THIRD-PARTY FUNDING COSTS AFTER *DTH V. DTF*: RECOVERABILITY, PUBLIC POLICY AND THE MALAYSIAN ARBITRATION FRAMEWORK

by

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ABSTRACT

The Singapore International Commercial Court decision in *DTH and another v. DTF and others* (2026)[1] ('*DTH v. DTF*') is likely to become an important reference point in the Asian debate on third-party funding in arbitration. The decision arose from a Singapore-seated arbitration in which the successful applicants sought to recover substantial third-party funding costs from the unsuccessful respondents. The tribunal majority refused to award those costs. The Singapore International Commercial Court dismissed the applicants' attempt to set aside or remit that part of the costs award on public policy and agreed-procedure grounds.

The importance of the decision lies not in any hostility to third-party funding. The Court did not decide that third-party funding costs can never be recovered in Singapore arbitration. Nor did it conduct a first-instance assessment of whether the tribunal majority was right or wrong as a matter of costs law. The decision is important because it separates three questions which are too often compressed: whether third-party funding is lawful; whether the funder's return is properly characterised as a cost of the arbitration; and whether the unsuccessful party can be required to bear that return as part of a costs award.

That distinction is particularly important for Malaysia. From 1 January 2026, Malaysia has operated under a new statutory and regulatory framework for third-party funding in arbitration, introduced by the Arbitration (Amendment) Act 2024 ('The Act'), the Code of Practice for Third Party Funding 2026 ('The Code'), and the Asian International Arbitration Centre Arbitration

Rules 2026 ('AIAC Rules'). The Malaysian framework is stronger than Singapore's framework in some respects, particularly because section 46A of the Arbitration Act 2005 expressly defines third-party funding by reference to the funder receiving a success-contingent financial benefit. The Code also addresses capital adequacy, conflicts, confidentiality, control, termination, adverse costs, costs insurance and security for costs. The 2026 AIAC Rules add a detailed institutional disclosure and costs framework.

But Malaysia has not yet expressly answered the recoverability question. The Act, the Code and the AIAC Rules recognise and regulate funding. They do not state in terms that the losing party must pay the funder's success fee, multiple, percentage return or agreed financial benefit. *DTH v. DTF* therefore matters for Malaysia because it shows how a tribunal or court may distinguish legality from cost-shifting, and how the funding waterfall may leave a successful funded party with little net recovery if the funder's return is not shifted to the respondent.

The judgment must also be read with the Court's careful analysis of the facts. The applicants had obtained a buyout order for US$14,736,000, but had claimed a much higher buyout figure of approximately US$65 million in closing submissions. The net recovery problem therefore arose not merely because funding costs were substantial, but because the recovery actually obtained was much lower than the claim advanced. The Court treated that as part of the ordinary risk of dispute resolution, not as a public policy basis for setting aside the costs award.

This article analyses *DTH v. DTF*, explains what the Singapore Court decided and did not decide, considers the practical impact for parties, funders and tribunals, contrasts the position with England and Wales after the post-2013, after-the-event insurance reforms and the Arbitration Act 1996 as amended by the Arbitration Act 2025, and examines the Malaysian regime under sections 44 and 46A to 46I of the Arbitration Act 2005, the Code of Practice and the AIAC Arbitration Rules 2026. It argues that Malaysia has largely solved the legality and governance problems, but has not yet conclusively solved the recoverability problem. That is the next frontier.

Keywords: Third-party funding; Arbitration costs; Singapore International Commercial Court; Malaysian Arbitration Act 2005; Arbitration (Amendment) Act 2024; Code of Practice for Third Party Funding 2026; AIAC Arbitration Rules 2026; Recoverability; Access to justice; Security for costs; Adverse costs; After-the-event insurance; *DTH v. DTF*.

INTRODUCTION

Third-party funding has moved from the margins of arbitral practice to a recognised feature of international dispute resolution. The commercial logic is familiar. A claimant may have a valuable claim but insufficient resources, or may prefer not to deploy its own capital. A funder may agree to pay some or all of the costs of the arbitration in return for a share of the proceeds or another success-contingent financial return. That structure may promote access to justice, spread risk and allow meritorious claims to be pursued.

The legal question, however, is no longer simply whether third-party funding is permitted. In many leading arbitral seats that question has been answered, either by legislation, professional regulation, institutional rules, or a combination of all three. The harder question is what happens at the end of the case. If the funded party succeeds, can it recover from the losing party not merely its ordinary legal and arbitral costs, but also the funder's success fee, multiple, uplift, percentage return or agreed financial benefit?

DTH v. DTF brings those questions into sharp focus. The case concerned a Singapore-seated arbitration administered under the Singapore International Arbitration Centre Rules 2016 ('SIAC Rules'). The applicants were the successful parties in the arbitration. They obtained substantive relief, including an order requiring the first respondent to buy out their shares in a joint venture company. But the tribunal majority refused to award their claimed third-party funding costs. The applicants then sought to set aside or remit that part of the costs award.

The commercial consequence was serious. The applicants claimed third-party funding costs of US$14,608,695.11. The buyout order made in the Partial Award was US$14,736,000. The Court recorded that, if the applicants had to pay the funding costs to the funder out of that buyout sum, they would be left with almost nothing by way of recovery. But the Court also noted that the applicants had claimed a much higher buyout figure of approximately US$65 million. Had that figure been awarded, the refusal to award third-party funding costs would not have produced the same net recovery problem. That distinction is central to the judgment.

It is that commercial and analytical consequence which gives the case its importance. The funded party may win, but the gross award is not the same as the net recovery. The funding agreement will ordinarily contain a waterfall. The award or settlement proceeds may first be used to reimburse funded costs, pay legal costs, discharge insurance premiums, satisfy adverse costs or security obligations, and pay the funder's return. Only the remaining balance may go to the claimant. If the funder's return cannot be shifted to the losing party, the funded party's net recovery may be much lower than the amount awarded.

The applicants in *DTH v. DTF* advanced two grounds of challenge. First, they argued that the tribunal majority's refusal to award third-party funding costs conflicted with Singapore public policy, particularly access to justice. Secondly, they argued that the majority had failed to follow the parties' agreed arbitral procedure because Rule 37 of the SIAC Rules permitted recovery of legal or other costs. The Court rejected both grounds.

The decision must be read carefully. It is not a final pronouncement that third-party funding costs can never be recovered in Singapore arbitration. The Court expressly declined to decide whether the tribunal majority had correctly interpreted Singapore law or Rule 37. The Court's task was narrower. It was asked to decide whether the costs award should be set aside or remitted under Article 34 of the Model Law. The Court held that the high threshold for public policy intervention was not met and that the tribunal's costs decision was not a procedural failure.

That narrower holding is still powerful. It means that recoverability of the funder's return cannot be assumed. It also means that a funded party who fails to persuade the tribunal to award funding costs will find it very difficult to convert that costs dispute into a public policy or procedural challenge before the supervising court.

For Malaysia, the significance is immediate. The Malaysian third-party funding regime became operative from 1 January 2026. It was introduced against a policy background of improving access to justice, supporting Malaysia as an arbitral seat, and aligning Malaysian arbitration with regional developments. But *DTH v. DTF* warns that legalising funding does not necessarily answer the recoverability question.

This article advances three propositions. First, *DTH v. DTF* is best understood as a recoverability and supervisory court case, not as an anti-funding case. Secondly, the decision forces practitioners to separate legality, disclosure, security and recoverability. Thirdly, Malaysia's new framework is stronger than Singapore's in some respects, but still leaves open the key question of whether a losing party may be required to bear the funder's agreed financial benefit.

THE LEGALISATION-RECOVERABILITY DISTINCTION

The starting point is conceptual. Third-party funding raises at least four distinct questions. First, is the funding agreement lawful? Secondly, is the funder qualified or otherwise compliant with the applicable regulatory regime? Thirdly, what must be disclosed, to whom, and when? Fourthly, if the funded party succeeds, can any part of the funder's return be recovered from the losing party as costs?

These questions are often compressed in discussion, but they must be kept separate. Legalising third-party funding answers the first question. A regulatory code or qualifying funder regime may answer the second. Institutional rules and statutory disclosure provisions may answer the third. None of those necessarily answers the fourth. Recoverability is a separate question because it affects a person who is not a party to the funding agreement: the losing respondent. The respondent has not agreed to the funder's multiple, percentage, internal pricing model, risk premium or waterfall. The respondent's liability to pay costs arises from the tribunal's costs jurisdiction, not from the funding agreement.

That is why the recoverability question is difficult. On one view, the funded party has incurred the cost of funding because the arbitration had to be pursued. If the respondent's conduct made funding necessary, and if the funding was reasonable, one might say that the cost of funding is part of the cost of obtaining justice. On another view, the funder's success fee is not a legal cost, disbursement, arbitral expense or expert fee. It is the price of capital. It is a commercial return for risk, negotiated privately between the funded party and the funder. If that price is shifted to the respondent, the respondent may be required to pay a sum far exceeding ordinary legal costs, calculated by reference to variables outside the respondent's control.

