AUSTRALIA: LITIGATION FUNDING IN INTERNATIONAL ARBITRATION: RECOVERING THE COSTS OF LITIGATION FINANCE

- Andrew Stephenson and Lee Carroll

The High Court in London recently upheld a decision of an arbitrator allowing recovery of £1.94 million in litigation funding costs.

This is the first decision of its kind and will no doubt be regularly referred to when a claimant seeks to recover such costs. The decision is particularly relevant as litigation funding is becoming more common in international arbitration.

Brackground

In *Essar Oilfields Services Limited v Norscot Rig Management Pvt Limited,*[1] an application was made to the Court under section 68 of the Arbitration Act 1996 (UK) to set aside the arbitrator's award on costs. The arbitrator had found Essar liable to pay damages to Norscot for repudiatory breach of an operations management agreement and awarded costs in the order of US$4 million. This included Norscot's costs of obtaining litigation funding.

The litigation funder had advanced to Norscot the sum of about £647,000 for the purpose of the arbitration. The agreement between the two provided that, in the event of Norscot's success, the litigation funder would be entitled to recover the greater of 300% of the funding or 35% of what Norscot recovered. The arbitrator considered that section 59(1)(c) of the Arbitration Act 1996 (UK) and Article 31(1) of the ICC Rules were wide enough to permit recovery of litigation funding.

Section 61(1) of the Act provides that:

> "The tribunal may make an Award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties".

Section 63(3) provides that (inter alia):

> "The tribunal may determine by award the recoverable costs of the arbitration on such basis as it thinks fit..."

Section 59 is a defining section. It states that: (emphasis added)

> 1. References in this Part to the costs of the arbitration are to –
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> 2.
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> a. the arbitrators' fees and expenses, and
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> b. the fees and expenses of any arbitral institution concerned, and
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> c. the legal or other costs of the parties.
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> 3. Any such reference includes the costs of or incidental to any proceedings to determine the amount of the recoverable costs of the arbitration."

Article 31(1) of the ICC Rules 1998 is similarly worded to section 59(1)(c). It provides that "The costs of the arbitration shall include... the reasonable legal and other costs incurred by the parties for the arbitration".

The arbitrator considered that "other costs" in section 59(1)(c) could include the costs of litigation funding. Further, in respect of the ICC Rules, the ICC Commission Report of 2015 headed "Decision on Costs in International Arbitration" supports the view that the costs of litigation funding can be recovered under Article 31(1)[2].

Essar applied under section 68(2)(b) of the Arbitration Act to set aside the arbitrator's award on the ground of a "serious irregularity", specifically "the tribunal exceeding its powers". Section 68(2)(b) has application only where an arbitrator has purported to exercise a power which he or she does not have. It does not apply where a tribunal erroneously exercised, or fell into error in the application of, a power that it did have. (Lesotho v Impregilo [2006] 1 AC 221.)

Upholding Decision

The Court said the arbitrator clearly had the power to award costs.

If the arbitrator fell into error, it was an error as to the scope of such costs, and therefore there was no serious irregularity within the meaning of s68(2)(b). Notwithstanding, the Court went on to consider the construction issue (i.e. whether the expression "other costs" include the costs of obtaining litigation funding) and agreed with the arbitrator's finding.

Sections 63(3) and 61(1) allow the arbitrator to determine the recoverable costs of the arbitration as he sees fit. Section 59(1)(c) then deliberately includes a head of costs, other than legal costs. The Court concluded that, "as a matter of language, context and logic", "other costs" can include the costs of obtaining litigation funding. The Court reasoned that the costs relate to the arbitration and are for the purpose of it as the costs have been incurred in order to bring the claim.

It is, of course, a matter of the arbitrator's discretion whether to award it.

In exercising his discretion to permit recovery of litigation funding, the arbitrator's findings as to the respondent's conduct was critical. The arbitrator said that Essar had set out to cripple Norscot financially by resolutely refusing to make certain payments. The arbitrator found that as a consequence of Essar's conduct "Norscot had no alternative, but was forced to enter into the litigation funding". The arbitrator found that "Essar was undoubtedly aware that Norscot's costs could not be financed from its own resources...and it was forced into 'litigation funding'..."

