illegal and/or unenforceable as a matter of English law. Notwithstanding Norscot's submission that OGD should not be permitted to advance its revised case concerning the Original Section 58AA, Norscot addresses that case below for completeness. As explained in this section, OGD's argument is, in any event, misconceived. Contrary to OGD's contention, the LFA was not illegal or unenforceable under English law when it was entered into in 2011.

40. OGD contends that the LFA was unenforceable under English law when it was entered into on 5 May 2011. Its argument, summarised at paragraph 12 of its Written Case, is that: (i) following *PACCAR*, the LFA falls within the statutory definition of a DBA; (ii) its enforceability must therefore be determined by reference to the Original Section 58AA; and (iii) the Original Section 58AA rendered DBAs generally unenforceable, save for compliant DBAs relating to employment matters. Since the LFA did not relate to an employment matter, OGD contends that it was unenforceable when made and remains so.

41. OGD's argument rests on a fundamental misconception concerning the effect of the Original Section 58AA. The fact that an agreement falls within the statutory definition of a DBA does not, without more, establish that it was rendered unenforceable by that provision. The Original Section 58AA regulated DBAs relating to employment matters. It did not render all other DBAs unenforceable, nor did it displace the common law governing third-party litigation funding agreements. The distinction is critical because, by 2011, properly structured third-party litigation funding agreements were recognised as

permissible at common law. The Original Section 58AA did nothing to change that position.

A. Third-party litigation funding agreements were enforceable at common law

42. Historically, common law regarded champertous agreements as illegal and void. Maintenance and champerty were both crimes and torts. Although criminal and tortious liability was abolished by sections 13(1)(a) and 14(1) of the Criminal Law Act, 1967, respectively, section 14(2) expressly preserved the common law rules under which such agreements could be treated as contrary to public policy or otherwise illegal. Champerty therefore continued to survive as a rule of public policy capable of rendering a contract unenforceable: *R (Factortame Ltd) v Secretary of State for Transport (No 8)* [2002] EWCA Civ 932 ("***Factortame***"), at [31]. [MHB/70/1147/31]

43. However, common law developed considerably in the ensuing decades, particularly in recognition of the role of third-party funding in facilitating access to justice. As Lord Phillips MR observed in *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA Civ 292, at [54]: [MHB/66/1087/54]

> "*Public policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation*".

44. In *Factortame*, the Court of Appeal upheld an agreement under which a firm of accountants, providing services ancillary to litigation, were entitled to remuneration calculated as 8% of the claimants' recovery. The Court rejected the proposition that such arrangements were necessarily champertous. It held that, in the absence of an applicable statutory restriction, the question was whether the particular agreement had a tendency to undermine the due administration of justice, including by creating an incentive to inflate damages, suppress evidence or otherwise interfere improperly with the litigation (at [36]). [MHB/70/1148/36] The Court recognised that statutory restrictions governing analogous arrangements could inform the limits of public policy, but the enforceability of an agreement was therefore to

be assessed by reference to its terms and circumstances, rather than by treating percentage-based remuneration as inherently objectionable (at [36], [44]). [MHB/70/1148, 1150/36, 44]

45. In *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655, the Court of Appeal considered an arrangement under which a professional funder had agreed to finance certain litigation expenses in return for a percentage of any damages recovered. The claimant retained control of the litigation, and the funder did not seek to interfere with its conduct (at [9], [13]-[14]). Although the case principally concerned the funder's liability for adverse costs, the Court recognised that commercial funding arrangements which facilitate access to justice, are not otherwise objectionable and leave the claimant in control of the litigation are not necessarily champertous (at [38]-[40]). The Court held that such a funder could nevertheless be liable for the opposing party's costs to the extent of the funding provided (at [41]-[43]). The decision therefore supports the proposition that an agreement entitling a commercial funder to a share of the recovery is not, merely for that reason, contrary to English public policy: see also *PACCAR*, at [55]. [MHB/52/938-965] [MHB/52/945-946] [MHB/52/953/38-40] [MHB/52/953-954/41-43] [MHB/72/1213/55]

46. Indeed, *PACCAR* itself expressly recognised this development. At [70], Lord Sales explained that the development of the common law in *Factortame* and *Arkin* had established that third-party funding arrangements of the kind under consideration were not champertous and were therefore enforceable. He further observed that section 58B of the CLSA, which had been enacted in 1999 to provide statutory recognition for certain funding agreements but was never brought into force, had been overtaken by these common law developments. The Supreme Court therefore in *PACCAR* recognised that third-party funding agreements, including arrangements involving a share of the recovery, had become enforceable under the common law even before the introduction of section 58AA. [MHB/72/1217/70]

47. This development of the common law was also recognised in *Friston on Costs* (4th Ed., Oxford University Press, 2023). Discussing *Arkin*, Dr Friston explains that the Court of Appeal's approach to professional litigation funding strongly implied that such funding arrangements were lawful. He concludes, at [33.16], that "*Thus litigation funding had become accepted as lawful and in accordance with public policy*". Indeed, at [33.25], the [MHB/75/1065-1072] [MHB/75/1068/33.16] [MHB/75/1070-1071/33.25]

author observes that the developments in the common law had shifted the focus away from the legality of litigation funding towards the question of its regulation.