The access to justice argument does not eliminate this tension. Third-party funding may promote access to justice by allowing impecunious or capital-constrained parties to bring claims. But access to justice does not necessarily require full indemnification of all funding costs. Civil litigation and arbitration often produce less than full recovery of actual expenditure. Successful parties may recover only reasonable and proportionate costs, or costs assessed under applicable rules. They may be unable to recover internal management time, opportunity cost, financing cost, insurance cost, or the full commercial price of risk transfer. A legal system may permit a party to access proceedings without guaranteeing that the opposing party will pay every economic cost of that access.

DTH v. DTF is significant because it places this distinction at the centre of arbitral costs. The applicants' argument was not that third-party funding was unlawful or that the funding agreement could not exist. Their argument was that, once funding had enabled them to vindicate their rights, the refusal to award funding costs deprived them of meaningful recovery and conflicted with public policy. The Court rejected that proposition as a basis for setting aside.

THE SINGAPORE FRAMEWORK BEFORE *DTH v. DTF*

Singapore historically treated maintenance and champerty as obstacles to third-party funding. The 2017 reforms altered that position in prescribed dispute resolution proceedings. Section 5A of the Civil Law Act 1909 abolished civil liability for maintenance and champerty, while preserving any other rule of law under which a contract may be contrary to public policy or otherwise illegal. Section 5B then permitted qualifying third-party funding contracts in prescribed dispute resolution proceedings. The Civil Law (Third-Party Funding) Regulations 2017 prescribe categories of proceedings and set qualifying funder requirements.

That statutory model is important. It validates qualifying funding contracts in prescribed proceedings. It does not, in express terms, say that a losing party may be ordered to pay the funder's return as part of costs. Nor does it state that the tribunal's costs jurisdiction is expanded to include success fees, multiples or percentage-based returns payable to a funder. That absence of express wording became central to the tribunal majority's reasoning in *DTH v. DTF*.

Singapore's arbitral costs framework also mattered. The tribunal majority relied in part on section 12(5) of the International Arbitration Act 1994, under which an arbitral tribunal may award any remedy or relief that could have been ordered by the General Division of the High Court if the dispute had been the subject of civil proceedings in that Court. The tribunal majority reasoned that, because the High Court could not have ordered recovery of third-party funding costs in ordinary litigation, the tribunal had no greater power to do so.

The applicants sought to avoid that conclusion by relying on Rule 37 of the Singapore International Arbitration Centre Rules 2016. Rule 37 provided that the tribunal had authority to order in its award that all or part of the legal or other costs of a party be paid by another party. The applicants also relied on SIAC Practice Note PN 01/17, which they submitted permitted the tribunal to take into account the existence or involvement of an external funder when apportioning costs or ordering that legal or other costs be paid by another party. Their argument was that 'other costs' included third-party funding costs and that the majority's refusal to award those costs breached the parties' agreed arbitral procedure.

The Court rejected the setting-aside challenge, but it did not determine the full merits of the recoverability issue. That is one reason the decision must not be overstated. The Court's concern was with the limited grounds of recourse against an arbitral award. It was not conducting a first-instance taxation or assessment of whether the funding costs were recoverable. It was not asked to rewrite the costs award. It was asked to set it aside or remit it.

THE FACTUAL AND PROCEDURAL SETTING OF *DTH v. DTF*

The underlying arbitration arose from a joint venture dispute. The applicants and the first and second respondents had entered into a joint venture for the provision of financing technology services. The parties' relationship deteriorated. The applicants brought claims for breaches of the shareholder and investment agreements and for minority oppression under section 216(1) of the Singapore Companies Act 1967.

In the Partial Award, the tribunal unanimously determined that the first and/or second respondents had breached the agreements in a number of respects and that the purported termination of the agreements was invalid. The tribunal also determined that the first respondent had acted oppressively in a number of respects. The majority ordered that the first respondent should buy out the applicants' shares in the third respondent for a total sum of US$14,736,000, comprising US$9,824,000 to the first applicant and US$4,912,000 to the second applicant.

The applicants had entered into a litigation funding agreement. Under that agreement, the funder was entitled to receive from any 'Resolution Sum' reimbursement of funded costs and, in addition, a success-based return calculated by reference to the greater of a multiple of total funded costs or a percentage of the Resolution Sum. The multiple ranged from 0.5 times to 3 times depending on the period between the date of the funding agreement and the resolution. The percentage ranged from 5 per cent to 30 per cent. If the funder funded ancillary proceedings, the amounts could be increased further.

In the costs phase, the applicants claimed third-party funding costs of US$14,608,695.11, ordinary legal costs and disbursements of US$4,561,716.59, and US$1,403,701.38 as an uplift on the legal costs of their English solicitors under a conditional fee agreement. The tribunal awarded legal costs, including arbitration costs, of US$4,129,633.56, with interest. The majority dismissed both the claim for third-party funding costs and the uplift claim.

The applicants' commercial point was that, if they had to pay the third-party funding costs to the funder from the buyout sum of US$14,736,000, they would be left with almost nothing by way of recovery. That point was powerful as a matter of funding economics. But it was not sufficient to satisfy the public policy threshold for setting aside.

The Court's further analysis is crucial. The applicants had not claimed only US$14,736,000. They had sought a buyout at a sum considerably exceeding that amount. In closing submissions, they had advanced a buyout figure of approximately US$65 million. The Court observed that, if the tribunal had awarded that amount but still disallowed third-party funding costs, it could hardly be said that the refusal to award those costs was contrary to public policy or that the applicants had obtained only a pyrrhic victory. The real grievance was therefore the relationship between the refusal to award funding costs and the amount actually recovered, not a freestanding public policy objection to non-recovery of funding costs.

The tribunal majority's reasons for refusing third-party funding costs included that the 2017 Singapore legislative reforms legalised third-party funding but did not provide for recoverability from the losing party; that section 12(5) of the International Arbitration Act did not confer a wider power than the General Division of the High Court would have; that Rule 37 did not extend to third-party funding costs; and that the particular funder's return was, in substance, a commercial investment return or reward for risk rather than part of the cost of funding the proceedings. A dissenting arbitrator disagreed, but the majority's view formed the costs award.

It is important to notice that the challenge was framed not as an appeal on the merits, because no such appeal was available, but as a setting-aside application. That shaped the Court's approach. The Court repeatedly emphasised that its task was not to decide whether the tribunal had correctly interpreted Singapore law or the arbitration rules. The question was whether the award crossed the high threshold for public policy intervention or amounted to a failure to follow the agreed arbitral procedure. That distinction matters for all future attempts to challenge arbitral costs awards.

PUBLIC POLICY: ACCESS TO JUSTICE AND ITS LIMITS

The applicants' first ground was public policy. They argued that the refusal to award third-party funding costs conflicted with Singapore's public policy of access to justice. The refined proposition was that Singapore public policy protects access to justice for impecunious but deserving parties with meritorious claims in arbitration.

The Court rejected the argument. The public policy ground for setting aside an award is narrow. The applicant must identify the rule or principle of public policy with which the award is said to conflict. The conflict must meet a stringent standard. The award must shock the conscience, violate the forum's most basic notions of morality and justice, be clearly injurious to the public good, or be wholly offensive to an ordinary reasonable and fully informed member of the public.

The Court held that a tribunal's ordinary costs decision did not come close to that standard. The case did not involve corruption, bribery, fraud, illegality or moral turpitude. It involved a tribunal majority deciding which categories of costs were recoverable. The Court was not prepared to convert a disagreement about the scope of recoverable costs into a public policy issue.

The Court also treated the applicants' formulation of public policy as too narrow. The proposed policy was not simply access to justice in general. It was access to justice for impecunious, successful, funded arbitrants seeking recovery of third-party funding costs. That was too specific and too outcome-driven to operate as a fundamental public policy capable of setting aside an award. It was closer to an argument about what the law ought to provide than a statement of what fundamental public policy presently required.

The Court did not reject access to justice as irrelevant. It accepted that access to justice is, generally speaking, a recognised head of public policy and that it had informed the 2017 amendments permitting third-party funding. But the Court drew a sharp distinction between permission to obtain funding and entitlement to shift the cost of that funding to the losing party. The first may support access to justice. The second does not necessarily follow. A legal system may allow funding without requiring a respondent to pay the funder's commercial return.

The Court's further observation that access to justice is not a one-way street is likely to become one of the most cited aspects of the judgment. If a respondent is sued by an impecunious funded claimant, and if the claimant's funding costs are recoverable, the respondent may be exposed to greater costs liability than it would have faced if sued by a claimant with means. That liability may depend on a private funding bargain to which the respondent was not a party. This is a legitimate countervailing consideration.

The Court also relied on the position in the Singapore International Commercial Court. Third-party funding is permitted in proceedings before that Court, but Order 22 rule 1(5) of the Singapore International Commercial Court Rules 2021 prohibits recovery of third-party funding costs. The Court reasoned that, if Singapore law prohibits such recovery in one significant commercial forum, it cannot plausibly be said that non-recovery of those costs in arbitration shocks the conscience or violates Singapore's most basic notions of morality and justice.

