

Third party funding costs can be claimed in arbitration proceedings

When a party can't take the risk of funding litigation, or doesn't want to, it might turn to a third party funder. Third party funders are businesses that will invest money in cases for a share of the proceeds. They offer funding for part of a case or all of it, depending upon the strength and size of the case. Their charges vary and can be a multiple of the amount funded or a percentage of damages recovered. Litigation funders are a valuable source of funding for cases in the UK now, including funders who are part of the Association of Litigation Funders ("ALF"), who abide by a Code of Conduct which provides significant benefits to those who seek funding. Stevens & Bolton LLP is a member of ALF.

A funder's charges cannot be recovered from an unsuccessful party in English court proceedings meaning that they come out of any settlement received. However in a big boost for both the third party funding industry and arbitration generally the English Commercial Court has just held that third party funding costs are recoverable in arbitration proceedings with an English seat.

In Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd the arbitrator awarded Norscot over \$12 million for damages for repudiatory breach of an operations management agreement relating to an offshore drilling platform, and that Norscot was also awarded its costs of the arbitration. Norscot had taken out third party funding and its success in the arbitration meant that it had to pay £1.94 million to the funders. In considering the position the arbitrator came to the view that Essar had deliberately put Norscot in a position where it could not fund the arbitration out of its own resources, and that it had therefore been reasonable for Norscot to obtain litigation funding from a third party funder on the terms that it did. Under the Arbitration Act 1996, the costs of the arbitration which can be awarded consist of the fees and expenses of the arbitrators and any arbitral institution concerned, plus the legal or "other costs" of the parties. The arbitrator held that the third party funder's charges were "other costs" of Norscot and were payable by Essar.

Essar issued court proceedings challenging the award under s.68(2)(b) of the Arbitration Act 1996 (serious irregularity), arguing that the arbitrator had exceeded his powers as "other costs" could not include the costs of third party litigation funding. However the Commercial Court held that the arbitrator was right to construe "other costs" as including third party litigation funding. The Act was intended to be a complete code, independent of the costs provisions in the Civil Procedure Rules (the rules governing court proceedings in England and Wales) which in any event did not have the wording "other costs" in it. Instead the right test was the functional one of considering what other costs were incurred in bringing or defending the claim, and as a matter of language, context and logic "other costs" could include third party litigation funding.

We await the full judgment but it would currently appear that there is nothing to stop arbitrators (where the arbitration has an English seat) from awarding recovery of third party funding charges. It remains to be seen whether arbitrators will make such awards, and if they do whether they will first require some fault on the part of the unsuccessful party leading to the successful party requiring third party funding.

If you have any questions or would like further advice in connection with any matter or issue raised by this note, please contact **Laura Beagrie** or your usual contact at Stevens & Bolton LLP.

Laura Beagrie

Professional Support Lawyer, Dispute Resolution

T: 01483 734293

E: laura.beagrie@stevens-bolton.com

This information is necessarily brief and is not intended to be an exhaustive statement of the law. It is essential that professional advice is sought before any decision is taken.

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Wey House, Farnham Road, Guildford, Surrey GU1 4YD
Tel: +44 (0)1483 302264 **Fax:** +44 (0)1483 302254
www.stevens-bolton.com DX 2423 Guildford 1