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Legal Update
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Landmark High Court decision: Clarification that third party funding costs are recoverable in arbitration

The High Court of Justice in London has handed down a landmark decision concerning the recovery of third party funding costs in the case of *Essar Oilfield Services Ltd v Norscot Rig Management PVT Ltd*.

Facts of the case

The Claimant (and funded party) (**"Norscot"**) commenced ICC arbitration proceedings against the Defendant (**"Essar"**) relating to a repudiatory breach of an operations management agreement concerning an offshore drilling platform. The arbitrator (Sir Philip Otton) found in Norscot's favour and held Essar liable for damages under the contract, totalling over $12 million. Norscot was also awarded indemnity costs as a consequence of Essar's conduct, both in respect of the underlying agreement and during the subsequent arbitration proceedings.

The indemnity costs award not only included the legal costs incurred in respect of the arbitration proceedings but also included £1.94 million that Norscot was required to pay to its third party funder, upon its success in the proceedings.

In reaching this view, the arbitrator held that Essar had deliberately put Norscot in a position where it could not self-fund the arbitration and, consequently, it had had been reasonable for Norscot to obtain third party funding (of £647,000). The tribunal also held that the terms on which the funding was obtained (under which Norscot was required to pay the higher of 300% of the funded amount or 35% of the damages recovered), were reasonable and were standard terms within the litigation funding market.

In making this award, the arbitrator indicated that he was exercising his powers under sections 59(1)(c)[1] and 63(3)[2] of the Arbitration Act 1996 (the **"Act"**) and the applicable ICC Arbitration Rules.

Essar challenged the award on the ground of "serious irregularity" on the basis that s. 59(1)(c) did not include the costs of third party funding and therefore the arbitrator had exceeded his powers in making the award.

In response, Norscot's primary argument was that the arbitrator's construction of the Act and the ICC rules was correct and it was within his power to award the costs Norscot was obliged to pay to its funder.

Decision

HHJ Waksman Q.C., sitting as a judge in the High Court, dismissed the application and held that the costs payable to the third party funder were recoverable in principle pursuant to s. 59(1)(c) of the Act and Article 31(1) of the ICC rules. The Court held that the arbitrator was right to construe "other costs" as being sufficiently wide to include the costs of third party funding. The judge noted however that the Civil Procedure Rules do not include the same (or equivalent) "other costs" wording.

Comment

This important clarification of the law confirms that an arbitrator does have, within its powers, the authority to include the costs of the funder's "return" within the ambit of an indemnity costs order. This is a significant shift from the usual position where the "return" is funded out of the award recovered by the funded party (diminishing its ultimate recovery).

This decision confirms the very broad discretion which an arbitrator has when dealing with issues of costs and is a further demonstration of the English Courts' generally supportive approach to arbitration.

1 s. 59(1)(c) states that "*References in this Part to the costs of the arbitration are to...the legal or other costs of the parties*".
2 s. 63(3) states that: "*The tribunal may determine by award the recoverable costs of the arbitration on such basis as it thinks fit*".

For more information about Mayer Brown's International Arbitration practice, please contact:

Mark Stefanini
Partner, London
E: mstefanini@mayerbrown.com
T: +44 20 3130 3704

Jonathan Cohen
Senior Associate, London
E: jcohen@mayerbrown.com
T: +44 20 3130 3536

0470ldr