B. The Original Section 58AA did not render non-employment DBAs unenforceable

48. Section 58AA was inserted into the CLSA by section 154 of the Coroners and Justice Act, 2009. The material provisions of the Original Section 58AA were subsections (1) and (2). Subsection (1) provided that a DBA relating to an employment matter, which satisfied the conditions prescribed under subsection (4), was not unenforceable merely by reason of being a DBA. Subsection (2) provided that a DBA relating to an employment matter, which did not satisfy those conditions, was unenforceable.

49. OGD accepts that subsections (1) and (2) were confined to employment matters. **[OGD WC, para. 17(a)]** However, it relies on the fact that the definition of a DBA in subsection (3)(a) was not so confined. OGD argues that Parliament thereby created a single statutory class of DBAs, all of which were presumptively unenforceable unless expressly permitted under subsection (1). **[OGD WC, paras. 31-36]** That argument confuses the definition of an agreement with the legal consequences which the statute attaches to that agreement. Subsection (3)(a) defined what constituted a DBA for the purposes of the section. It did not independently regulate the enforceability of agreements falling within that definition. Those consequences were prescribed by subsections (1) and (2), which Parliament expressly confined to employment matters.

50. Nor does the language of subsection (1) support OGD's argument. OGD places particular reliance on the words "*not unenforceable by reason only of its being a damages-based agreement*", contending that they necessarily presuppose the unenforceability of all DBAs unless expressly sanctioned by statute. **[OGD WC, para. 24]** However, subsection (1) addresses the enforceability of DBAs relating to employment matters, and does not provide that all other DBAs are unenforceable. OGD's construction would require the Board to infer a general statutory prohibition which Parliament did not express. It would mean that, although the operative provisions of the Original Section 58AA were expressly confined to employment matters, Parliament had implicitly rendered every other DBA unenforceable, including commercial litigation funding agreements which were already

permissible at common law. There is no basis for attributing to Parliament an intention to effect such a significant change in the existing law without any express statutory language to that effect.

51. The Damages-Based Agreements Regulations, 2010 ("**2010 Regulations**") (which were the regulations prescribed under subsection (4) of the Original Section 58AA) reinforce this conclusion. They define a DBA to mean "*a damages-based agreement which relates to an employment matter*" (at regulation 1(2)). They were, therefore, expressly confined to employment matters, consistent with the operative provisions of the Original Section 58AA. Subsection (5) of the Original Section 58AA, which empowered the Lord Chancellor to prescribe different requirements for different descriptions of agreements, did not confer a power to extend the operation of subsections (1) and (2) beyond employment matters. The broader statutory regime which OGD now seeks to read into the Original Section 58AA would have required an amendment to the primary legislation. That is precisely what subsequently occurred in 2013.

C. OGD's reliance on the law governing conditional fee agreements and the legislative history is misplaced

52. OGD seeks to support its interpretation of the Original Section 58AA by relying on a series of authorities concerning conditional fee agreements ("**CFAs**") under section 58 of the CLSA, together with the legislative history concerning the regulation of DBAs. [**OGD WC, paras. 25-28, 40, 41**] Neither assists OGD. CFAs entered into by legal practitioners and commercial third-party litigation funding agreements have different legal histories and are governed by different considerations of public policy. Further, the legislative materials relied upon by OGD principally concern the regulation of contingency fee arrangements in employment matters and court proceedings.[5] They do not establish that

[5] See, for instance, the Ministry of Justice's *Reforming Civil Litigation Funding and Costs in England and Wales: Implementation of Lord Justice Jackson's Recommendations – The Government Response* ("**Government Response**"), published on 29 March 2011, available at: https://assets.publishing.service.gov.uk/media/5a7c01f4ed915d41476222f7/8041.pdf. At paragraph 13 of *The Way Forward* (p.8), the Government Response describes DBAs by reference to lawyers' remuneration being calculated as a percentage of damages recovered. Similarly, Question 45 (p. 56) expressly concerns whether lawyers should be permitted to enter into DBAs with their clients in civil litigation.

Parliament intended to prohibit commercial litigation funding agreements which were already recognised as permissible at common law.