The arbitrator concluded that Norscot's impecuniosity was deliberately caused, or substantially contributed to, by Essar.

In addition, the arbitrator considered the funding costs (i.e. 300% of the sum advanced or 35% of the sum recovered) reflected standard market rates and terms for such a facility.

An Australian Position

Section 33B(1) of the Australian model Commercial Arbitration Act provides:

"Unless otherwise agreed by the parties, the costs of an arbitration (including the fees and expenses of the arbitrator or arbitrators) are to be in the discretion of the arbitral tribunal".

The relevant phrase is "the costs of an arbitration". It is not defined (unlike the English equivalent) and it is not given any context by other provisions of the Act.

In Minister for Home and Territories v Teesdale-Smith (1924) 35 CLR 120, the High Court stated "the costs of an arbitration [include] the costs of every step necessary from the essential preliminaries to the final determination" and include costs incidental to the arbitration. Notwithstanding this case, Section 33B is unlikely to be read widely, to empower an arbitrator to award costs which are not legal costs. Such legal costs will include

the costs associated with running the arbitration, including expert costs, witness costs and the like. However, legal costs will not include costs incurred in respect of employees of a party giving instructions or the financing of litigation.

The jurisdiction of arbitrators to award costs can be derived from the legislation (e.g. Section 33B) or can be extended by agreement. The arbitration agreement may include the arbitral rules of an institution. If so, those rules form part of the agreement and have the capacity to extend the jurisdiction of an arbitrator.

For example, Rule 44 of the ACICA Rules[3] provides as follows:

"The Arbitral Tribunal shall fix the costs of arbitration in its award. The term "costs of arbitration" includes only:

a. the fees of the Arbitral Tribunal, to be stated separately as to each arbitrator, and to be fixed in accordance with Article 45;

b. the travel (business class airfares) and other reasonable expenses incurred by the arbitrators;

c. the costs of expert advice and of other assistance required by the Arbitral Tribunal;

d. the travel (business class airfares) and other reasonable expenses of witnesses to the extent such expenses are approved by the Arbitral Tribunal;

e. the legal and other costs, such as the costs of in-house counsel, directly incurred by the successful party in conducting the arbitration, if such costs were claimed during the arbitral proceedings, and only to the extent that the Arbitral Tribunal determines that the amount of such costs is reasonable;

f. ACICA's administration fee;

g. fees for facilities and assistance provided by ACICA in accordance with Articles 9 and 47.4;

h. ACICA's registration fee; and

i. the costs associated with any request for emergency interim measures of protection made pursuant to Article 33.1 (a)."

Rule 44(e) uses the same expression 'other costs' which the English High Court considered in the context of Section 59 of the Arbitration Act 1996 (UK). It is therefore arguable that the ACICA Rules are wide enough to allow a party to recover the costs of litigation funding. However, the language of Rule 44 of the ACICA Rules is different. Time will tell whether the general words 'other costs' should be constrained by the surrounding words, in particular the words 'such as the costs of in-house counsel'. Those words provide an example, which suggests a narrower ambit for the expression 'other costs'.

In any event, where the ACICA Rules apply, respondents arbitrating in Australia should not be alarmed. Even if 'other costs' are given a wide meaning, an arbitrator's discretion to include in "other costs" the costs of litigation funding will not be exercised in the case of all successful claimants who are funded by litigation funders. In *Essar Oilfields Services Limited v Norscot Rig Management Pvt Limited*, the arbitrator exercised his discretion because of the respondent's egregious conduct (as described above) which "forced" Norscot into litigation funding and because the funding arrangement in question reflected standard market rates. The authors submit that a similar factual scenario would be required.

Finally, we note that the potential consequences of this case is one reason why litigation funding arrangements should be disclosed by a claimant at the outset of an arbitration (other reasons being potential conflicts of interest and applications for security for costs).

End Notes

1 [2016] EWHC 2361 (Comm).

2 http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2015/Decisions-on-Costs-in-International-Arbitration---ICC-Arbitration-and-ADR-Commission-Report/

3 Similar to and based upon Article 40(2) of the UNCITRAL Rules.

***The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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