CLIENT ALERT

English High Court Upholds Award for Third-Party Funding Costs in *Tenke Fungurume Mining v Katanga Contracting Services*

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AUTHORS

Duncan Speller | Mark Feldner

I. Introduction

The use of third-party funding in international arbitration is on the rise. Third-party funding gives parties the ability to pursue meritorious claims while limiting their own legal costs. Under third-party funding arrangements, an outside investor typically covers all or part of a party's legal costs on a no-recourse basis. In exchange, should the funded party prevail in the dispute, the funder is usually entitled to a multiple of the invested amount or to a share of the proceeds. The recent High Court decision in *Tenke Fungurume Mining v Katanga Contracting Services* will be welcomed both by funders and funded parties: the judgment provides further confirmation that a tribunal in a London-seated arbitration has the power to award the costs of obtaining third-party funding to the successful party.[1] At the same time, the judgment will be welcomed by the London arbitration community more generally as it affirms the English courts' non-interventionist approach to procedural decisions and reinforces the finality of arbitral awards.

II. Background

The underlying arbitration arose out of two commercial agreements relating to a mine in the Democratic Republic of the Congo (the "DRC"). In January 2020, Katanga Contracting Services ("KCS") commenced arbitration proceedings,

[1] *Tenke Fungurume Mining SA v Katanga Contracting Services SAS* [2021] EWHC 3301 (Comm) (7 December 2021).

governed by the ICC Rules and seated in London, against Tenke Fungurume Mining (“TFM”). The arbitral tribunal comprised Mr Charles Kaplan, Mr Jeffrey Gruder QC and Dr Achille Ngwanza (the “Tribunal”).

The emerging COVID-19 pandemic and the resulting government mandates affected the conduct of the arbitration in several ways. First, in January 2021, TFM requested an adjournment of the merits hearing, contending that travel restrictions had prevented the parties’ mining experts from visiting the site. Moreover, in the same month, TFM’s leading counsel contracted COVID-19, rendering him unable to appear at the merits hearing scheduled for March 2021. TFM thus applied for a two-month adjournment to the hearing to allow it to instruct alternative counsel. By two procedural orders issued in January and February 2021, respectively, the Tribunal dismissed TFM’s applications and ruled that the hearing should proceed as planned.

Following the hearing, in late March 2021, the parties exchanged submissions on costs and interest. In the course of its submissions, KCS revealed that it had obtained a shareholder loan, described as a “litigation funder agreement”, to fund the arbitration. KCS submitted two witness statements in support of its claim for costs and interest. In response, TFM requested permission to cross-examine the witnesses on the new statements relied on by KCS. By a further procedural order, the Tribunal refused any additional cross-examination but ordered that KCS produce certain documents relating to its financial position.

In August 2021, the Tribunal rendered its final award, ordering TFM to pay all sums claimed by KCS and dismissing TFM’s counterclaims. In addition, the Tribunal awarded KCS its legal and expert costs of approximately USD 1.4 million, a further USD 1.7 million in respect of litigation funding fees, as well as pre- and post-award compound interest at a rate of nine per cent.

III. The Section 68 Challenge

The proceedings before the English courts were brought under s. 68 of the Arbitration Act 1996 (the “Act”), which allows a party to an arbitration to challenge an award “on the ground of serious irregularity affecting the tribunal, the proceedings or the award”. Subsection (2) provides an exhaustive list of nine categories of irregularity that may form the basis of a challenge. Further, the applicant must be able to show that the alleged irregularity caused it to suffer “substantial injustice”, which is usually taken to mean that it must have affected the outcome of the arbitration.

In *TFM v KCS*, TFM challenged the award on the basis that the Tribunal had exceeded its powers or that the Tribunal had failed to comply with its general duty under s. 33 of the Act. Section 33 requires an arbitral tribunal to “act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent” and to “adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined”. TFM asserted that a serious irregularity could be made out on four distinct grounds:

- **Ground 1**: Failure to adjourn the arbitration to allow a visit to the construction site

First, TFM contended that its counterclaim required a site visit to the DRC. However, TFM's expert, Deloitte, was not prepared to visit the mine amidst pandemic-related travel restrictions. The Tribunal refused TFM's application for an adjournment of the hearing and dismissed the counterclaim without a site visit having been conducted. In its s. 68 challenge, TFM submitted that, by deciding not to adjourn the arbitration, the Tribunal failed to give TFM a reasonable opportunity to put its case and failed to adopt procedures suitable to the circumstances of the case.

Having reviewed the relevant passages of the final award, the Court concluded that the Tribunal had given adequate consideration to the arguments for and against a site visit. In particular, the parties' experts agreed that no site visit was necessary in respect of a majority of the issues in dispute, and there was disagreement as to whether a site visit would have aided the experts in their assessment of the remaining issues. The Court emphasised the Tribunal's discretion in procedural matters and found that there was "no basis" to conclude that the Tribunal's decision "surmounted the high hurdle of a successful challenge under section 68". The relevant test, as applied by the Court, was whether the Tribunal's conclusion was one "which no reasonable arbitrator could have arrived at".