53. The distinction between CFAs and third-party litigation funding agreements is important. Historically, agreements under which solicitors' remuneration was contingent upon the success of litigation were regarded as contrary to public policy, principally because of the potential conflict between the solicitor's financial interest in the outcome and the solicitor's professional obligations: *Factortame*, [60]-[62] (referring to *Wallersteiner v Moir (No 2)* [1975] QB 373, at [401]-[402]). Section 58 of the CLSA established a statutory regime under which such agreements could be enforced, subject to specified conditions. Commercial third-party litigation funding agreements, by contrast, do not involve the provision of legal representation by the funder. As explained above, by the time the Original Section 58AA was introduced, such agreements had already been recognised as permissible at common law, provided that they did not offend the public policy considerations underlying the prohibition against champerty. [MHB/70/1155-1156/60-62]

54. This distinction was expressly recognised by Jacobs J in *Therium Litigation Funding A IC v Bugsby Property LLC* [2023] EWHC 2627 (Comm) ("***Therium***"), at [60]. In considering the differences between the statutory regimes governing CFAs and DBAs, Jacobs J observed that they had different common law and statutory backgrounds. Whereas CFAs were historically unlawful at common law unless they satisfied the applicable statutory requirements, litigation funding agreements were, in principle, lawful and did not offend public policy. Accordingly, Jacobs J considered it arguable that the effect of section 58AA was "*not to authorise what would otherwise be illegal agreements, but rather to render unenforceable legal agreements*" which failed to satisfy its requirements. The authorities concerning CFAs therefore do not establish that commercial litigation funding agreements falling outside the operative provisions of the Original Section 58AA were necessarily unenforceable. Nor does OGD's reliance on *Factortame*, at [36], assist it. **[OGD WC, para. 30]** While the Court recognised that express statutory restrictions may inform the limits of public policy in analogous situations, it did not suggest that restrictions applicable to one category of agreement [MHB/73/1290-1291/60] [MHB/70/1148/36]

necessarily rendered unenforceable other agreements which were otherwise lawful at common law.

55. OGD further contends that it would be incoherent for Parliament to have created a broad statutory class of DBAs, some of which were unenforceable, others regulated, and still others enforceable under the common law. [**OGD WC, paras. 31-36**] There is no such incoherence. The statutory definition of a DBA identifies agreements falling within a particular description; it does not follow that every agreement within that description must be subject to identical rules concerning enforceability. Parliament was entitled to regulate particular types of DBAs while leaving others subject to the existing common law. The fact that the definition of a DBA was broader than the operative provisions of the Original Section 58AA does not establish that Parliament intended to prohibit every agreement falling outside those provisions.

56. The legislative history relied upon by OGD does not support a different conclusion. [**OGD WC, paras. 37-42**] OGD refers to various Explanatory Notes, consultation papers and parliamentary statements indicating that DBAs were not then permitted in court proceedings and that Parliament did not intend, in 2009, to extend the statutory regime beyond employment matters. However, these materials must be understood in their proper context. They concern the regulation of contingency fee arrangements, particularly the circumstances in which such arrangements could be used in employment tribunals and civil litigation. They do not establish that Parliament intended to prohibit commercial third-party funding arrangements of the kind recognised in *Factortame* and *Arkin*. The distinction is particularly relevant in the present case, where the LFA concerned the funding of a commercial arbitration rather than a contingency fee agreement between a litigant and its legal representative.

57. Indeed, the fact that Parliament considered, but did not adopt, proposals to extend the statutory regime beyond employment matters in 2009 is consistent with Norscot's interpretation. It demonstrates that Parliament chose, at that stage, to confine the operative provisions of the Original Section 58AA to employment matters. It does not establish that Parliament intended, without expressly saying so, to render unenforceable

commercial litigation funding agreements which were otherwise permissible at common law. The subsequent extension of the scope of section 58AA in 2013 likewise demonstrates that further legislation was required to bring non-employment DBAs within the statutory regime. Neither the authorities concerning CFAs nor the legislative history relied upon by OGD provides any basis for implying into the Original Section 58AA a general prohibition which Parliament did not enact.

D. The amendments introduced in 2013 do not apply to the LFA

58. Section 58AA was subsequently amended by section 45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("**LASPO**"). Those amendments removed the limitation to employment matters from the operative provisions of section 58AA, thereby extending the statutory regime to DBAs more generally. Although section 45 was brought into force for limited purposes on 19 January 2013, the amendments became generally operative on 1 April 2013, when the 2013 Regulations also came into force.

59. Importantly, however, Parliament expressly provided that the amendments would not apply retrospectively. Section 45(13) of LASPO provides:

> "*The amendments made by subsections (1) to (11) do not apply in relation to an agreement entered into before this section comes into force*."

60. The 2013 Regulations contain a corresponding savings provision, exempting previously executed agreements from their scope. Regulation 1(3) expressly provides that, subject to specified exceptions, the Regulations apply to DBAs entered into on or after their commencement date. The LFA was entered into on 5 May 2011. It therefore falls outside both the amendments made by section 45 of LASPO and the requirements prescribed by the 2013 Regulations.

