

The difference arbitration makes: Losing party pays costs of nearly 3 times sum advanced to cover legal fees by funder

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On 15 September 2016 the High Court of England & Wales handed down a judgment in the case of *Essar Oilfields Services Limited v Norscot Rig Management Pvt Limited (2016) QBD*. The court considered a challenge to the decision of the arbitrator, Sir Philip Otton, in an arbitration under the ICC rules.

The arbitrator ordered the losing respondent to pay not only the legal expenses of the claimant, but also the success fee, paid by the claimant to a third party who had funded its legal costs. The terms of the funding arrangement envisaged the payment to the third party of either 300% of the sum advanced or 35% of the sums recovered in case of success – terms seen as standard in the market. The sum payable to the third party funder was £1.94m. The sum advanced by the third party to cover legal fees was £647,000.

The basis for the challenge (under s 68 of the Arbitration Act 1996) was alleged serious irregularity and exceeding of powers by the arbitrator. However, the court left the decision in force.

ARBITRATOR CAN AWARD NOT ONLY LEGAL, BUT ALSO 'OTHER' COSTS

The court concluded that the success fee paid to the funder is not a 'legal cost'. However, under s 59(1)c of the Arbitration Act 1996 the arbitrator had power to award the payment by the losing party not only of legal costs, but also 'other costs' of the winning party (as long as those costs were connected with the arbitration proceedings).

This decision highlights a key difference between rules applicable in arbitration and the corresponding rules on allocation of costs applicable in court proceedings. The Civil Procedure Rules 1998, which contain, inter alia, rules on allocation of legal costs between the parties, does not contain wording in relation to 'other costs'.

The Arbitration Act 1996 gives arbitrators additional powers, which are not contained in the Civil Procedure Rules. The court also held that there is no reason to interpret the words 'other costs' narrowly or by reference to the Civil Procedure Rules.

ARBITRATION GOES ITS OWN WAY

This decision also cuts against the general tendency of developments in the civil procedural law of England & Wales and the recent attempts legislatively to limit how far the losing party can be responsible for the costs of the winning party.

Following reforms initiated by Lord Justice Jackson, a success fee paid under conditional fee agreements with lawyers concluded after 1 April 2013 is no longer recoverable from the other side as legal costs. The same goes for premiums payable under ATE insurance policies in relation to legal costs (previously the policy premium could be recovered from the other side in the event of success together with other costs). In the last few years, rules have also been introduced on the compulsory provision of budgets to the other side and the approval of costs by the court. It seems unlikely that success fees paid to other parties will ever be recoverable from the other side in court.

This decision will probably not change the situation in relation to court proceedings. However, the court has held that the powers of an arbitrator to award costs under the Arbitration Act 1996 are significantly wider in this respect than the powers of a judge. Nevertheless, arbitrators may assess success fees by reference to standard rates in the third party litigation/arbitration funding market.

The respondent asked for permission to appeal, but permission was denied. In view of the novelty and unexpected nature of the decision, a follow-up application for permission to the Court of Appeal may follow.

We will continue to monitor events. At present, the judgment has not yet been published. The source of the information set out in this publication is the short summary published on the Lawtel database.

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