This reasoning does not destroy access to justice as a relevant consideration. It limits what access to justice can do in a setting-aside application. Access to justice may support the legality and legitimacy of funding. It may be relevant to costs discretion in an appropriate case. It may influence future legislation or institutional rule-making. But it does not, without more, require a supervising court to set aside a tribunal's refusal to shift the funder's return to the losing party.

ARBITRAL PROCEDURE: RULE 37 AND THE LIMITS OF PROCEDURAL RECOURSE

The applicants' second ground was that the tribunal had failed to follow the agreed arbitral procedure. Their argument depended on Rule 37 of the SIAC Rules and PN 01/17. They argued that Rule 37, read with the practice note, formed part of the parties' agreed procedure and permitted the tribunal to award legal or other costs, including third-party funding costs. On that basis, the majority's refusal to award such costs was said to breach the agreed arbitral procedure.

The Court rejected that analysis for two principal reasons. First, Rule 37 was not procedural in the relevant sense. It did not regulate the manner in which the arbitration was to be conducted. It concerned the tribunal's disposition of costs. A decision on costs, and the tribunal's interpretation of its costs power, were substantive matters rather than matters of arbitral procedure for the purposes of Article 34(2)(a)(iv) of the Model Law.

Secondly, even if Rule 37 were treated as procedural, the tribunal majority's interpretation was at least open on the wording. The applicable principle is that a supervising court will not revisit a tribunal's construction of an agreed procedure where that construction is open on the text of the agreement. It is not enough that the court might have preferred another interpretation. Intervention is reserved for cases where the tribunal's construction is simply not open on any view of the text.

This is an important restraint on creative challenges to costs awards. Parties may be tempted to frame a disagreement over the scope of 'other costs' as a procedural failure because that may provide a route to challenge an award. *DTH v. DTF* makes that route difficult. If the complaint is really that the tribunal reached the wrong answer on recoverability, it is likely to be characterised as a merits complaint, not a procedural irregularity.

The Court also considered the applicants' reliance on *Sanum*.[2] It held that *Sanum* did not decide the present question in a considered way and did not prevent the conclusion that Rule 37 was not procedural in the relevant sense. The result is that Rule 37 did not provide a reliable path for converting a costs-discretion dispute into an Article 34 procedural challenge.

THE ADDITIONAL BASIS: THE STRUCTURE OF THE FUNDING AGREEMENT

Although the Court dismissed both principal grounds, it also noted an additional point: the tribunal majority had not merely held that it lacked power to award third-party funding costs. It had also held that the particular litigation funding agreement did not fall within the third-party funding permitted under the Singapore 2017 amendments. The majority characterised the funder's return as a commercial investment return or reward for risk, rather than as part of the cost of funding the proceedings.

This part of the judgment is significant for funders. It suggests that the structure and language of the funding agreement matter. A return calculated as a multiple of funded costs, a percentage of the recovery, or an increased entitlement for ancillary proceedings may be commercially normal in funding markets. But the legal characterisation of that return may still matter when a tribunal is asked to shift it to the respondent.

This point should not be taken too far. Third-party funding by its nature involves a success-contingent return. A funder who assumes risk will expect reward. That does not automatically make the arrangement improper. The issue is narrower: when the funded party asks the tribunal to require the losing party to pay that return, the tribunal must decide whether the sum is properly a cost of the arbitration or a private investment return payable out of the claimant's recovery.

The Court said there was some force in the respondents' submission that the majority's characterisation of the funding agreement provided an independent basis for refusing the claim. Even if the tribunal had power to award third-party funding costs in principle, the particular funding arrangement would still have faced a separate characterisation problem. That matters for Malaysia because it shows why statutory recognition of a funder's financial benefit may assist, but may not be conclusive.

WHAT *DTH v. DTF* DECIDES, AND WHAT IT LEAVES OPEN

DTH v. DTF is likely to be cited for propositions broader than it decides. That should be avoided. The decision does not establish an absolute rule that third-party funding costs are never recoverable in Singapore-seated arbitration. The Court was not asked to decide recoverability at first instance. It was asked to set aside or remit the costs award. The supervisory context is essential.

The decision does establish that a refusal to award third-party funding costs will not readily be set aside as contrary to public policy. Access to justice, even if accepted as a relevant policy consideration, does not automatically require the losing party to pay the successful party's funding costs. The fact that the successful funded party is left with little net recovery may be commercially harsh, but it does not necessarily shock the conscience.

The decision also establishes that a challenge based on agreed arbitral procedure is unlikely to succeed where the complaint is really about the tribunal's interpretation of its costs power. A costs rule authorising the tribunal to award legal or other costs is not necessarily a procedural rule for the purposes of Article 34(2)(a)(iv). Even if it were, the court will not intervene merely because a different interpretation was arguable.

Finally, the decision highlights the importance of characterisation. A funding arrangement may be lawful, but the funder's return may still be characterised as an investment return or reward for risk rather than as a cost of the arbitration. That distinction will be central in future disputes about recoverability.

PRACTICAL IMPACT FOR SINGAPORE-SEATED ARBITRATION

For Singapore-seated arbitration, the immediate practical impact is caution. Funded parties should not assume that the funder's return can be shifted to the respondent merely because the funded party succeeds. Respondents will rely on *DTH v. DTF* to argue that legalisation of funding does not equal recoverability and that the funder's return is a private commercial bargain.

Funders may respond by pricing Singapore-seated arbitrations more conservatively where recoverability of funding costs is material to the investment thesis. They may require higher claim values, stronger merits, capped exposure, clearer adverse costs protection, or more detailed modelling of net recovery. They may also seek greater clarity in the funding agreement as to what happens if the tribunal awards ordinary legal costs but refuses to award the funder's return.

Funded parties should prepare their costs case from the outset. If they intend to seek recovery of funding costs, they should gather evidence of necessity, reasonableness, proportionality, alternatives considered, the respondent's conduct, the funding terms, the relationship between the funding and the arbitration, and the practical effect of non-recovery. A bare appeal to access to justice is unlikely to be sufficient.

Tribunals are likely to scrutinise the source of their costs power, the wording of the applicable rules, the structure of the funding agreement and the evidence supporting the claim. A tribunal may distinguish between reimbursement of costs actually funded, the cost of capital, adverse costs insurance, security for costs, and a success-based funder return. Those categories should not be assumed to stand or fall together.

Post-award challenges will remain difficult. The Singapore courts are likely to treat attempts to challenge costs awards through public policy or procedural grounds with caution. Unless the costs award involves something much more serious than disagreement over recoverability, curial intervention will be unlikely.

ENGLAND AND WALES: COURT LITIGATION AND ARBITRATION MUST BE SEPARATED

A useful comparison may be drawn with the treatment of after-the-event insurance premiums in England and Wales. After-the-event insurance is insurance taken out after a dispute has arisen, usually to protect a party against the risk of having to pay the opponent's costs if the claim fails.

Before 1 April 2013, a successful party in many civil claims could seek to recover the premium for such insurance from the losing party as part of its costs. That general position was changed by section 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Section 46 inserted section 58C into the Courts and Legal Services Act 1990 and restricted the recoverability of costs-insurance premiums from the opposing party. The transitional machinery is separate. Civil Procedure Rules Part 48 and Practice Direction 48 deal with preserved pre-commencement arrangements and defined exceptional categories.

That court litigation position should not be transposed automatically into arbitration. For arbitrations seated in England and Wales, the statutory framework remains the Arbitration Act 1996, as amended by the Arbitration Act 2025. The 2025 Act did not replace the 1996 Act with a new self-contained arbitration code. It amended the 1996 Act. The commencement regulations brought the substantive provisions of the 2025 Act into force on 1 August 2025, subject to the Act's transitional arrangements.

For present purposes, the important point is that the arbitration costs regime remains distinct from the court litigation costs regime. Section 59 of the Arbitration Act 1996 defines the costs of the arbitration as including the arbitrators' fees and expenses, the fees and expenses of any arbitral institution, and the legal or other costs of the parties. Section 63 preserves party autonomy by providing that the parties are free to agree what costs of the arbitration are recoverable; if there is no such agreement, the tribunal may determine the recoverable costs on such basis as it thinks fit, subject to reasonableness.

The Arbitration Act 2025 made a targeted amendment to section 61 of the Arbitration Act 1996. Section 6 of the 2025 Act amended section 61 to clarify that a tribunal may make an award allocating the costs of the arbitration even where the tribunal has ruled, or a court has held, that the tribunal has no substantive jurisdiction, or has exceeded its substantive jurisdiction. That amendment is important for jurisdictional disputes, but it does not introduce an express statutory rule on the recoverability of third-party funding costs or after-the-event insurance premiums in arbitration.

The question whether funding-related costs, or an after-the-event insurance premium, may be recoverable in an English-seated arbitration is therefore not answered simply by reference to the post-2013 court litigation rule. It depends on the arbitration agreement, the applicable arbitral rules, the tribunal's statutory costs jurisdiction, and the evidence as to reasonableness, necessity and connection with the arbitration.