61. This also explains why OGD's original statutory case, advanced in its Grounds of Appeal and subsequently abandoned in its Written Case, was misconceived. OGD originally relied on the LFA's alleged non-compliance with the Amended Section 58AA and the 2013 Regulations. As Norscot pointed out in its Grounds of Objection dated 12 December 2025, those provisions could not apply to an agreement entered into in 2011. OGD now

accepts that and says that the enforceability of the LFA must be determined by reference to the Original Section 58AA. [**OGD WC, paras. 5, 12(c)**] However, as explained above, the Original Section 58AA did not render non-employment litigation funding agreements unenforceable.

E. The LFA was enforceable under English law

62. It is common ground that the LFA was entered into on 5 May 2011 and concerned the funding of a commercial arbitration. It did not relate to an employment matter. As explained above, the operative provisions of the Original Section 58AA did not regulate the enforceability of DBAs outside the employment context, and the amendments introduced in 2013 were likewise inapplicable. Accordingly, even assuming that the LFA fell within the statutory definition of a DBA, its enforceability falls to be determined by reference to the common law, under which third-party litigation funding agreements were permissible provided that they did not offend the public policy considerations underlying the prohibition against champerty.

63. There is no basis for concluding that the LFA offended those considerations. Under clause 14.1 of the LFA, Norscot expressly retained day-to-day and overall control and conduct of the Arbitration. [**RR/2/160**] Although the LFA provided for the funder to be kept informed and consulted concerning the proceedings, including possible settlement, it did not transfer control of the Arbitration to the funder. In particular, clause 15.3 expressly provided that Norscot was not obliged to comply with any request by the funder to settle or discontinue the proceedings. [**RR/2/161**] As explained in *Factortame*, at [36] and [44], the relevant inquiry is whether the particular arrangement had a tendency to undermine the due administration of justice. OGD has identified no feature of the LFA, nor any conduct on the part of the funder, which suggests that it did so.

[MHB/20/299]

[MHB/20/300]

[MHB/70/1148/36]

[MHB/70/1150-1151/44]

64. Moreover, the Sole Arbitrator expressly considered the circumstances in which the LFA had been entered into and the reasonableness of its terms. In particular, at [84] of the Fifth Partial Award, he recorded Norscot's reliance on the expert statement of Mr James Blick, a broker in procuring litigation funding, concerning the prevailing market rates and

[MHB/25/577/84]

terms for such arrangements. **[RR/3/438]** At [92], the Sole Arbitrator expressly accepted that evidence, finding that: [MHB/25/580-581/92]

> "*The Tribunal accepts the evidence of Mr Blick that Norscot's litigation funding costs reflect standard market rates and terms for such facility*."

65. The Sole Arbitrator further explained at [92] that those terms involved a return calculated by reference to the higher of three times the amount advanced or 35% of the sum recovered. **[RR/3/441-442]** He also found that Norscot had been forced to obtain litigation funding because of OGD's conduct, which had deliberately caused or substantially contributed to Norscot's impecuniosity, and that there was no credible alternative source of funding. **[RR/3/440-442/89-94]** Thus, the necessity for the funding and the commercial reasonableness of its terms were expressly considered and accepted on the evidence before the Sole Arbitrator. [MHB/25/580-581/92] [MHB/25/580-581] [MHB/25/580-581]

66. The Sole Arbitrator's decision to award Norscot its Litigation Funding Costs was subsequently upheld by the English High Court in *Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm), which rejected OGD's challenge to the Sole Arbitrator's power to award such costs under section 59(1)(c) of the Arbitration Act 1996. **[RR/3/469-482]** Although the Court was not required to determine the enforceability of the LFA itself, its judgment records the Sole Arbitrator's findings concerning the necessity and reasonableness of the funding arrangement. **[RR/3/473/22-28]** In these circumstances, there is no basis for concluding that the LFA was contrary to English public policy or unenforceable under the common law applicable in 2011. Accordingly, Norscot's Issue 2 should be answered in the negative, and OGD's Issue 1 should be determined in Norscot's favour. [MHB/26/607-621] [MHB/26/481/22-28]

VI. IN ANY EVENT, ENFORCEMENT OF THE FINAL AWARD DOES NOT CONTRAVENE THE PUBLIC POLICY OF MAURITIUS

67. Norscot's Issue 3 / OGD's Issue 2 concerns whether enforcement of the Final Award would be contrary to the international public policy of Mauritius by reason of the alleged

illegality or unenforceability of the LFA under English law. For the reasons explained in Sections III–V above, Norscot submits that OGD should not be permitted to advance its revised statutory case and that, in any event, the LFA was lawful and enforceable under English law when it was entered into in 2011. However, even if OGD were permitted to advance its revised case and could establish that the LFA was unenforceable under English law (both of which are denied), it would not follow that enforcement of the Final Award would offend the international public policy of Mauritius.