In any event, the Tribunal confirmed in its final award that the counterclaim was unsuccessful not because of the absence of a site visit, but because TFM had failed to adduce sufficient evidence. TFM could not establish that a site visit might have changed the outcome of the counterclaim. In the circumstances, the requirement to prove "substantial injustice" was not satisfied.

- **Ground 2**: Failure to adjourn the arbitration notwithstanding the illness of TFM's leading counsel

Second, TFM argued that the Tribunal should have adjourned the merits hearing in light of its leading counsel's COVID-19 infection. TFM submitted that leading counsel's participation in the hearing was vital to its legal representation and formed part of TFM's "fundamental right of due process". Because there were only 10 working days between the Tribunal's decision and the hearing date, TFM contended that fairness demanded an adjournment.

The Court disagreed. Dismissing the second limb of TFM's s. 68 challenge, the Court held that the Tribunal had considered all the circumstances, as it had been required to do. This entailed weighing up "the delay which would be caused by an adjournment against the fact that TFM could still appoint someone to act and they would have the support of a highly experienced team of arbitration lawyers". The Court noted that TFM had been advised by a "highly-qualified legal team from a reputed international law firm", including a senior partner who regularly acts as counsel in international arbitrations.

Moreover, the parties' arbitration agreement specifically provided that any arbitral proceedings should be "concluded as expeditiously as possible", and that, if possible, a final award should be issued "within 90 days" of the Tribunal's first meeting. The Court found that, in deciding whether to grant an adjournment, the Tribunal had been entitled to take into

account the wording of the arbitration clause and to give effect to the parties' express intention to conclude the proceedings as swiftly as possible. Against this background, it held that "[t]he fact that a different tribunal may have arrived at a different decision is not sufficient" for the Court to interfere with the award.

- **Ground 3**: Costs award

Third, TFM submitted that the Tribunal's decision to award costs based on KCS' shareholder loan, and not to allow cross-examination of KCS' witnesses, constituted a serious irregularity. Specifically, TFM relied on the recent High Court decision in *P v D* to argue that, by failing to permit cross-examination on issues relevant to the costs award, the Tribunal had breached its general duty under s. 33 of the Act.[2] In *P v D*, it was held that arbitrators had breached their duty to act fairly and impartially as between the parties by reaching a decision on a core issue without allowing the losing party's main witness to be cross-examined on that issue.

TFM sought to question KCS' witnesses on the agreed lending fee, the size of the premium, the company's financial position and the identity of its shareholders, issues which TFM said were central to the costs award. In the words of the Tribunal, TFM argued that KCS' funding arrangement was "little more than an opportunistic and unjustified attempt to confer a windfall benefit on a related party, *i.e.* on itself and its shareholders".

The Court accepted the Tribunal's analysis of the circumstances surrounding the litigation funding agreement and found that the Tribunal was entitled to conclude that the funding terms were reasonable, even without cross-examination on this issue. Reiterating the relevant test under s. 68 of the Act, the Court held that TFM would have had to show that the Tribunal's refusal to allow cross-examination was a decision "which no arbitrator could reasonably have reached in the circumstances of the case". TFM failed to meet that requirement.

Relatedly, TFM sought to challenge the costs award on the basis that the Tribunal had exceeded its powers by awarding KCS' funding costs. Section 61(1) of the Act provides in relevant part that a tribunal may "make an award allocating the costs of the arbitration as between the parties". Section 59 specifies that "the costs of the arbitration" include "the legal or other costs of the parties", but it does not define the meaning of "other costs". In the landmark case of *Essar v Norscot*, the English High Court upheld an arbitral award that ordered the losing party to pay the successful party's funding costs, including a 300 per cent success fee.[3] The decision in *Essar v Norscot* thus established, for the first time under English law, that "other costs" may include fees payable to a third-party funder.

Since the 2016 judgment in *Essar v Norscot*, arbitration practitioners have fiercely debated both whether the case was correctly decided and the scope of the decision. TFM pointed to the ongoing controversy to argue that "[t]he decision in *Essar Oilfields* is wrong and has been met with surprise and concern in the field of international arbitration". In any event,

[2] *P v D* [2019] EWHC 1277 (Comm).

[3] *Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm).

TFM contended that in the present case, there was even less justification for designating funding fees as recoverable costs: whereas the dispute finance in *Essar* was provided by a regulated third-party funder, KCS received its funding from a related company owned by one of KCS' own shareholders. TFM submitted that, on the present facts, there was no reason to follow the decision in *Essar v Norscot*. The Tribunal was therefore not entitled to award the funding costs as part of the "costs of the arbitration". By attempting to do so, TFM argued, the Tribunal had exceeded its powers in breach of s. 68(2)(b) of the Act.

