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Tenke v Katanga: The English Commercial Court Provides Further Clarity on the Ability to Recover Third Party Funding Costs in Arbitration

Louise Barber (Herbert Smith Freehills) · Thursday, January 27th, 2022 · Herbert Smith Freehills

The recent English Commercial Court decision in *Tenke Fungurume Mining SA v Katanga Contracting Services SAS [2021] EWHC 3301 (Comm)* has provided an interesting further comment on the broad discretion available to tribunals in English-seated arbitrations to award the costs of third party funding as part of costs awards.

The decision by Mrs Justice Moulder DBE of the Queen's Bench Division, which was published on 7 December 2021, built on the foundation laid in the 2016 High Court decision in *Essar Oilfields Services Limited v Norscot Rig Management PVT Limited [2016] EWHC 2361 (Comm)*. Similar to that case, the Commercial Court in *Tenke* rejected a challenge to an arbitration award brought on the basis of the tribunal's award of the costs of third party funding to the successful party, finding that it did not constitute a serious irregularity under section 68 of the 1996 Arbitration Act (the "**Act**").

This topic has already been the subject of great interest and debate in the arbitration community. This latest case provides clarity on the approach the court will take to an award of third party funding costs in arbitration, but leaves open the question of whether the difference in recovery between litigation and arbitration should be permitted.

The foundation laid down in *Essar*

Under English law, tribunals are empowered by section 61 of the Act to award the costs of the arbitration between the parties on any basis they see fit to do so (subject to any agreement between the parties on this point). Section 59 of the Act defines "*costs*" to include the fees and expenses of the arbitrators, the fees and expenses of any arbitral institution, and – significantly for this decision – the legal or "*other costs*" of the parties.

This latest case on the topic of the award of third party funding as costs comes five years after the High Court's noteworthy decision in *Essar*. In that decision, the High Court refused a challenge to the award of a sole arbitrator under section 68(2)(b) of the Act brought on the basis that he had included the costs of third party funding in his award of costs to the successful party. The Court held that the sole arbitrator's decision under the 1998 ICC Rules to treat the success fee payable to

the third party funder as an "*other cost*" within the meaning of the Act did not amount to a serious irregularity.

In particular, the Court emphasised that a serious irregularity can only be made out where a tribunal purports to exercise a power which it does not have – not where there is an erroneous exercise of a power that it does have. In that instance, it was plainly within the sole arbitrator's power to award costs. The complaint from the unsuccessful party was only that the sole arbitrator had wrongly exercised his discretion as to which costs would be awarded. This could not therefore form a basis for a serious irregularity.

Notwithstanding this decision, however, the Court also made a number of obiter observations as to the meaning of "*other costs*". Most notably, the Court rejected the suggestion that such a meaning should be constrained by the English Civil Procedure Rules and the aversion to the award of third party funding costs as part of English court litigation – a finding that made significant waves in the arbitration community at the time and since. The Court consequently observed that "*other costs*" could, as a matter of language, context and logic, include the costs of obtaining third party funding and that it was within the arbitrator's discretion to award them.

Serious irregularity in *Tenke*

The circumstances facing the Commercial Court in *Tenke* were different from those in *Essar* in several respects. Among other things, the funding for the successful party, described as a "*litigation funding agreement*", was obtained from a related company as a shareholder loan. The terms included a fixed success fee. The successful party sought to recover both that success fee and compound interest at a high rate of 9.5% based on its claimed costs of borrowing.

Consistent with the decision in *Essar*, the Tribunal in *Tenke* treated the funding costs as "*other costs*" within the meaning of the Act, and consequently included over $1 million of such costs in its costs award.

The unsuccessful party subsequently challenged the award before the Commercial Court, alleging a serious irregularity under section 68 of the Act on a number of bases. This included a challenge to the Tribunal's award of the funding costs within its costs award, as well as the Tribunal's decision not to allow the cross-examination of witnesses in connection with the funding arrangements.

The award of funding costs

In pursuing the challenge on the basis of the Tribunal's award of the funding costs, the unsuccessful party argued that it could never have been reasonably intended when the Act was passed that the award of costs would include fees paid to third party funders – especially given that such fees are not otherwise recoverable in court litigation – nor the costs related to a loan taken out to pay for legal costs.

It argued that the High Court's decision in *Essar* had therefore been wrongly decided and should not be followed. It argued in particular that this case was an even more extreme example than Essar

because it concerned a shareholder loan, rather than funding from a regulated third party funder, and because unlike *Essar*, there was no finding that such funding was needed in order for the successful party to be able to pursue the arbitration.

However, Mrs Justice Moulder declined to depart from the reasoning in *Essar* decision and rejected this challenge accordingly. For the same reasons as outlined by the High Court, it did not amount to an excess of powers to have awarded such costs given that the Tribunal was clearly empowered to decide the matter of costs. Even if there was a wrongful exercise of such power by the Tribunal, no remedy for such wrongful exercise would lie under section 68.

In contrast to that case, however, there was no comment offered on whether "*other costs*" could or should include the costs of funding as a matter of construction.

Interestingly, and in contrast to the *Essar* decision, the Court observed that a remedy for a wrongful exercise by the Tribunal of a power such as the award of costs could be found under section 69 of the Act, namely an error of law. However, in this instance, the parties had excluded such a challenge by agreement and no such remedy was consequently available here.