68. OGD contends that enforcement of the Final Award would be contrary to Mauritius's public policy. Its argument proceeds on three propositions: (i) the LFA was illegal and/or unenforceable under English law; (ii) enforcement of the Final Award would require OGD to pay costs incurred under an agreement governed by the law of a friendly foreign State which was illegal or unenforceable under that law; and (iii) requiring such payment would be contrary to Mauritius's public policy on grounds of comity. **[OGD WC, paras. 51-55]**

69. The parties agree that the relevant public policy exception arises under Article V(2)(b) of the New York Convention and that the public policy to be considered is that of Mauritius in the international context. **[OGD WC, paras. 49-50]** Norscot also accepts that international comity is a relevant consideration in determining the international public policy of Mauritius. The dispute concerns the application of those principles to the present case.

70. Norscot submits that OGD's argument fails for three independent reasons. First, even on OGD's interpretation of section 58AA, the alleged statutory consequence is unenforceability of the LFA, not the illegality of the funding arrangement. Second, enforcement of the Final Award would neither constitute enforcement of the LFA nor require the performance of any act in England which would be unlawful under English law. OGD's reliance on international comity is therefore misplaced. Third, the public policy considerations favouring the finality and enforcement of international arbitral awards weigh decisively in favour of enforcing the Final Award.

A. The alleged unenforceability of the LFA does not establish illegality under English law

71. At the outset, as explained at length in Section V above, the LFA is valid and enforceable under English law. This, by itself, would be dispositive of OGD's appeal, since OGD's entire case in this appeal is premised on the illegality of the LFA under English law.

72. In any event, even if OGD were correct that the Original Section 58AA applied to the LFA and rendered it unenforceable (which is denied), that would not establish that the LFA was illegal under English law. Section 58AA provides that DBAs falling within its operative provisions which do not satisfy the prescribed conditions are "*unenforceable*". It does not provide that such agreements are illegal. The distinction between unenforceability and illegality was also observed by Jacobs J in *Therium* at [60]: "*the effect of section 58AA is not to authorise what would otherwise be illegal agreements, but rather to render unenforceable legal agreements which do not satisfy its requirements*" (emphasis added). See also, Lord Phillips' speech in *Factortame*, at [31]. [MHB/70/1147/31]

73. OGD's own Written Case reflects that distinction. Although OGD frames its first issue by reference to whether the LFA was "*illegal and/or unenforceable*", its conclusion is that the LFA was "*unenforceable under English law*". **[SFI, OGD's Issue 1; OGD WC, paras. 47, 69]**

74. This distinction is fatal to OGD's reliance on international comity. The mere fact that a contractual obligation may be unenforceable under the law governing the contract does not establish that recognition of an arbitral award relating to that obligation would require the commission of an unlawful act in the foreign jurisdiction. Still less does it establish, without further analysis, that enforcement of the award would offend the international public policy of Mauritius.

75. Further, even if section 58AA were engaged by the LFA (which is denied), it would not necessarily follow that the LFA was unenforceable in its entirety. Clause 8 of the LFA provides for the funder's return to be calculated by reference to the higher of (a) three times the amount advanced by the funder; or (b) 35% of Norscot's recovery. **[SFI, para.**

11(a); RR/2/156] It is only the latter, percentage-based component which is potentially objectionable under Section 58AA, since the former is calculated by reference to the amount advanced rather than the amount recovered. There is therefore a further question whether the allegedly unenforceable component could be severed, leaving the remainder of the LFA enforceable. The possibility of severance in such circumstances is recognised in *Zuberi v Lexlaw Ltd* [2021] EWCA Civ 16, at [7]-[8], and *Therium*, at [53]-[61]. Indeed, clause 34 of the LFA expressly provides for the severance of any provision which is "*illegal, invalid or unenforceable*", while preserving the validity and enforceability of the remaining provisions. [**RR/2/171**] Whether severance would ultimately be permissible would require consideration of the terms of the LFA and the applicable principles of severance, including whether removing the percentage-based component would change the nature of the agreement. These are questions which were never considered by the Sole Arbitrator or the courts below, precisely because OGD failed to advance its present argument under section 58AA at any earlier stage. They are not questions which the Board should be required to determine for the first time on appeal. OGD therefore cannot simply assume that, even on its interpretation of section 58AA, the LFA would necessarily be unenforceable in its entirety.

