



# English High Court allows recovery of third party funding costs in ICC arbitration proceedings

## Litigation Update

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The use of third party funding in arbitration has grown significantly in recent years, with many funders now reporting that their portfolio of funded cases is evenly split between litigation and arbitration matters.

Third party funders typically offer to fund a claimant's legal fees and disbursements on a litigation or arbitration matter (or, increasingly, on a portfolio of matters) in return for either a multiple of the funds advanced or a percentage of the damages awarded. If the claim is unsuccessful, the funder will make no recovery and has no recourse against the claimant. If the claim is successful, the claimant will pay the funder out of the damages recovered from the defendant.

A decision handed down by the English High Court this week has the potential significantly to alter the landscape for third party funding in arbitration. In the currently unreported case of *Essar Oilfield Services Limited v Norscot Rig Management Pvt Limited* the Court upheld the decision of the arbitrator in an ICC arbitration to allow the recovery of the costs of third party funding in addition to the award of costs and damages as "other costs" as provided for under the Arbitration Act 1996 (the Act) and the applicable ICC Arbitration Rules.

The ICC arbitration was seated in England and, thereby, subject to the Act. Upon succeeding in the arbitration, the Claimant (Norscot) sought its costs from the Respondent (Essar). It included within the claim for costs, the costs of the third party funding which it had been forced to incur in order to advance the proceedings. The funding was for £647,086.49 with the funder entitled to recover, in the event of success, either 300% of the funding advanced (being £1,941,259.47), or 35% of the damages recovered, whichever was the greater.

The third party funding costs payable on success were found to be recoverable in addition to the legal costs as "other costs" by the sole arbitrator, Sir Philip Otton (a former Lord Justice of the Court of Appeal). The Respondent disputed the arbitrator's jurisdiction to make such an award and appealed the decision to the High Court.

In dismissing the appeal, the High Court held that the third party costs incurred by the Claimant were recoverable pursuant to section 59(1)(c) of the Act and Article 31(1) of the ICC Rules. These provisions set out the types of costs which can be recovered in arbitration and prescribe the power of an arbitrator to make an award. The Court accepted that the terms of section 59(1)(c), including reference to "legal and other costs", was wide enough to permit the recovery of third party funding costs. In particular, it was held that there was no basis for construing "legal and other costs" narrowly in the context of the Act, and that the correct test involved considering what other costs were incurred in bringing or defending a claim, as the case may be.

It is relevant to note that the arbitrator was critical of the Respondent's conduct, both as regards its repudiatory

breach of the contract in issue in the proceedings and in respect of the arbitration proceedings themselves, finding that the Respondent had deliberately put the Claimant in the position where it was unable to fund the arbitration out of its own resources, The costs of the proceedings were ordered to be paid on the indemnity basis.

We are not aware of any previous English-seated arbitration where a tribunal has awarded third party funding costs in addition to legal costs as "other costs". Traditionally, compensation due to a third party funder has not been held to be a recoverable cost.

Permission to appeal was refused by the High Court and we will await with interest any application for permission to appeal to the Court of Appeal. Regardless of whether there is an appeal, this case will trigger further interest in third party funding for arbitration, albeit that the facts of this case and, in particular the arbitrator's criticism of the Respondent's conduct, may mean that Essar is not an authority which arbitral tribunals will easily be persuaded to follow.

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