

New Commercial Court decision on recoverability of funding costs in arbitration 'Tenke Fungurume Mining SA v Katanga Contracting Services [2021] EWHC 3301 (Comm)'

[James Leabeater KC](#) appeared in *Tenke Fungurume Mining SA v Katanga Contracting Services* [2021] EWHC 3301 (Comm), in which the Court considered whether an arbitral tribunal could award funding costs; specifically, a fee payable under a loan advanced by a company associated with a shareholder to fund costs of the arbitration. Such a fee would not be recoverable in litigation (see *Rowe v Ingenious Media Holdings* [2021] EWCA Civ 29 paras 45-52) but a fee for funding arbitration costs was allowed in *Essar Oilfields Services v. Norscot Rig Management* [2016] EWHC 2361 (Comm), a decision much discussed by international arbitration practitioners.

Mrs Justice Moulder dismissed the application on the basis that the tribunal's decision did not exceed its available powers and so could not form the basis for a s.68 challenge. However, the Court did not go further, as the Court had in *Essar*, in finding in the alternative that such fees were recoverable as a matter of law. Accordingly, the correct resolution of the point of law is unclear. If and when this point can be raised as a point of law under s.69 of the Arbitration Act 1996, which was not possible in this case, there is all to play for.