This is where *Essar Oilfields Services Ltd v. Norscot Rig Management Pvt Ltd*[3] remains relevant, but it should be used cautiously. The case concerned third-party funding costs, not after-the-event insurance premiums. The Commercial Court upheld an arbitrator's decision that, on the facts of that arbitration, third-party funding costs could fall within 'other costs' for the purposes of the Arbitration Act 1996. It does not establish that funding costs or insurance premiums are automatically recoverable in every English-seated arbitration.

The comparison assists in two ways. First, it shows that court litigation and arbitration in England and Wales do not operate under identical costs regimes. Secondly, it reinforces the wider lesson from *DTH v. DTF*: legality, recoverability and cost-shifting are separate questions. A funding arrangement may be lawful. It may be properly disclosed. It may be commercially necessary. But it does not follow automatically that the opposing party must bear the funder's return, the insurance premium, or the commercial cost of the funding arrangement.

MALAYSIA'S NEW FRAMEWORK FROM 1 JANUARY 2026

Malaysia's third-party funding regime became operative from 1 January 2026. The Arbitration (Amendment) Act 2024 inserted a new Chapter 2 into Part III of the Arbitration Act 2005. The provisions include definitions, prospective application, abolition of maintenance and champerty in relation to third-party funding, power for the Minister to issue a code of practice, consequences of non-compliance with the Code, confidentiality exceptions, disclosure obligations, disclosure of termination, and the effect of non-compliance with the statutory disclosure provisions.

Section 46A is central. It defines third-party funding as funding by a third-party funder of all or part of the costs or expenses of the arbitration, made under a written third-party funding agreement, in return for the funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement. That wording is significant because it incorporates the funder's success-contingent financial benefit into the statutory definition of third-party funding itself.

Section 46C removes maintenance and champerty as objections in relation to third-party funding in arbitration. A third-party funding agreement is not to be treated as contrary to public policy or illegal merely on maintenance or champerty grounds. But section 46C does not immunise all funding agreements from all public policy scrutiny. It preserves any other rule of law under which a contract may be treated as contrary to public policy or otherwise illegal.

Sections 46G and 46H impose disclosure obligations. The funded party must disclose the fact that a third-party funding agreement has been made and the name of the third-party funder. It must also disclose termination or the end of the funding agreement. Those obligations support transparency, conflict checking and procedural fairness. They also align Malaysia with the broader movement in international arbitration towards early disclosure of funding arrangements.

The Code of Practice for Third Party Funding 2026 adds practical standards. It deals with matters such as independent legal advice, funding agreement requirements, capital adequacy, conflicts of interest, confidentiality, control and influence over the arbitration, adverse costs, security for costs, insurance premiums, termination, complaints and due diligence. The Code is important because it shapes market conduct and provides tribunals and courts with a benchmark.

The Asian International Arbitration Centre Arbitration Rules 2026 add an institutional layer. The Rules require disclosure of third-party funding at the commencement stage and contain a standalone Rule 31 on third-party funding. They also confer express powers on the tribunal to make enquiries about funding and to take funding arrangements and disclosure compliance into account when making orders, awards and costs decisions. This materially strengthens the procedural architecture, but it does not conclusively answer recoverability.

WHERE MALAYSIA IS STRONGER THAN SINGAPORE

Malaysia is better placed than Singapore on the validity of the funding arrangement. The Malaysian Act expressly contemplates that the funder may receive a financial benefit if the arbitration is successful. That makes it harder to argue that a success-contingent funder benefit is alien to the statutory scheme. In Singapore, the tribunal majority in *DTH v. DTF* was able to characterise the funder's return as a commercial investment return or reward for risk rather than a cost of the proceedings. In Malaysia, that argument is more difficult because the statute itself defines third-party funding by reference to the funder's success-based financial benefit.

The Malaysian Code also strengthens the position. Clause 8 requires the third-party funding agreement to state, among other matters, the amount of funding to be provided and the agreed financial benefit for the funder. Clause 13 requires the agreement to state the extent of the funder's liability for adverse costs, costs insurance premiums, security for costs and any other financial liability. Clause 9 imposes capital adequacy requirements. Clause 10 addresses conflicts of interest. Clause 12 addresses control and influence.

The AIAC Arbitration Rules 2026 further distinguish Malaysia from a purely silent regime. Rule 5.1(f) requires a claimant's Notice of Arbitration to include a statement on the existence of any third-party funding relationship and the identity and contact details of the third-party funder. Rule 6.1(d) imposes the corresponding requirement on the respondent's Response to the Notice of Arbitration. Similar requirements appear in Rule 8.2(f) for consolidation requests, Rule 10.4(h) for joinder requests, and Rule 12.4(h) for emergency arbitrator requests.

Once the arbitration is underway, Rule 28.1(e) gives the tribunal express power to make necessary enquiries on the existence of third-party funding arrangements and to order disclosure of the identity of the funder and any change in circumstances throughout the arbitration. Rule 31.1 requires the funded party to communicate in writing to the tribunal, the other parties and the AIAC the existence of the funding agreement and the identity of the funder. Rule 31.2 deals with timing. Rule 31.3 requires notification of changes in circumstances, including termination. Rule 31.4 permits the tribunal to take into account any third-party funding agreement, including compliance or non-compliance with Rule 31 disclosure obligations, when issuing an order, award or final award, or when apportioning costs.

These features give Malaysian tribunals more material to work with. A tribunal considering a funding-related issue will not be operating in a legislative vacuum. It can look to the Act, the Code and the applicable institutional rules. It can ask whether the funding agreement complies with the required standards, whether the funder has adequate resources, whether the funder has improper control, whether conflicts have been addressed, whether adverse costs and security for costs have been provided for, and whether the necessary disclosures have been made.

That is a real strength. It reduces uncertainty on legality, transparency and governance. It also allows Malaysia to present itself as a regulated funding jurisdiction rather than a jurisdiction merely tolerating funding.

WHERE MALAYSIA REMAINS VULNERABLE: RECOVERABILITY

The difficulty is that Malaysia's Act, Code and institutional rules now provide a relatively detailed framework for legality, disclosure, governance and costs allocation, but they still do not expressly answer the ultimate recoverability question: whether the losing party may be ordered to pay the successful funded party's third-party funding costs or the funder's agreed financial benefit.

Section 46A of the Arbitration Act 2005, defines third-party funding as funding by a third-party funder of all or part of the costs or expenses of the arbitration, made under a written third-party funding agreement, in return for the funder receiving a financial benefit only if the arbitration is successful within the meaning of that agreement. That wording is significant because the funder's success-contingent financial benefit is built into the statutory definition of third-party funding itself.

Section 46C then removes the common law rule against maintenance and champerty in relation to third-party funding and provides that a third-party funding agreement shall not be treated as contrary to public policy on the grounds of maintenance and champerty. That is the principal statutory provision giving the framework its permissive effect. But section 46C does not answer the separate recoverability question. Nor does it immunise funding agreements from all public policy scrutiny, because section 46C(2) preserves any other rule of law under which a contract may be treated as contrary to public policy or otherwise illegal.

The Code of Practice strengthens the framework, but it does not close the recoverability gap. Clause 8 requires the third-party funding agreement to state, among other matters, the amount of funding to be provided and the agreed financial benefit for the funder. Clause 13 also requires the agreement to state the extent of the funder's liability for adverse costs, costs insurance premiums, security for costs and any other financial liability. Those provisions improve the contractual architecture of funding arrangements. But they do not say that the losing party may be ordered to pay the successful party's funding costs or the funder's agreed financial benefit.

That distinction matters because the statutory disclosure obligation is narrower than the content requirements for the funding agreement. Section 46G requires the funded party to disclose the fact that a third-party funding agreement has been made and the name of the third-party funder. Section 46H requires disclosure of the termination or end of the funding agreement. Those provisions assist conflict checks and procedural transparency. They do not, in themselves, require disclosure of the funder's agreed return, still less confer a right to recover that return from the opposing party.

The AIAC Arbitration Rules 2026 materially strengthen the Malaysian position, but still stop short of resolving the recoverability issue conclusively. Rule 31.4 provides that the tribunal may take into account any third-party funding agreement, including compliance or non-compliance with the disclosure obligations under Rule 31, in issuing an order, award or final award, or in apportioning costs. Rule 47.9 provides that the tribunal may decide that all or part of the legal or other expenses incurred by a party be paid by another party, on such reasonable basis as the tribunal thinks appropriate.

Those provisions may provide a stronger route than the route considered in Singapore. In Malaysia, a funded party may argue that section 44 of the Arbitration Act 2005, read together with Rules 31.4 and 47.9 of the AIAC Arbitration Rules 2026, permits the tribunal to treat funding-related sums as recoverable in an appropriate case. Section 44 gives the tribunal discretion in relation to the costs and expenses of an arbitration, subject to the parties' agreement. Rule 47.9 then refers to legal or other expenses incurred by a party and gives the tribunal a reasonableness-based discretion.

