Tenke Fungurume Mining S.A. v Katanga Contracting Services S.A.S. [2021] EWHC 3301 (Comm): High Court upholds award of third-party funding costs- James Leabeater KC

The recent decision of Mrs Justice Moulder DBE in a challenge to an arbitration award brought under section 68 of the Arbitration Act 1996 ("the 1996 Act") reinforces the reluctance of the English courts to intervene in arbitration appeals. Most importantly, the decision confirms the approach taken in Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd [2016] EWHC 2361 (Comm) in which the High Court refused to allow a section 68 challenge to an award of the cost of third-party litigation funding as "other costs" of the arbitration. The judgment confirmed the distinction between an excess of power and an error of law; the latter can only be challenged under section 69 of the 1996 Act, which was excluded by agreement in Tenke Fungurume.

Background facts

The underlying dispute arose in relation to a mine in the Democratic Republic of the Congo, which was operated by the Claimant ("TFM"). TFM agreed various construction-related contracts with the Defendant ("KCS"). In January 2020 KCS commenced two arbitrations against TFM, which were later consolidated. The arbitration was governed by ICC rules and seated in London. The merits hearing took place in March 2021 and was followed by written submissions on costs and interest. KCS also provided two witness statements in support of its claim for interest and costs. By its Final Award, the Tribunal awarded KCS all sums claimed and dismissed all of TFM's counterclaims.

The Tribunal ordered TFM to pay KCS's legal and expert costs. The Tribunal also ordered TFM to pay USD $1.7 million for the cost of litigation funding. This amount included a fixed fee of 100% of the cost of the funding which was payable in the event of a successful outcome for KCS and a variable fee. The funding was advanced by a related company which was owned by one of KCS's shareholders. The Tribunal also awarded KCS compound interest at 9% on the cost of the litigation funding.

TFM challenged the Final Award under section 68 of the 1996 Act (a challenge under section 69 was excluded by agreement). Section 68 provides that an award can be challenged in the event of serious irregularity on various grounds including that the tribunal has failed to comply with its general duty under section 33 of the 1996 Act (section 68(2)(a)) and that the tribunal has exceeded its powers (section 68(2)(b)). The Judge emphasised that a challenge under section 68 could only succeed where "*what has happened is so far removed from what could reasonably be expected of the arbitral process*" [37] and where the outcome might well had been different had the procedural irregularity not occurred [38].

TFM's challenge to the award of third-party funding costs

TFM's challenge in relation to the award of the cost of litigation funding had two limbs. The first, under section 68(2)(a), was based on the Tribunal's refusal to allow TFM to cross-examine KCS's witnesses in relation to their evidence on costs

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and interest. TFM submitted that this was a serious irregularity. The Judge dismissed this challenge on the basis that TFM had not shown that the refusal to allow cross examination was a decision which no arbitrator could reasonably have reached in the circumstances [71].

TFM also challenged the award of the cost of litigation funding under section 68(2)(b), on the basis that the Tribunal acted in excess of its powers. Section 59 of the 1996 Act defines the "*costs of the arbitration*" as including the "*legal or other costs of the parties*". The Tribunal had relied on the decision of the High Court in Essar v Norscot; in that case HHJ Waksman KC upheld an arbitration award which ordered the losing party to pay the costs of third-party litigation funding as "*other costs*". This decision was controversial and was followed by debate amongst practitioners as to whether it was correct.

TFM submitted that the proper interpretation of "other costs" did not extend to the cost of obtaining litigation funding and that the Tribunal had no power to award such costs. TFM argued that Essar v Norscot was wrongly decided, and that the decision of the Tribunal in the instant case was even worse because the funding came from a company owned by one of KCS's shareholders, rather than from a regulated third-party funder as in Essar v Norscot. TFM emphasised that fees payable to litigation funders are not recoverable in litigation and that Parliament would not have intended the rules for arbitration to be different.

However, the Judge held that TFM's argument amounted to dressing up an alleged error of law as an excess of powers so as to permit a challenge under section 68 of the 1996 Act. The Judge placed emphasis on the decision of the House of Lords in Lesotho Highlands Development Authority v Impregilo SpA [2005] UKHL 43 [2006] 1 AC 221, in which Lord Steyn held that a challenge under section 68(2)(b) might exist if the tribunal purported to exercise a power which it did not have, but not if the tribunal had erroneously exercised a power that it did have [24]. Applying the principles in Lesotho Highlands, HHJ Waksman KC held in Essar v Norscot that the arbitrator in that case had the power to award costs, and that characterising the arbitrator's decision on the award of costs as an excess of power would be "*wholly unrealistic and artificial*" [42].

The Judge declined to depart from the decision in Essar v Norscot and held that, taken at its highest, the Tribunal's award was an erroneous exercise of an available power and could only be challenged as an error of law under section 69 of the 1996 Act. Having excluded section 69 by agreement, "*it is not open to a party to circumvent it by characterising an alleged error of law as an excess of power*" [95].

TFM's additional grounds of challenge

TFM challenged the arbitration award on three additional grounds:

1. The Tribunal refused to adjourn the arbitration until the parties' experts could visit the construction site after the Covid-19 pandemic prevented a site visit.
2. The Tribunal refused to adjourn the arbitration due to TFM's leading counsel contracting Covid-19 and becoming unwell in January 2021.
3. The Tribunal awarded compound interest at 9%.

TFM submitted that the Tribunal's decisions on the first two of the above grounds constituted a serious irregularity. The Judge disagreed; it was held that the Tribunal had considered all of the circumstances, including the effect of delaying the hearing, and was entitled to reach the conclusions it did. In relation to the second ground, the Judge emphasised that the fact that a different tribunal might have reached a different conclusion is not sufficient to interfere – it must be a conclusion that no reasonable arbitrator could have reached [62]. The high threshold for a section 68 challenge was not met.

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In relation to compound interest, TFM submitted that the amount awarded constituted a serious irregularity and caused substantial injustice to TFM. TFM submitted that the Tribunal should have given TFM a chance to cross examine KCS's witnesses on the point. Again, the Judge held that the decision not to allow cross examination is a procedural matter within the discretion of the Tribunal [100], and that TFM had not shown that the outcome might well have been different had cross examination been allowed.

Conclusion

Mrs Justice Moulder DBE's decision reinforces the non-interventionist approach of the English courts in relation to challenges to arbitration awards and emphasises the high threshold which must be met for a section 68 challenge to be allowed. Importantly, the judgment confirms the approach of HHJ Waksman KC in Essar v Norscot, and will be of particular interest to parties looking to fund the cost of arbitration. It remains to be seen whether the courts would approach the question of the award of the costs of third-party litigation funding differently in a section 69 appeal on a point of law.

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Read full judgment

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