

ENGLISH COMMERCIAL COURT GRANTS THIRD PARTY FUNDER COSTS

Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd [2016] EWHC 2361 (Comm)

Introduction

In a decision handed down on 15 September 2016, the English Commercial Court declined to set aside an arbitration award in which an arbitrator awarded third party funder costs to the successful party in ICC proceedings.

Background

The present proceedings in the Commercial Court related to a partial arbitration award granted in arbitration proceedings (which took place under the ICC Rules). The sole arbitrator, Sir Philip Otton, found the defendant in the arbitration, Essar Oilfields Services Limited (“Essar”), liable to pay damages to the present respondent and claimant in the arbitration, Norscot Rig Management Pvt Limited (“Norscot”), for repudiatory breach of an operations management agreement dated 14th August 2007. He also awarded to Norscot various sums which were due, but unpaid, under the Agreement.

On 17th December 2015, the arbitrator made the fifth partial award (the “Award”) relating to interests and costs. In the Award, the arbitrator held, among other things, that Norscot was entitled to the costs of litigation funding which it had obtained in order to bring the arbitration, because such litigation funding costs were “other costs” for the purpose of s.59(1)(c) of the Arbitration Act 1996, which refers to “legal or other costs of the parties”.

Under the litigation funding agreement (made in 2011), the litigation funder, Woodsford Litigation Funding, advanced to Norscot the sum of around £647,000 for the purpose of the arbitration, and was entitled (if Norscot succeeded in the arbitration) to a fee of 300 per cent of the funding or 35 per cent of the recovery. Norscot sought £1.94 million (that being the sum owed to Woodsford),

The applicant Essar made an application under s68 of the Arbitration Act 1996 to set aside the Award. Norscot opposed the application on the grounds that:

- The application was out of time;
- There was no serious irregularity within the meaning of s.68(2)(b);
- Even if the alleged error would constitute a serious irregularity under s.68(2)(b), there was no substantial injustice to Essar;
- Even if there was otherwise a claim under s.68(2)(b), Essar lost its right to make it by reason of statutory waiver as a result of its pre and post Award conduct;
- Alternatively, there was, in fact, no error of law anyway because the arbitrator’s construction of “other costs” so as to include the cost of litigation funding was correct.

Decision

The Commercial Court (HHJ Waksman QC sitting as a Judge of the High Court) declined to

grant the application.

At the outset of his decision, HHJ Waksman QC emphasized the heavy burden associated with succeeding on a s68 application. On the facts of the case, he found that there was no “serious irregularity” within the meaning of s68, with this conclusion being sufficient to deal with the case.

However, in deference to arguments made, HHJ Waksman dealt with the other issues raised in the application, and in particular, with whether the arbitrator’s construction of “other costs” so as to include the cost of litigation funding was correct.

In determining what “other costs” meant in the context of s59, the approach taken by the courts under the Civil Procedure Rules as to what can and cannot be awarded by way of costs was of little direct relevance – the relevant context was the Arbitration Act 1996 itself and the wide scope of procedural powers conferred upon the arbitrator.

HHJ Waksman said that “other costs” within the meaning of s59 had to be seen as other costs which relate to the arbitration proceedings, the question then being what such costs are or might be. Where a party to an arbitration was funding it by obtaining specific litigation funding, so as to enable him to specifically enforce his legal rights, it was very hard to see how that was excluded for all purposes from the expression “other costs”.

Costs of the arbitration were to be viewed in a broad sense – costs could include the legal costs, and the other costs of the arbitration. The limiting factor was a “functional one” – “Do the costs relate to the arbitration and are they for the purposes of it?”. If costs were not incurred in order to bring or defend the claim in question, they would fall outside the definition of “other costs” and they would not relate to the arbitration. However, that was not the case for the present costs.

As a matter of language, context and logic, “other costs” could include the costs of obtaining litigation funding, and therefore would fall within the arbitrator’s discretion.

25th October 2016