But the argument remains an argument. Neither the Act, the Code, nor the AIAC Rules 2026 expressly state that the funder's agreed financial benefit, success fee, multiple, uplift or percentage return is recoverable from the losing party. Rule 31.4 permits the tribunal to take the funding agreement into account. It does not say that the funder's return is recoverable. Rule 47.9 refers to legal or other expenses incurred by a party. Whether a funder's success-contingent return falls within that phrase remains a question of characterisation.

A respondent in a Malaysian arbitration may therefore rely on *DTH v. DTF* by analogy and submit that legality does not equal recoverability. It may say that the funder's return is a private commercial return payable out of the funded party's recovery, not a cost or expense of the arbitration. It may add that the respondent was not a party to the funding agreement and should not be exposed to a success fee, multiple or percentage return agreed by others.

The funded party will respond that Malaysia's statutory and institutional wording is materially different. It will say that the Malaysian Act expressly recognises a success-contingent financial benefit as part of the definition of third-party funding. It will rely on section 44 of the Arbitration Act 2005, Rule 31.4 and Rule 47.9. It may point to access to justice, equality of arms, the respondent's conduct, the reasonableness and necessity of the funding arrangement, and the fact that the tribunal is expressly empowered to take the funding agreement into account when apportioning costs. It may also rely on comparative authority such as *Essar Oilfields Services Ltd v. Norscot Rig Management Pvt Ltd*, while accepting that *Essar* is fact-sensitive, English-seated, and not a blanket rule.

The likely battleground will be characterisation. Is the funder's return properly characterised as a recoverable cost or expense of the arbitration, or is it a private commercial return payable by the funded party out of its own recovery? The answer may depend on the wording of the arbitration agreement, the applicable arbitral rules, the funding agreement, the nature of the return, the evidence of necessity and reasonableness, the extent of disclosure, and the conduct of the parties.

The safer conclusion is therefore this: Malaysia has addressed legality, disclosure and regulatory governance more expressly than Singapore did in the context considered in *DTH v. DTF*. The AIAC Arbitration Rules 2026 further strengthen the Malaysian position by giving tribunals express powers to enquire into funding, require disclosure and take funding into account when making orders, awards and costs decisions. But Malaysia has still not expressly answered whether the losing party can be required to bear the funder's agreed financial benefit. That remains the vulnerable point, although the Malaysian framework now provides a stronger route for argument than the Act and Code alone.

NON-COMPLIANCE WITH THE MALAYSIAN CODE AND STATUTORY DISCLOSURE PROVISIONS

A separate issue concerns the consequences of non-compliance. Sections 46E and 46I of the Arbitration Act 2005 are deliberately flexible. Section 46E provides that non-compliance with the Code of Practice shall not, by itself, render a third-party funder liable to any action or legal proceedings.

Section 46I adopts the same approach to non-compliance with sections 46F, 46G and 46H, which concern disclosure for the purpose of seeking or securing funding, disclosure of the funding agreement, and disclosure of termination or the end of the funding agreement. In both cases, however, compliance or non-compliance may be taken into account by a tribunal or court if it is relevant to a question being decided.

The Code adopts the same structure. Clause 4 provides that non-compliance with the Code shall not, in itself, render a third-party funder liable to any action or legal proceedings, but that compliance or non-compliance may be taken into account by a tribunal or court where relevant to a question being decided.

This has led to the criticism that the Malaysian regime lacks bite. That criticism is understandable, but incomplete. The provisions do not create automatic liability against the funder, nor do they provide a fixed statutory sanction for every breach. But that does not mean they are toothless. Their effect is contextual. Non-compliance may matter where it affects conflicts, confidentiality, security for costs, adverse costs, procedural fairness, costs allocation, or the integrity of the funding arrangement.

That conclusion is reinforced by the AIAC Arbitration Rules 2026. Rule 31 requires disclosure of the existence of the third-party funding agreement and the identity of the funder, and it imposes a continuing obligation to notify changes in circumstances, including termination. Rule 31.4 then provides that the tribunal may take into account any third-party funding agreement, including compliance or non-compliance with disclosure obligations under Rule 31, when issuing an order, award or final award, or when apportioning costs.

Practical examples illustrate the point. Late disclosure of the funder's identity may require renewed conflict checks. Failure to disclose termination of funding may be relevant to an application for security for costs. Failure to state the funder's liability for adverse costs or security for costs may be relevant to the tribunal's assessment of enforcement and costs risk. Improper funder control may be relevant to settlement authority, counsel independence or procedural fairness. Breach of confidentiality restrictions may justify protective measures or costs consequences. Where non-compliance causes unnecessary applications, delay or procedural prejudice, the tribunal may attach procedural or costs consequences to that conduct.

The Code itself provides the benchmark against which those matters may be assessed. It requires the funding agreement to state the amount of funding and the funder's agreed financial benefit; it imposes capital adequacy requirements; it requires procedures for conflicts of interest; it addresses confidentiality; it prohibits funder control or influence over the conduct or settlement of the arbitration; and it requires the agreement to state the extent of the funder's liability for adverse costs, costs insurance premiums, security for costs and other financial liabilities.

The advantage of the Malaysian model is flexibility. The disadvantage is uncertainty. It avoids automatic invalidity or automatic funder liability for technical breaches, which is sensible in a developing market. But it leaves tribunals and courts to determine consequences case by case. That may produce proportionate outcomes, but it will take time for a coherent body of arbitral and judicial practice to emerge.

DISCLOSURE: IDENTITY IS THE START, NOT THE END

Disclosure is one of the most important practical issues in funded arbitration. The common minimum in Malaysia's new regime is disclosure of the existence of third-party funding and the identity of the funder. That enables conflict checks and allows the tribunal and the administering institution to address questions of independence, impartiality and procedural integrity.

The statutory position is carefully confined. Section 46G of the Arbitration Act 2005 requires the funded party to disclose to the other party, the tribunal or the relevant court the fact that a third-party funding agreement has been made and the name of the third-party funder. Section 46H requires disclosure of the termination or end of the funding agreement and the relevant date of termination or ending. Those provisions do not require routine disclosure of the funding agreement itself, the amount of funding, the funder's agreed financial benefit, the funder's due diligence, or the funder's internal assessment of the claim.

The Code of Practice should be distinguished from the disclosure obligation. Clause 8 requires the funding agreement to state, among other matters, the amount of funding to be provided and the agreed financial benefit for the funder. Clause 13 requires the agreement to state the extent of the funder's liability for adverse costs, costs insurance premiums, security for costs and other financial liability. Those are mandatory content requirements for the funding agreement. They improve transparency between funder and funded party and provide a benchmark for regulatory and procedural scrutiny. But they do not, without more, require those terms to be disclosed to the opposing party or the tribunal.

The AIAC Arbitration Rules 2026 strengthen the disclosure framework. The Notice of Arbitration and the Response to the Notice of Arbitration must include a statement on the existence of any third-party funding relationship and the identity and contact details of the funder. Rule 28.1(e) also empowers the tribunal to make necessary enquiries on the existence of third-party funding arrangements and to order disclosure of the identity of the funder and any change in circumstances during the arbitration. Rule 31.1 requires the funded party to communicate in writing to the tribunal, the other parties and the AIAC the existence of the funding agreement and the identity of the funder. Rule 31.3 requires notification of changes in circumstances relating to the funding agreement, including termination. Rule 31.4 allows the tribunal to take into account any third-party funding agreement, including compliance or non-compliance with Rule 31 disclosure obligations, when issuing an order, award or final award, or when apportioning costs.

Those provisions make funding visible to the tribunal and institution. But visibility is not the same as full production. Disclosure of the funder's identity is not the same as disclosure of the funding agreement, the funder's financial model, the funding waterfall, the due diligence file, advice on merits, adverse risk analysis or settlement assessment. Those materials raise separate questions of relevance, materiality, privilege, confidentiality, proportionality and control.

The recent English Commercial Court decision in *Uber London Ltd v. White and others/Uber London Ltd v. Peters and another*[4] ('*Uber*') is relevant by analogy. It was not an arbitration case, and it should not be treated as laying down an arbitration rule. But it is important because it concerned documents generated between a litigation funder, solicitors, a trade association and potential claimants before the claims were formally brought. The Court accepted that legal advice privilege could apply to communications between the funder and solicitors where the ordinary requirements were met. However, the Court held that communications created for the dominant purpose of enabling the funder to decide whether to fund the claim did not attract litigation privilege on the facts. The fact that litigation was contemplated was not enough.

The Court also treated confidentiality as distinct from privilege. Confidentiality may affect how disclosure is managed, and may justify conditions, redactions or restrictions on use. But confidentiality is not itself an automatic answer to disclosure of non-privileged material. *Uber* also emphasises that privilege claims must be properly explained rather than asserted in blanket terms.

The lesson for arbitration is therefore narrower, but important. Funder communications are not immune simply because they are confidential, commercially sensitive, or connected with contemplated proceedings. If funding material becomes relevant to a live issue, and if privilege is not properly established, a tribunal may be asked to order targeted production.