The decision not to allow cross-examination in relation to funding

The unsuccessful party also challenged the Tribunal's decision on a number of evidential points relating to the funding arrangements, including not to allow cross-examination of witnesses in connection with the funding arrangement, alleging that it constituted a procedural irregularity. The Tribunal had concluded that the issue was whether in fact the funding costs were objectively unreasonable in either form or amount, and that neither was the case here. In particular, it was "*not inherently unreasonable*" to obtain a shareholder loan from a related entity for this purpose, including in circumstances where it was "*doubtful*" that funding would have been available from other sources. Cross-examination was not permitted on this basis.

The Court similarly rejected this challenge, finding that the Tribunal was entitled to reach the conclusion that it did. Such a decision did not meet the high threshold of a decision which no arbitrator could reasonably have reached in those circumstances.

Comment

Following hot on the heels of further moves towards an acceptance of third party funding in Singapore and Hong Kong, this latest decision highlights the reluctance of the English courts to second-guess the discretionary exercise of tribunals' power (including to award costs), with the Court emphasising that it "*should be extremely slow to interfere with these discretionary procedural decisions*".

It also reinforces the high threshold to meet to establish serious irregularity: as Mrs Justice Moulder observed, "*only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process, will the Court allow an application under section 68. Section 68 is designed as "a longstop, only available in extreme cases, where the tribunal has gone so wrong in its conduct of the arbitration in one of the respects*

listed in section 68, that justice calls out for it to be corrected": RAV Bahamas Ltd and another v Therapy Beach Club Inc [2021] UKPC 8; [2021] A.C. 907 at [30]."

The Court's comment that the remedy for the wrongful exercise by a Tribunal of a power such as an award on costs lay under section 69 raises the prospect of a future challenge to an award of funding costs on this basis. If such a challenge were made, it would be interesting to see whether the arguments raised before the Court in *Tenke* regarding the consistency of approach between litigation and arbitration would be well received or whether the obiter views in *Essar* would continue to hold sway. In reality, given the propensity for many parties to exclude challenge for an error of law under section 69 of the Act in their arbitration clauses, there may be limits to how much further this issue can be explored before the English courts. However, in light of the Law Commission's recent announcement of the planned review of the 1996 Arbitration Act, the award of costs and the relevance of third party funding in arbitration may well be an area which receives further legislative attention – and possibly further clarity – in the years to come.

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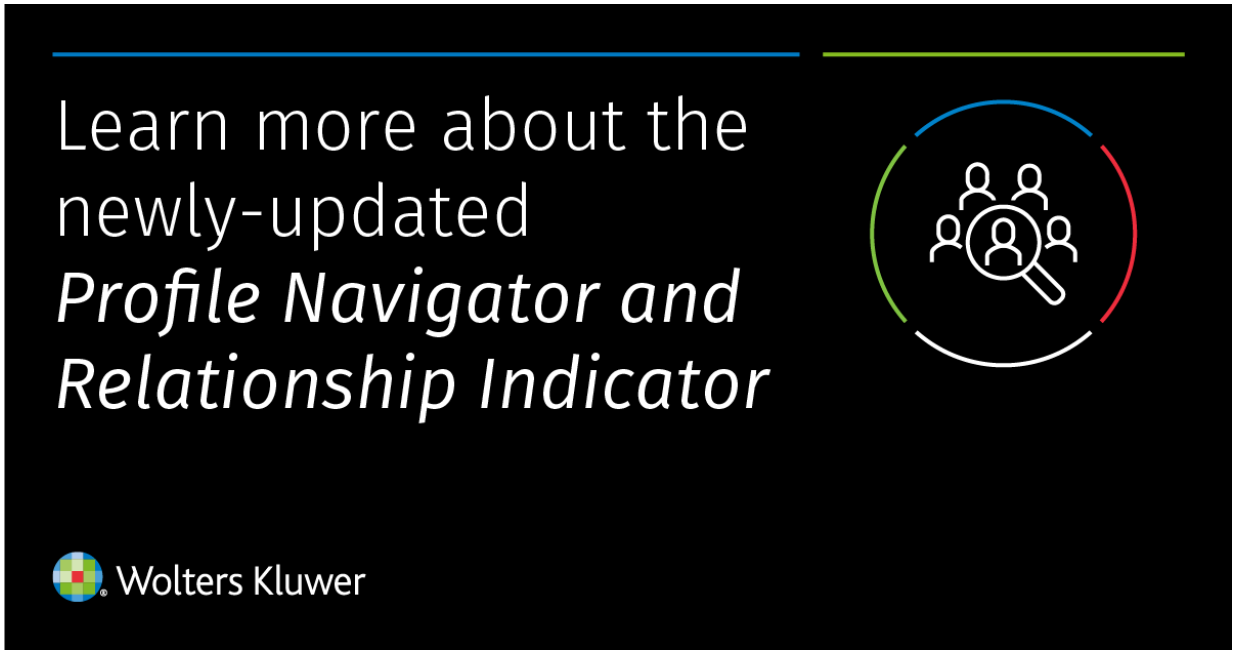

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