English Court Gives the Green Light (Again) to Recovery of Third-Party Funding Costs in Arbitration

22 December 2021

INTRODUCTION

The number of arbitrations involving third-party funding has increased significantly over the past decade[1] but is not subject to statutory regulation in the United Kingdom. On 7 December 2021, the English Commercial Court in *Tenke Fungurume v. Katanga* provided welcome guidance to parties and funders on the recoverability of funding costs.[2] The Court rejected in its entirety a challenge under section 68 of the 1996 Arbitration Act by the unsuccessful respondent in the arbitration, and upheld an award of third-party funding costs rendered by a London-seated International Chamber of Commerce ("ICC") arbitral tribunal. The Court also refused to interfere with the tribunal's discretionary procedural decisions in relation to COVID-19 restrictions.

BACKGROUND

The underlying dispute arose out of two contracts between Katanga Contracting Services S.A.S. ("Katanga") and Tenke Fungurume Mining S.A. ("Tenke"), a leading copper and cobalt producer, that related to a mine operated by Tenke in the Democratic Republic of Congo. The contracts and the arbitration clauses were subject to English law and provided for ICC arbitration seated in London.

In January 2020, Katanga commenced arbitration proceedings against Tenke. In March 2021, during the costs submission stage, Katanga disclosed that it had funded its costs in

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1 Third-party funding typically refers to an agreement by an entity that is not a party to the dispute to provide a party or its affiliate funds to finance the costs of the proceedings—including a party's legal representation and fees of the arbitral tribunal—in exchange for a financial return that is dependent on the outcome of the dispute. *See* Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration (April 2018), https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf.

2 *Tenke Fungurume Mining S.A. v. Katanga Contracting Services S.A.S.* [2021] EWHC 3301 (Comm).

the arbitration by way of a loan from a third-party funder, Logos Agvet Limited, a related company in which Katanga's shareholder held a controlling stake.

In August 2021, the tribunal rendered a final award in favour of Katanga. The tribunal ordered Tenke to pay Katanga's legal and expert costs of approximately USD$1.4m; Katanga's funding costs of USD$1.7m, which appear to have comprised (i) a success fee payable to Katanga's funder that the tribunal described as "a fixed fee or markup, payable in the event of a successful outcome . . . of 100% of the amount of the funding, namely USD[$]1,300,000," (ii) a variable fee payable to Katanga's funder of over USD$200,000 and (iii) a success fee payable by Katanga to its solicitors under a conditional fee agreement ("CFA"); and compound interest at 9%.

THE ENGLISH COMMERCIAL COURT

Tenke challenged the award in the English Commercial Court under section 68 of the Arbitration Act, on the basis that a "serious irregularity" had caused or will cause it "substantial injustice." In reaffirming that a section 68 challenge is available only in "extreme cases," the Court rejected Tenke's application in its entirety.

Costs Award

The Court rejected Tenke's challenge that the tribunal's award of third-party funding costs as a component of "legal and other costs of the parties" under section 59(1) of the Arbitration Act[3] amounted to an excess of power under section 68(2)(b).[4] Following the Commercial Court's decision in *Essar*,[5] the Court held that Tenke's argument that the tribunal did not have the power to award third-party funding costs effectively dressed up "an alleged error of law [an erroneous exercise of an available power] as an excess of power [a purported exercise of a power which the tribunal did not have]." While an error of law can in principle be challenged under section 69 of the Arbitration Act, such challenge had been waived by the parties in this case by agreeing to the ICC Arbitration Rules. Speaking *obiter*, the Court noted that it would have dismissed the challenge to the tribunal's award of the solicitors' success fee under the CFA for the same reason (which it had dismissed as out-of-time).

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[3] Section 59(1) of the Arbitration Act provides that "costs of arbitration" consist of "(a) the arbitrators' fees and expenses, (b) the fees and expenses of any arbitral institution concerned, and (c) legal or other costs of the parties."

[4] The Court also rejected Tenke's procedural challenge under section 68(2)(a) of the Arbitration Act.

[5] *Essar Oilfields Services Ltd v. Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm), [2017] Bus LR 227. *See also Lesotho Highlands Development Authority v. Impregilo SpA* [2005] UKHL 43, [2006] 1 AC 221.

Procedural Decisions Related to COVID-19

Tenke had also challenged under section 68(2)(a) of the Arbitration Act the tribunal's rejection of applications to adjourn the merits hearing on the basis that (i) COVID-19 restrictions had prevented the parties' mining experts from visiting the site of the mine and (ii) subsequently, Tenke's lead counsel had contracted COVID-19 and therefore could not attend the merits hearing. The Court rejected the challenge, finding it insufficient that "a different tribunal may have arrived at a different decision" and that it was unpersuaded that "no reasonable arbitrator could have arrived at" these conclusions.

The Commercial Court has reportedly rejected Tenke's permission to appeal to the Court of Appeal.

IMPLICATIONS FOR PARTIES AND FUNDERS

In November 2021, the Law Commission announced that it would conduct a review of the Arbitration Act to "ensure that the U.K. remains at the forefront of international dispute resolution."[6] In view of the increase in third party funding in commercial and investment treaty arbitration, and the English courts' examination of these issues at the set-aside stage, it remains to be seen whether the Law Commission will recommend reform in this area.

In the meantime, the decision in *Tenke* that an arbitral tribunal seated in London can in principle award reasonable funding costs—including a success fee uplift—to the successful party provides welcome clarity to parties and funders alike, and is likely to fuel an already increasing trend of litigation funding in arbitration proceedings. In addition, the Court's acceptance of a related-party funding transaction has important implications for intra-group funding arrangements and financially impecunious parties that do not have recourse to standard commercial funding such as bank loans or overdrafts. Finally, the decision in *Tenke* that English courts will only in exceptional circumstances overturn a tribunal's discretionary procedural decisions—particularly refusals to adjourn proceedings on grounds of restrictions related to COVID-19—provides welcome guidance to parties framing set-aside applications in this evolving environment, and reinforces London's role as a world's leading arbitration centre.

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Please do not hesitate to contact us with any questions.

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[6] Law Commission, *Law Commission to review the Arbitration Act 1996* (30 November 2021), https://www.lawcom.gov.uk/law-commission-to-review-the-arbitration-act-1996/.


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