The result will depend on the applicable law, the applicable arbitral rules, the tribunal's procedural order, the nature of the documents, the basis of any privilege claim, and the proportionality of the request.

For Malaysia, this has particular force. The statutory regime requires disclosure of the fact of funding and the funder's name. The Code requires the funding agreement to contain key information about the funder's return and liabilities. The AIAC Arbitration Rules 2026 add institutional disclosure requirements, empower tribunal enquiry, and permit the tribunal to take funding into account when making orders, awards and costs decisions. That framework may make targeted disclosure applications more likely where funding becomes relevant to conflicts, security for costs, adverse costs exposure, funder control, costs allocation, or the recoverability of funding-related sums.

The safe conclusion is this: Malaysia's framework starts with disclosure of identity, but it does not necessarily end there. The funding agreement and related funder material are not automatically disclosable. Equally, they are not categorically protected. If the material becomes relevant to a live issue, the tribunal will have to balance relevance, privilege, confidentiality, proportionality and procedural fairness.

DRAFTING AND ADVOCACY AFTER *DTH v. DTF*

The practical response to *DTH v. DTF* is not to abandon third-party funding. It is to draft, disclose and advocate with discipline. The case does not decide that third-party funding costs are never recoverable in Singapore-seated arbitration. But it does show that a funded party should not assume that a funder's success fee, multiple, uplift or percentage return can automatically be shifted to the losing party. The safer assumption is that recoverability must be justified by the applicable law, the arbitration agreement, the institutional rules, the funding agreement, and the evidence.

The funding agreement should be drafted with particular care. Some matters are required by the Malaysian Code of Practice. Clause 8 requires the agreement to state, among other matters, the name and contact details of the funder, the amount of funding to be provided, the agreed financial benefit for the funder, a neutral and independent dispute resolution mechanism for disputes under the funding agreement, and all matters required under Chapter 2 of Part III of the Arbitration Act 2005 and the Code. Clause 13 requires the agreement to state the extent of the funder's liability for adverse costs, costs insurance premiums, security for costs and any other financial liability.

Other matters are not expressly required in those terms, but should be addressed as a matter of prudent drafting. These include the order of payment in the funding waterfall, the treatment of recoveries after legal costs and funder returns, responsibility for any insurance premium, termination mechanics, confidentiality and privilege arrangements, and the extent to which the funder may be consulted on settlement. The agreement should avoid language suggesting that the funder controls the arbitration or counsel. That is important because Clause 12 of the Code provides that the funder shall not control or seek to influence the funded party or its legal representative in the conduct or settlement of the arbitration, and shall not cause the funded party's legal representative to breach professional duties.

The drafting should also anticipate later characterisation. If the funder's entitlement is framed purely as a commercial investment return or reward for risk, it may be harder to characterise that sum as a recoverable cost or expense of the arbitration. That does not mean the funder cannot earn a commercial return. It means that the drafting should not ignore the later forensic question: what precisely is being claimed from the respondent, and why is it a recoverable cost rather than a private investment return?

The funded party should also prepare its costs case from the beginning. If it intends to seek recovery of funding-related costs, it should not wait until final costs submissions to assemble the evidence. It should be ready to explain why funding was needed, what alternatives were considered, why the terms were reasonable, how the funding enabled the arbitration to proceed, whether the respondent's conduct contributed to the need for funding, and why shifting some or all of the cost would be fair in the circumstances. A bare assertion that funding promoted access to justice is unlikely to be sufficient.

The AIAC Arbitration Rules 2026 strengthen the procedural framework for this advocacy. At the commencement stage, Rule 5.1(f) requires a claimant's Notice of Arbitration to include a statement on the existence of any third-party funding relationship and the identity and contact details of the third-party funder. Rule 6.1(d) imposes the corresponding requirement on the respondent's Response to the Notice of Arbitration. Similar disclosure requirements also appear in specific procedural applications: Rule 8.2(f) for consolidation requests, Rule 10.4(h) for joinder requests, and Rule 12.4(h) for emergency arbitrator requests.

Once the arbitration is underway, Rule 28.1(e) gives the tribunal express power to make necessary enquiries on the existence of third-party funding arrangements and to order disclosure of the identity of the funder and any change in circumstances throughout the arbitration. Rule 31.1 then provides the standalone third-party funding disclosure obligation: where a third-party funding agreement is made, the funded party must communicate in writing to the tribunal, the other parties and the AIAC the existence of the funding agreement and the identity of the funder. Rule 31.2 deals with timing. Rule 31.3 requires notification of changes in circumstances relating to the funding agreement, including termination. Rule 31.4 permits the tribunal to take into account any third-party funding agreement, including compliance or non-compliance with Rule 31 disclosure obligations, when issuing an order, award or final award, or when apportioning costs.

Those provisions give the funded party a stronger basis for costs advocacy, but they still do not amount to an express rule that the funder's return is recoverable from the losing party. They support the argument that third-party funding may be relevant to costs, but they do not answer the characterisation question: whether the sum claimed is a recoverable legal or other expense of the arbitration, or a private commercial return payable by the funded party out of its own recovery.

The respondent should also take a disciplined approach. It should decide early whether to seek further disclosure, security for costs, or information about adverse costs coverage. It should not assume that the existence of funding alone proves impecuniosity or inability to meet an adverse costs order. Funding may be relevant, but it is not conclusive. A security for costs application will usually require something more: evidence of inability or unwillingness to satisfy an adverse costs order, uncertainty over adverse costs protection, termination of funding, or other factors showing real enforcement or costs risk.

Tribunals should manage funding issues procedurally and early. They should ensure compliance with the mandatory disclosure requirements on funder identity and continuing disclosure of changes or termination. They should also distinguish between different types of funding-related disclosure. Conflict disclosure is not the same as costs disclosure. Costs disclosure is not the same as security for costs disclosure. Disclosure of the funder's identity is not the same as disclosure of the funding agreement, the funding waterfall, legal advice, due diligence material or settlement analysis.

Where wider funding-related disclosure is sought, tribunals should require a proper basis. The request should be tied to a live issue such as conflicts, security for costs, adverse costs exposure, funder control, costs apportionment, or recoverability of funding-related sums. Tribunals should preserve privilege and confidentiality where appropriate, including by redaction, confidentiality undertakings, confidentiality rings, staged disclosure or limited inspection. But they should also avoid allowing privilege or confidentiality to be asserted in blanket form without proper explanation.

The practical lesson is therefore this: after *DTH v. DTF*, parties and funders should treat recoverability as a point to be built into the case strategy from the outset. The funding agreement must be compliant and carefully drafted. Disclosure must be timely. Costs evidence must be assembled early. Respondents must challenge funding-related claims with precision. Tribunals must separate legality, disclosure, security and recoverability.

SHOULD LEGISLATION OR INSTITUTIONAL RULES GO FURTHER?

DTH v. DTF raises a policy question which is likely to recur beyond Singapore: should legislation or institutional rules expressly address the recoverability of third-party funding costs? The Singapore International Commercial Court did not have to design such a rule. It held that the tribunal's refusal to award third-party funding costs did not conflict with Singapore public policy and did not amount to a failure to follow the parties' agreed arbitral procedure. But the case exposes the uncertainty that arises where a legal system permits third-party funding without expressly addressing whether the funder's return may be shifted to the losing party.

There are at least three possible models. These are not outcomes mandated by *DTH v. DTF*. They are possible legislative or institutional responses to the recoverability problem.

The first model is prohibition. A statute or institutional rule could provide that the funder's success fee, multiple, uplift, percentage return or agreed financial benefit is not recoverable from the losing party. The advantage is certainty and respondent protection. The respondent would know that it is not exposed to a private commercial bargain to which it was not a party. The disadvantage is that such a rule may reduce the attractiveness of funding for lower-value, high-risk or strategically important claims. It may also weaken access to justice in cases where external funding is necessary to bring the arbitration at all.

The second model is express permissibility. A statute or institutional rule could provide that funding-related costs may be recoverable as costs of the arbitration, subject to tribunal discretion and reasonableness. The advantage is clarity and flexibility. It would confirm that the tribunal has jurisdiction to consider such costs without making recovery automatic. The disadvantage is that respondents may face substantial and unpredictable costs exposure unless the rule contains strong safeguards. Those safeguards would need to address reasonableness, proportionality, disclosure, necessity, the nature of the funder's return, and the risk of overcompensation.

The third model is structured discretion. This may be the preferable model for a developing funding market. It would not make funding costs automatically recoverable. Nor would it prohibit recovery in all cases. Instead, it would identify relevant factors for the tribunal to consider. Those factors might include the necessity of funding, the reasonableness of the funding terms, proportionality, the conduct of the parties, compliance with disclosure obligations, adverse costs arrangements, security for costs, whether the funder's return is calculated by a multiple or percentage, whether recovery would overcompensate the funded party, and whether the respondent had fair notice that funding-related costs would be claimed.