MHB/20/295

[MHB/106/1969/7-8]

[MHB/73/1289-1291/53-61]

[MHB/20/310]

B. Enforcement of the Final Award does not offend Mauritius's public policy of international comity

76. The public policy exception under Article V(2)(b) of the New York Convention is narrow and exceptional. As the Supreme Court of Mauritius explained in *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] SCJ 100 ("***Cruz City***"), a party seeking to resist enforcement on grounds of international public policy bears a substantial burden. It must identify the particular principle of public policy said to be engaged and establish why enforcement of the award would violate that principle [p.27]. OGD has failed to discharge that burden.

[MHB/81/1406-1435]

[MHB/81/1431-1432]

77. OGD relies principally on *Katra Holdings Ltd v Standard Chartered Bank (Mauritius) Ltd* [2024] UKPC 8 ("***Katra***"), at [39], to contend that enforcement of the Final Award would offend the principle of international comity. [**OGD WC, para. 53**] In *Katra*, the

[MHB/88/1641/39]

Board considered whether enforcement of a contractual obligation in Mauritius would be contrary to public policy because the underlying transaction allegedly involved breaches of Indian law. In that context, the Board considered, by analogy, two principles of English common law concerning foreign illegality, derived respectively from *Ralli Bros v Compañia Naviera Sota y Aznar* [1920] 2 KB 287 and *Foster v Driscoll* [1929] 1 KB 470: [MHB/97/1814-1831]

> "*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*."

78. The Board described the above principles as "*complementary aspects of comity as it applies to foreign illegality*": *Katra*, [39]. In *Katra* itself, the Board found no basis for refusing enforcement on grounds of comity because the alleged unlawful conduct was neither required by the contract nor intended by the parties: [40]-[42]. Neither of those considerations arises in the present case. [MHB/88/1641/39] [MHB/88/642/40-42]

79. First, enforcement of the Final Award is <u>not</u> enforcement of the LFA. OGD is not a party to the LFA, and its liability to pay Norscot's Litigation Funding Costs does not arise under that agreement. Rather, the Sole Arbitrator determined in the Fifth Partial Award that he had the power, under sections 59 and 63 of the Arbitration Act 1996 and Article 31(1) of the ICC Rules, to award those costs as part of Norscot's recoverable costs of the Arbitration. OGD challenged that determination before the English High Court, which dismissed the challenge. The Final Award subsequently quantified the costs which the Sole Arbitrator had already determined were recoverable. Accordingly, recognition and enforcement of the Final Award would give effect to an arbitral costs award, not enforce a contractual obligation owed by Norscot to the funder under the LFA.

80. Second, even if enforcement of the Final Award could be regarded as enforcement of the LFA (which is denied for reasons identified above), it would not require the commission

of any act unlawful under English law. Enforcement would require OGD to satisfy the monetary liability imposed by the Final Award. It would not require the parties to enter into or perform any unlawful transaction in England. Nor has OGD identified any intention on the part of the parties to the LFA to perform an act prohibited under English law. The circumstances which engaged the common law principles discussed in *Katra* are therefore absent.

81. Third, international comity does not require the Mauritian courts to refuse enforcement of an arbitral award merely because the underlying contractual arrangement is alleged to be unenforceable under foreign law. In *Cruz City*, at p. 26, the Supreme Court of Mauritius held noted that a breach of foreign law "*does not per se amount to a breach in public policy in Mauritius, be it in the domestic or international context*". This is consistent with the distinction recognised in *Dicey, Morris & Collins on The Conflict of Laws* (16th ed.), at [16-115] ("***Dicey***"), between questions concerning the legality of an agreement under its governing law and those exceptional cases in which enforcement of an arbitral award would itself offend fundamental principles of public policy. [MHB/81/1431-1432] [MHB/83/1552/16-115]

82. The decision of the Singapore International Commercial Court in *CHY v CIA* [2022] SGHC(I) 3 provides a further illustration of that distinction. In that case, the applicants sought to set aside an arbitral award on the ground that it required performance of obligations allegedly prohibited by Indian foreign exchange regulations and that giving effect to the award would therefore offend Singapore's public policy of international comity. Ramsey IJ rejected that argument. At [75], he explained that international comity does not require public policy to be engaged merely because of an alleged infringement of foreign law, "*absent the type of criminal activity such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice or would 'shock the conscience'* […]" Although that decision concerned the setting aside of an award, rather than its enforcement, the reasoning is instructive. OGD has identified no comparable consideration of fundamental public policy in the present case. [MHB/78/1373-1384] [MHB/78/1383/75]

83. It follows that OGD's reliance on international comity provides no basis for refusing enforcement of the Final Award. The award does not require the performance of the LFA,

still less the commission of any unlawful act in England. Nor has OGD identified any fundamental principle of Mauritian international public policy which would be violated by requiring it to satisfy the costs liability imposed by the Sole Arbitrator. OGD's public policy objection must therefore fail.