The Court rejected TFM's argument. The judge declined to depart from the decision in *Essar v Norscot* and accepted, in principle, that the tribunal had the power available to it under s. 61(1) of the Act to award a successful party its funding costs. The judge considered that, at most, it could be argued that the Tribunal's decision was an "erroneous exercise of an available power". The remedy to correct an error of law is found in s. 69 of the Act, a section excluded by the ICC Rules applicable to the present arbitration. To succeed with a s. 68 challenge, the applicant would have to show that there was an excess of power. A mere error of law would therefore not be sufficient.

In practice, the judgment means it will be extremely difficult to challenge a tribunal's decision to award a successful party its funding costs in an institutional arbitration (where the institutional rules will typically exclude the possibility of a s. 69 challenge). Moreover, even where a s. 69 challenge remains theoretically possible, the high threshold for such a challenge entails that it is likely to be extremely difficult to overturn a tribunal's decision to award the costs of third-party funding in practice.

- **Ground 4**: Compound interest

Lastly, TFM challenged the Tribunal's decision to award pre- and post-award compound interest at a rate of nine per cent. The Tribunal had rejected TFM's request to cross-examine KCS' witnesses on the company's asserted cost of borrowing, which guided the Tribunal in its interest award. Instead, TFM was left to contest KCS' claim on the basis of limited documentary evidence.

The Court reiterated that the decision whether to allow cross-examination on specific issues was a procedural matter that was firmly within the Tribunal's discretion. TFM had not shown that the Tribunal's decision was one that no reasonable arbitrator could have reached. Moreover, TFM had failed to establish that cross-examination might have led to a different outcome. As a result, the Court also dismissed the final ground of TFM's s. 68 challenge, thus rejecting TFM's application in its entirety.

IV. Practical Points Arising from the Judgment

The decision in *TFM v KCS* has significant implications for international arbitrations seated in England and Wales. While the judgment is particularly relevant to parties considering third-party funding, it also provides valuable insights into the English courts' approach to challenges under s. 68 of the Act.

- ***Upholding tribunals' power to award funding costs:*** *TFM v KCS* confirms that English courts will be reluctant to overturn arbitral awards on the ground that the tribunal exceeded its powers by allocating the costs of third-party funding. By following and reinforcing the authority of *Essar v Norscot*, the Court has confirmed that s. 68 cannot be used to overturn a tribunal decision that the costs of third-party finance constitute 'other costs'.

- ***Clarifying and extending the scope of* Essar v Norscot**: The arbitrator in *Essar v Norscot* justified his award of funding costs by reference to the extreme facts of that case: he found that Essar had "set out to cripple Norscot financially", that it had mounted "unjustifiable personal attacks and allegations of fraud and dishonesty" against Norscot personnel, and that it had effectively forced Norscot to resort to third-party funding as a result of the "financial disadvantage" caused by Essar's conduct. The tribunal also emphasised that the third-party funding provided to Norscot reflected standard market rates.

  In *TFM v KCS*, by contrast, there was no suggestion that TFM had behaved improperly. Moreover, the funding arrangement in question was provided as a shareholder loan by a related party: the Tribunal expressly recognised that "the funding transaction is therefore not considered as an arms' length transaction". The Court upheld the award without addressing these aspects of the funding agreement. After five years of speculation whether *Essar v Norscot* should be confined to its peculiar facts, *TFM v KCS* confirms a tribunal's power to award funding costs and confirms that this power is not only applicable in the somewhat extreme facts at issue in *Essar v Norscott*. This confirmation of a tribunal's power to award funding costs is likely further to enhance the appeal of third-party funding to parties to arbitrations seated in England.

- ***Confirming the high threshold for s. 68 applications***: More generally, the decision demonstrates the English courts' reluctance to interfere with arbitral awards, consistent with the arbitration-friendly stance of English law. Stringent tests need to be met to overturn an award pursuant to s. 68 of the Act. TFM advanced an array of arguments to show that the award had been marred by serious irregularities. The grounds on which TFM relied ranged from alleged failures to adjourn the merits hearing and to allow for cross-examination of additional witnesses to an asserted excess of power and prohibitions based on public policy. In response to each argument, the Court underlined that recourse to s. 68 is only available in exceptional and exceedingly rare cases. Accordingly, users of international arbitration can have confidence that the English courts will strive to uphold arbitral awards.

- ***Providing guidance on COVID-19 measures***: The judgment in *TFM v KCS* also marks one of the first English arbitration cases to consider procedural orders made in the context of the COVID-19 pandemic. The Court stressed the Tribunal's broad discretion when making case-management decisions, including whether to allow site visits and additional cross-examination. By repeatedly deferring to the Tribunal's considered decisions, the judgment serves to reassure both parties and arbitrators that the English courts will not interfere lightly with the approach taken by arbitral tribunals, even when faced with unprecedented circumstances.

In conclusion, the English High Court's judgment in *TFM v KCS* provides welcome additional confirmation that a tribunal seated in England has, in principle, the power to award a successful party its costs of obtaining third-party funding. The ruling also shows that English courts will generally defer to tribunals, including in respect of procedural decisions, and will only intervene in extreme cases.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Duncan Speller
+44 203 580 4711
dspeller@willkie.com

Mark Feldner
+44 203 580 4745
mfeldner@willkie.com

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