Any structured discretion should deal with two separate questions. The first is whether the tribunal has power in principle to award funding-related costs. The second is whether the particular sum claimed is properly characterised as a recoverable cost rather than an investment return. *DTH v. DTF* shows that even if the first question were answered in favour of the funded party, the second may remain a serious obstacle.

Malaysia already contains elements of the third model, but not yet in express recoverability terms. Section 44 of the Arbitration Act 2005 gives the tribunal discretion over the costs and expenses of an arbitration, including power to direct by whom and in what manner those costs or any part of them are to be paid. Section 46A defines third-party funding by reference to the funder receiving a financial benefit only if the arbitration is successful, and section 46C removes maintenance and champerty as objections to third-party funding in arbitration.

The Code[5] also supplies relevant safeguards. Clause 8 requires the funding agreement to state the amount of funding and the agreed financial benefit for the funder. Clause 13 requires the agreement to state the extent of the funder's liability for adverse costs, costs insurance premiums, security for costs and any other financial liability. Clauses 10, 11 and 12 address conflicts, confidentiality, and control or influence over the arbitration.

The AIAC Arbitration Rules 2026 then add an institutional layer. Rule 31.4 provides that the tribunal may take into account any third-party funding agreement, including compliance or non-compliance with the Rule 31 disclosure obligations, in issuing an order, award or final award, or in apportioning costs. Rule 28.1(l) gives the tribunal power to order and award the costs of the arbitration and legal costs, including the proportion of costs to be borne by each party, having regard to the circumstances of the case and without prejudice to costs, in principle, being borne by the unsuccessful party. Rule 47.8 requires the tribunal to fix the costs of the arbitration and decide which party shall bear them, or in what proportion. Rule 47.9 gives the tribunal power to decide that all or part of the legal or other expenses incurred by a party be paid by another party, on such reasonable basis as the tribunal thinks appropriate.

Those provisions give Malaysian tribunals a stronger textual basis than a wholly silent regime. But they still do not expressly say that the funder's agreed financial benefit, success fee, multiple, uplift or percentage return is recoverable from the losing party. Rule 31.4 allows the tribunal to take the funding agreement into account. Rule 47.9 refers to legal or other expenses incurred by a party. The remaining question is whether a particular funding-related sum is properly characterised as a recoverable cost or expense of the arbitration, or as a private commercial return payable by the funded party out of its own recovery.

Malaysia may not need immediate legislative amendment. It may be preferable to allow tribunals and courts to develop the position under section 44 of the Arbitration Act 2005, Chapter 2 of Part III of that Act, the Code of Practice, and the AIAC Arbitration Rules 2026. That would allow the law to develop incrementally, with attention to the facts of particular cases and the practical behaviour of funders, funded parties and respondents.

If uncertainty persists, however, a clarifying provision may be useful. Such a provision need not make funding costs automatically recoverable. It could state that the tribunal may take funding-related costs into account when allocating costs, but only where the tribunal is satisfied that the amount claimed was reasonably incurred, reasonable in amount, properly disclosed in accordance with applicable obligations, proportionate in the circumstances, and properly characterised as a cost or expense of the arbitration rather than merely a transfer of an investment return to the losing party.

The objective should be neither hostility to funding nor an uncritical transfer of funding economics to respondents. The better policy is disciplined discretion: funding should remain available, recoverability should remain possible in an appropriate case, but the losing party should not be made liable for the funder's commercial return unless the tribunal has a principled basis for treating that sum as a recoverable cost of the arbitration.

AFTER-THE-EVENT INSURANCE AND THE DANGER OF FALSE COMPARISON

The after-the-event insurance example remains useful, but only as a warning against false comparison. In court litigation in England and Wales, Parliament has restricted the recoverability of a specific class of insurance premium. The point is important, but limited: it concerns court litigation costs. It does not establish a general principle that funding-related costs can never be recovered in arbitration.

Conversely, *Essar Oilfields Services Ltd v. Norscot Rig Management Pvt Ltd* should not be treated as establishing an automatic rule in the other direction. The case is significant because it shows that, under the English arbitration costs framework and on particular facts, an award of funding costs may fall within the tribunal's costs jurisdiction and survive challenge. But it does not mean that funding costs, after-the-event insurance premiums, success fees, multiples or funder returns are automatically recoverable in arbitration.

The reason is that arbitration has its own costs architecture. Under section 59 of the Arbitration Act 1996, the costs of the arbitration include the arbitrators' fees and expenses, the fees and expenses of any arbitral institution, and the legal or other costs of the parties. Section 61 empowers the tribunal to allocate the costs of the arbitration between the parties, subject to any agreement of the parties. Section 63 allows the parties to agree what costs are recoverable; failing such agreement, the tribunal may determine the recoverable costs on such basis as it thinks fit, with reasonableness operating as the default measure unless the tribunal or court determines otherwise.

The better approach is therefore functional, not categorical. The tribunal should ask: what is the sum claimed; why was it incurred; what is the source of the tribunal's costs jurisdiction; does the sum fall within that costs jurisdiction; was it reasonably incurred; is it reasonable in amount; was it reasonably necessary for the arbitration; was the claim for such costs properly raised; did the opposing party have a fair opportunity to answer it; and is it just, in all the circumstances, to shift the burden to the losing party?

That is the analytical bridge back to *DTH v. DTF*. The Singapore decision warns against assuming that the legalisation of third-party funding automatically carries with it a right to shift the funder's commercial return to the losing party. The English after-the-event insurance position warns against confusing court litigation costs rules with arbitral costs powers. *Essar v. Norscot* warns against assuming the opposite extreme: that funding costs are unrecoverable simply because they are funding costs. The correct analysis is more disciplined. Legality, cost-shifting and recoverability are separate questions.

THE WATERFALL AND THE NET RECOVERY PROBLEM

The commercial effect of *DTH v. DTF* is best understood through the waterfall. In a funded arbitration, the proceeds of an award or settlement are not necessarily received by the claimant as a single undifferentiated sum. The funding agreement will usually define the order in which the recovery is distributed. Depending on its terms, that order may provide for repayment of funded costs, payment of unpaid legal fees, arbitral expenses, expert fees, insurance premiums, the funder's success-based return, and only then the claimant's residual entitlement.

The waterfall matters because the funded party's real interest is net recovery, not gross award. A claimant may obtain substantial relief and yet retain relatively little if the funder's return consumes a large part of the recovery. That is not necessarily a defect. The claimant may have accepted that bargain because, without funding, there may have been no claim at all. But the issue becomes contentious when the claimant seeks to shift the funder's return to the respondent. At that point, the tribunal is no longer concerned only with the private bargain between claimant and funder. It must decide whether a non-party to that bargain should bear its economic consequences.

DTH v. DTF illustrates the point; the applicants' commercial point was that, if they had to pay the third-party funding costs to the funder out of the US$14,736,000 buyout sum, they would be left with almost nothing by way of recovery. The Court recorded that consequence, but it did not treat it as sufficient to establish a public policy objection to the Costs Award.

The Court's reasoning is important. The applicants had not claimed only US$14,736,000. They had sought a buyout at a sum considerably exceeding that amount. In closing submissions, they advanced a buyout figure of approximately US$65 million. The Court observed that, if the tribunal had awarded the applicants the US$65 million buyout price they claimed, but still disallowed the third-party funding costs, it could hardly be said that the refusal to award those costs was contrary to public policy or that the applicants had obtained only a pyrrhic victory.

That analysis sharpens the lesson. *DTH v. DTF* is not simply a case where the funding costs nearly equalled the amount awarded. It is also a claim-value and recovery-risk case. The net recovery problem arose because the applicants recovered US$14,736,000, not the approximately US$65 million buyout figure they had advanced. The Court therefore treated the applicants' grievance as arising from the relationship between the refusal to award third-party funding costs and the amount actually recovered. It did not treat the net recovery problem as a freestanding public policy ground. Instead, it characterised the result as part of the risk inherent in dispute resolution: a party may not obtain the monetary recovery it sought or anticipated when proceedings began.

For practitioners, the lesson is that the waterfall must be examined before the claim is filed, not after the award. Parties and their advisers should ask: what is the best realistic recovery; what is the likely settlement range; what legal and arbitral costs will be incurred; what is the funder's priority; what is the funder's minimum return; what happens if funding costs are not recovered; what happens if only ordinary legal costs are recovered; what happens if the respondent becomes insolvent; and what happens if enforcement is delayed. The waterfall should be modelled under conservative assumptions, including a scenario in which the funder's return is not recovered from the respondent.

In Malaysia, this analysis is particularly important because the Act recognises the funder's financial benefit but does not expressly say that the respondent must pay it. Section 46A of the Arbitration Act 2005, defines third-party funding by reference to the funder receiving a financial benefit only if the arbitration is successful within the meaning of the funding agreement. Clause 8 of the Code requires the funding agreement to state the amount of funding and the agreed financial benefit for the funder. Clause 13 requires the agreement to state the extent of the funder's liability for adverse costs, costs insurance premiums, security for costs and other financial liabilities.