84. It should also be noted, that while OGD did challenge the enforcement of the Final Award before the Supreme Court of Mauritius on public policy grounds, it did so by reference to "*the Money Lenders Act, high interest rates, damage-based agreement, and the Truck Cartel Litigation*". **[Judgment under Appeal, para. 25]** The Judgment under Appeal does not, however, record any distinct public policy argument based on international comity. Consequently, the Supreme Court of Mauritius did not address whether the alleged unenforceability of the LFA under English law could engage Mauritius' international public policy on grounds of comity. They are not questions which the Board should be required to determine for the first time on appeal.

C. Public policy considerations favour the enforcement of the Final Award

85. Independently of the foregoing, the public policy considerations relevant to enforcement weigh decisively in Norscot's favour. The authorities recognise that the court must consider the policy against enforcing awards which offend fundamental principles of justice alongside the strong public policy favouring the finality and enforcement of international arbitral awards. As explained in *Dicey* at [16-115]: [MHB/83/1552/16-115]

> "[…] *the court has to perform a balancing exercise between the finality that should prima facie exist particularly for those that agree to have their disputes arbitrated, against the policy of ensuring that the enforcement power of the English court is not abused: the nature of, and strength of the case for, the illegality, and the extent to which it can be seen that the asserted illegality was addressed by the arbitral tribunal are factors in the balancing exercise between the competing public policies of finality and illegality*."

86. The Board's decision in *Betamax* is particularly instructive. Although that case concerned an application to set aside an arbitral award, the Board expressly recognised that the

principles governing judicial intervention on grounds of public policy apply equally to the recognition and enforcement of foreign arbitral awards. At [21], the Board observed that there was "*no reason for difference as to the extent of a court's right of intervention in respect of public policy*" under Articles 34 and 36 of the Model Law, the latter being derived from Article V of the New York Convention. The Board reiterated at [43] that the policy of the IAA is to treat the setting aside and enforcement of awards in international arbitrations in the same manner as the enforcement of foreign awards. Turning to the scope of judicial intervention, the Board held at [48] that a determination made within the arbitral tribunal's jurisdiction is final, "*whether right or wrong in fact or in law*", absent specified vitiating factors. At [49], it emphasised that the court's role is to determine whether, on the findings of fact and law made in the award, there is any conflict with public policy; the court cannot, "*under the guise of public policy, reopen issues relating to the meaning and effect of the contract or whether it complies with a regulatory or legislative scheme*". At [52], the Board further explained that even a tribunal's determination concerning the legality of an agreement is ordinarily final where made within its jurisdiction, subject to fraud, breach of natural justice or other vitiating factors, and that it was difficult to envisage exceptional circumstances justifying intervention. Finally, at [95], the Board declined to consider the public policy implications of an allegedly illegal contract where illegality had not been established, observing that such considerations are best addressed when the illegality is established and its seriousness can be assessed in context.

[MHB/76/1335/21] [MHB/76/1344/43] [MHB/76/1345/48] [MHB/76/1345/49] [MHB/76/1346/52] [MHB/76/1353/95]

87. These principles apply with particular force in the present case. The Sole Arbitrator, having considered OGD's objections based on maintenance and champerty, the circumstances in which Norscot was compelled to obtain litigation funding, and the reasonableness of the LFA's terms, determined in the Fifth Partial Award that the Litigation Funding Costs were recoverable. OGD's challenge to his power to award those costs was dismissed by the English High Court. The Final Award merely quantified those costs, after OGD had been given an opportunity to contest their amount, and was never challenged before the English courts. Nearly ten years later, OGD now seeks to resist enforcement by advancing a statutory argument which it failed to raise in those proceedings. To permit such a collateral challenge, absent any established violation of

Mauritius's international public policy, would undermine the principles of arbitral finality and limited judicial intervention affirmed by the Board in *Betamax*.

88. Finally, for completeness, we note that the enforcement of the Final Award would also be consistent with the public policy of England, the seat of the Arbitration. English law recognises a strong public policy in favour of enforcing arbitral awards, subject to a narrow exception for clear cases involving fundamental public policy concerns: *Dicey* at [16-115]. Further, English law has also long recognised the importance of third-party litigation funding in facilitating access to justice: see *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA Civ 292, at [54], and *Factortame*, at [36] and [44]. More recently, following *PACCAR*, the Litigation Funding Agreements (Enforceability) Bill, 2024 was introduced before the House of Lords on 19 March 2024, with the stated objective of restoring the position that prevailed before *PACCAR*, namely that LFAs were not DBAs and were therefore enforceable.[6] Although that Bill lapsed following the dissolution of Parliament in 2024, the Lord Chancellor had commissioned the Civil Justice Council ("**CJC**") to undertake a broader review of litigation funding and its regulation. In its Final Report published on 2 June 2025, the CJC recommended legislation reversing the effect of *PACCAR*.[7] The CJC also recommended that the proposed regulations governing litigation funding should not apply to the funding of arbitration proceedings.[8] Subsequently, on 17 December 2025, the UK Government announced its intention to legislate to clarify that LFAs are not DBAs.[9] Although those proposed reforms have not yet been enacted, they underscore the recognised importance of litigation funding to access to justice in England and Wales.