The AIAC Arbitration Rules 2026[6] strengthen the costs framework, but they do not eliminate the waterfall problem. They still do not expressly provide that the losing party must pay the funder's success fee, multiple, percentage return or agreed financial benefit.

Malaysian funded parties should therefore assume, unless and until the law develops, that the funder's return may have to come out of the claimant's recovery. That assumption may make some claims uneconomic, even if they are legally meritorious. It may also encourage more sophisticated funding structures, including capped returns, sliding scales, staged funding, costs insurance, adverse costs undertakings, or lawyer fee arrangements where permitted by applicable professional rules. But the economic analysis must be candid from the start.

The central point is this: the gross award is not the same as the funded party's net recovery. *DTH v. DTF* shows that a successful claimant may still face a commercially disappointing result where the award falls materially below the claim advanced, the funder's return remains payable from the recovery, and the tribunal refuses to shift that return to the respondent. That is why the waterfall is not merely a funding document. It is part of the case strategy.

REGIONAL IMPLICATIONS AND MARKET BEHAVIOUR

The regional significance of *DTH v. DTF* lies in its timing. Singapore is a leading arbitral seat. Malaysia has just introduced its statutory and regulatory framework. Hong Kong has an established funding regime. Other jurisdictions in Asia are watching the development of third-party funding with interest. A decision from the Singapore International Commercial Court on funding-cost recoverability will therefore influence regional arguments, even where it is not binding.

The decision will be most attractive to respondents. They will rely on it to resist claims for funder success fees, multiples, uplifts or percentage returns. The respondent's argument will be simple: the fact that funding is legal does not mean that the respondent must pay for it. The respondent did not agree to the funder's economics. The funder priced the risk of the case. The claimant accepted that risk allocation. The tribunal should not convert a private funding bargain into a costs liability for the opposing party unless the applicable law and rules clearly justify that result.

Funded parties will respond that *DTH v. DTF* was a Singapore setting-aside case, not a Malaysian merits decision on costs. They will say that Malaysia's statutory wording is materially different. They will rely on section 46A's express recognition of the funder's success-contingent financial benefit, section 44's costs discretion, the Code's funding-agreement requirements, and the AIAC Rules 2026, particularly Rules 31.4 and 47.9. They will argue that Malaysian tribunals have a stronger textual route to consider funding-related expenditure than the route considered in *DTH v. DTF*.

Funders will adapt. They may price Singapore-seated and Malaysian-seated arbitrations differently depending on the governing costs regime, the applicable institutional rules, the likely enforceability of adverse costs protection, and the strength of any recoverability argument. They may pay closer attention to the ratio between the likely recovery and the funder's return. The US$65 million point in *DTH v. DTF* matters here. Funding economics may look defensible at the claim-value stage but harsh at the recovery stage if the award falls materially below the amount claimed.

Institutions may also respond. Modern rules increasingly require disclosure of the existence of funding and the identity of the funder. The next question is whether rules should address recoverability more directly. The AIAC Arbitration Rules 2026 have taken an important step by giving tribunals express powers to enquire into funding, require disclosure, and take funding agreements and disclosure compliance into account when issuing orders, awards and costs decisions. But those Rules still stop short of saying that the funder's agreed financial benefit is recoverable from the losing party.

The market is likely to move towards more careful drafting and more careful costs advocacy. Funding agreements will need clearer provisions on adverse costs, security for costs, waterfall consequences, termination, settlement consultation and confidentiality. Costs submissions will need to be evidence-based. Tribunals will need to decide whether the sum claimed is properly a recoverable cost, and not merely a commercial return.

A MALAYSIAN DRAFTING CHECKLIST

A Malaysian funding agreement intended for arbitration should now be drafted with *DTH v. DTF* in mind. It should identify the funder, the funded party, the arbitration, the scope of funding, the amount of funding, the agreed financial benefit, and the waterfall. It should state what happens if the tribunal awards ordinary legal costs but refuses to award the funder's return. It should address whether the funder's return is payable only out of recoveries, whether it is capped, whether it operates by multiple or percentage, and whether it changes over time.

The agreement must also comply with the Code. It should state the name and contact details of the funder, the amount of funding, the agreed financial benefit, the dispute resolution mechanism under the funding agreement, and the matters required by the Act and the Code. It should state the extent of the funder's liability for adverse costs, costs insurance premiums, security for costs and other financial liabilities. It should address capital adequacy, conflicts, confidentiality, control, termination and complaints.

The agreement should not assume recoverability. It should make clear what happens if the tribunal refuses to award funding costs or awards only ordinary legal costs. It should identify whether the funded party remains liable to pay the funder from the recovery, whether the funder accepts any haircut, whether the return is capped by reference to net recovery, and whether there are settlement thresholds below which funder consent is required. Any settlement consultation mechanism must be drafted consistently with the Code's prohibition on funder control or influence over the conduct or settlement of the arbitration.

The funded party should also prepare a costs evidence file from the outset. That file should record why funding was required, what alternatives were considered, why the funding terms were reasonable, how the funding enabled the arbitration to proceed, how the funding related to the costs of the arbitration, and whether the respondent's conduct increased the need for funding. If the funded party later seeks recovery, it will need evidence, not rhetoric.

Disclosure should be planned. The party must comply with section 46G and section 46H of the Arbitration Act 2005 and with the applicable AIAC Rules where those Rules apply. The Notice of Arbitration, Response, consolidation request, joinder request and emergency arbitrator request may each trigger specific disclosure obligations under Rules 5.1(f), 6.1(d), 8.2(f), 10.4(h) and 12.4(h). Rule 31 imposes the continuing third-party funding disclosure obligation. Parties and their advisers should diarise updates, especially termination or material changes in funding.

Legal advisers should also preserve privilege deliberately. Communications created for the purpose of the funder's investment decision may not be protected in the same way as legal advice or documents created for the dominant purpose of conducting litigation or arbitration. The English decision in *Uber* shows that courts may distinguish between legal advice privilege, litigation privilege, confidentiality and control. Malaysian arbitration practice should not assume that labelling documents as confidential or funding-related will be conclusive.

Finally, the funding documents should anticipate security for costs. The tribunal may wish to know whether the funder has committed to meet an adverse costs order, whether there is costs insurance, whether security will be provided, and whether the funding has ended. A funding agreement which is silent on these matters may weaken the funded party's position if security is sought.

CONCLUSION

DTH v. DTF is not an anti-funding decision. It is a discipline decision. It disciplines assumptions about recoverability, post-award challenges and the use of public policy. It reminds practitioners that the legality of third-party funding is one thing; the shifting of the funder's commercial return to the losing party is another.

For Singapore-seated arbitration, the practical result is caution. Funded parties should not assume that the funder's return will be recoverable. Respondents have strong authority for resisting such claims. Tribunals are likely to scrutinise the costs power, the funding agreement and the evidence of reasonableness. Challenges to costs awards will remain difficult because Singapore courts will be slow to treat a costs dispute as a public policy or procedural failure.

The judgment's waterfall analysis is also more precise than a simple comparison between the funding costs and the award. The applicants claimed a buyout figure of approximately US$65 million but obtained US$14,736,000. The Court treated the applicants' complaint as arising from the relationship between the refusal to award third-party funding costs and the amount actually recovered. That was not a public policy violation. It was a risk inherent in dispute resolution and funding economics.

For Malaysia, the decision arrives at a formative moment. Malaysia's new framework is welcome and significant. It gives third-party funding statutory recognition, removes the maintenance and champerty objection for arbitration, imposes disclosure obligations, establishes a Code addressing funder standards, and introduces AIAC institutional rules that expressly deal with third-party funding disclosure and costs-related consequences. It is stronger than Singapore's framework on several aspects of validity and governance. But it does not expressly decide recoverability. The funder's financial benefit is recognised as part of third-party funding, but the Act, Code and AIAC Rules do not state that the losing party must bear that benefit.

The next phase of Malaysian arbitral practice will therefore turn on characterisation, evidence and discretion. A funded party seeking recovery must show why the funding cost is properly a cost or expense of the arbitration and why it is fair to shift it. A respondent resisting recovery will say that the funder's return is a private commercial bargain. Tribunals will have to decide the issue within the statutory and institutional framework.

The best summary is this. Malaysia has solved the legality problem. It has substantially addressed the transparency and governance problem. It has strengthened the institutional framework through the AIAC Arbitration Rules 2026. It has not yet conclusively solved the recoverability problem. That is not a failure of the new regime. It is the next frontier.

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Endnotes:

[1] *DTH and another v. DTF and others* [2026] SGHC(I) 5 (Singapore International Commercial Court, June 2026).

[2] *Sanum Investments Ltd v. Government of the Lao People's Democratic Republic* [2022] 4 SLR 198.

[3] *Essar Oilfields Services Ltd v. Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm).

[4] *Uber London Ltd and others v White and others/Uber London Ltd and others v. Peters and another* [2026] EWHC 1610 (Comm) (June 2026).

[5] The Code of Practice for Third Party Funding 2026.

[6] AIAC Arbitration Rules 2026, Rules 31.4 and 47.9.