[MHB/83/1552/16-115] [MHB/66/1087/54] [MHB/70/1148/36] [MHB/70/1150-1151/44]

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6 Litigation Funding Agreements (Enforceability) Bill 2024, Explanatory Notes, para. 1, available at: https://bills.parliament.uk/publications/54764/documents/4594.

7 CJC Review of Litigation Funding Final Report, paras. 1.1, 1.2, 3.2, available at: https://www.judiciary.uk/wp-content/uploads/2025/06/CJC-Review-of-Litigation-Funding-Final-Report.pdf.

8 CJC Review of Litigation Funding Final Report, para. 2.4.

9 Written Ministerial Statement, *Third-Party Litigation Funding*, 17 December 2025 (HCWS1192), available at: https://questions-statements.parliament.uk/written-statements/detail/2025-12-17/hcws1192 - :~:text=LFAs are also used in.benefit to the UK economy.

89. Accordingly, the public policy considerations in both Mauritius and England favour recognition and enforcement of the Final Award. OGD has identified no fundamental public policy consideration sufficient to displace those principles, still less any consideration sufficient to outweigh the strong public policy favouring the finality and enforcement of international arbitral awards. Its challenge under Article V(2)(b) of the New York Convention must therefore fail. Accordingly, Norscot's Issue 3 and OGD's Issue 2 should both be answered in the negative.

VII. CONCLUSION

90. For the reasons set out above, Norscot's preliminary objection and its position on each of the issues identified in the SFI may be summarised as follows.

(i) **Preliminary Objection:** OGD seeks to advance a materially different statutory case from that pleaded in its Grounds of Appeal, without having sought or obtained permission to amend those grounds. Having expressly abandoned its reliance on the Amended Section 58AA and the 2013 Regulations, OGD cannot substitute a new case based on the Original Section 58AA merely by announcing that change in its Written Case. The Board should therefore uphold Norscot's preliminary objection and decline to entertain OGD's revised statutory case. If the preliminary objection is upheld, nothing remains of OGD's appeal, since it has expressly abandoned the statutory case originally advanced in its Grounds of Appeal. The appeal must therefore fail, without the Board needing to determine any of the substantive issues identified in the SFI.

(ii) **Norscot's Issue 1 / OGD's Issue 3:** In any event, the Fifth Partial Award determined Norscot's entitlement to recover the Litigation Funding Costs. That award is final and binding, and OGD's challenge to the Fifth Partial Award was dismissed by the English High Court. The Final Award subsequently quantified the liability established by the Fifth Partial Award, and OGD did not challenge it before the English courts. Against that background, OGD should not now be permitted to reopen the question of Norscot's entitlement to recover those costs

by advancing a statutory argument which it failed to advance before the Sole Arbitrator, the English courts, or the Supreme Court of Mauritius. There are no exceptional circumstances justifying its introduction for the first time before the Board. Accordingly, even if OGD were entitled to advance its revised statutory case, the Board should decline to entertain it.

(iii) **Norscot's Issue 2 / OGD's Issue 1:** Even if OGD were permitted to advance its revised argument, it is wrong as a matter of English law. The LFA was lawful and enforceable when it was entered into in 2011. By that date, properly structured third-party litigation funding agreements were recognised as permissible at common law. The operative provisions of the Original Section 58AA concerned DBAs relating to employment matters and did not render non-employment litigation funding agreements unenforceable. The amendments introduced in 2013, which extended the statutory regime to DBAs more generally, expressly did not apply retrospectively to agreements entered into in 2011. Nor does *PACCAR* establish otherwise. Although the Supreme Court held that litigation funding agreements involving percentage-based returns fell within the statutory definition of a DBA, it did not determine that the Original Section 58AA rendered non-employment litigation funding agreements entered into in 2011 unenforceable.

(iv) **Norscot's Issue 3 / OGD's Issue 2:** In any event, enforcement of the Final Award would not be contrary to the international public policy of Mauritius. The Final Award is an arbitral costs award made by a London-seated tribunal pursuant to the Arbitration Act 1996 and the ICC Rules. Its enforcement does not require performance of the LFA. Even if OGD were correct that the LFA was unenforceable under English law (which is denied), that would not establish that enforcement of the Final Award would offend Mauritian international public policy. The principles of international comity considered in *Katra* are not engaged by enforcement of the monetary liability imposed by the Final Award. The strong public policy favouring the finality and enforcement of international

arbitral awards provides an additional and compelling reason for dismissing OGD's challenge.

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