IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Neutral Citation No. [2016] EWHC 2361 (Comm)

No. CL-2016-000188

Thursday, 15th September 2016

Before:

HIS HONOUR JUDGE WAKSMAN QC

sitting as a Judge of the High Court

IN THE MATTER OF THE ARBITRATION ACT 1996

AND IN THE MATTER OF AN ARBITRATION UNDER THE

ICC INTERNATIONAL COURT OF ARBITRATION RULES

(ICC CASE NO 15790/VRO)

B E T W E E N :

ESSAR OILFIELDS SERVICES LIMITED — Claimant

- and -

NORSCOT RIG MANAGEMENT PVT LIMITED — Defendant

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MR. A. HOGAN (instructed by Squire Patton Boggs) appeared on behalf of the Claimant.

MR. C. KARIA QC and MR. N. BACON QC (instructed by Davies Johnson) appeared on behalf of the Defendant.

J U D G M E N T

HHJ WAKSMAN QC:

INTRODUCTION

1. This is an application made under s.68 of the Arbitration Act 1996 ("the Act") to set aside the fifth partial Award of the sole arbitrator, Sir Philip Otton, made on 17th December 2015 and as clarified on 3rd March 2016 ("the Award"). The Award was concerned only with the question of interest and costs, and followed earlier awards in which he found the applicants on this application and the defendant in the arbitration, Essar Oilfields Services Limited ("Essar"), liable to pay damages to the present respondent and claimant in the arbitration, Norscot Rig Management Pvt Limited ("Norscot"), for repudiatory breach of an operations management agreement dated 14th August 2007 ("the Agreement"). He also awarded to Norscot various sums which were due, but unpaid under the Agreement.

2. The present position is that Essar is now liable to Norscot for the total sum of around US$12m. This includes around US$4min respect of the costs order that is in issue here. There is one further award to be made dealing with some quantum issues and new claims.

3. As will become clear, the arbitrator was highly critical of Essar's conduct towards Norscot, both during the currency of the agreement and also for most of the arbitration period, so as to justify an order for indemnity costs.

4. The arbitration proceeded according to the ICC Rules. It is common ground that, by Article 28(6) thereof, the parties have excluded any right of appeal under s.69 of the Act.

5. By the Award, the arbitrator held, among other things, that Norscot was entitled to the costs of litigation funding which it had obtained in order to bring the arbitration. The litigation funder, Woodsford Litigation Funding, had made an agreement with Norscot in 2011, whereby it advanced to it the sum of around £647,000 for the purpose of the arbitration. That agreement entitled it, in the event of Norscot's success, to a fee of 300 per cent of the funding or 35 per cent of the recovery. In that regard, Norscot sought as against Essar the total sum of just over £1.94 million, being the sum now owed to Woodsford. The precise quantification of this Award of costs has yet to be done, but it will be in that region. The arbitrator held that he was entitled so to order in his discretion, because such litigation funding costs were "other costs" for the purpose of s.59(1)(c) of the Act, which refers to "legal or other costs of the parties".

THE ISSUES

6. At first blush, Essar's present challenge is simple. It says that, as a matter of construction of s59(1)(c), "other costs" do not include the costs of litigation funding of the kind claimed here, so the arbitrator had no power to include them in his costs order. Therefore, there was a serious irregularity under s.68(2)(b) of the Act, because the arbitrator exceeded his powers and, given the amount ordered, it would cause substantial injustice to Essar if it had to be paid.

7. However, Norscot contends that such simplicity is deceptive and, in truth, there is no basis for setting the award aside for the following reasons or any of them:

(1) This arbitration claim in the High Court was made on 31st March 2016. However, it was out of time, because Essar had only 28 days from the date of Award, made on 17th December 2015, and there had been no extension of time granted. So it is out of time, and should be dismissed for that reason alone. In that regard, (a) the fact that the Award was clarified on 3rd March 2016 makes no difference and does not set the 28 day clock running again, and (b) there is no prospect whatever of any retrospective extension of time being granted, having regard, in particular, to the length of the day and the absence of any good reason for it ("the Time Issue");

(2) Further or alternatively, there was no serious irregularity within the meaning of s.68(2)(b). At best, there was an error of law, in that the arbitrator erroneously thought that "other costs" could encompass the costs of litigation funding, and so he could exercise his undoubted powers to Award costs under s.61(1), so as to include them. An erroneous exercise of such power is not the arbitrator exceeding his powers ("the Characterisation Issue");

(3) Even if the alleged error would constitute a serious irregularity under s.68(2)(b), there was no substantial injustice to Essar by reason thereof ("the Substantial Injustice Issue");

(4) Even if there was otherwise a claim under s.68(2)(b), Essar lost its right to make it by reason of statutory waiver as a result of its pre and post Award conduct ("the Waiver Issue");

(5) Finally, in the yet further alternative, there was, in fact, no error of law anyway because the arbitrator's construction of "other costs" so as to include the cost of litigation funding, was correct ("the Construction Issue").

I will now consider those issues, though in a slightly different order.

THE CHARACTERISATION ISSUE

Introduction

8. Some initial observations are appropriate. First, it is well established that the categories of serious irregularity as set out in s.68(2) are closed and exist in a context which is designed to permit such applications only in very narrow circumstances. In para.27 of the judgment of Lord Steyn in the leading case of *Lesotho v. Impregilo* [2006] 1 AC 221, he approved the oft-cited para.280 of the DAC Report, which said that:

> "Section 68 is really designed as a longstop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected".

9. As to s.68(2)(b) itself, Lord Steyn also stated that it only applies where the tribunal has purported to exercise a power which it did not have, not where it erroneously exercised a power that it did have:

> "It must always be borne in mind that the erroneous exercise of an available power cannot by itself amount to an excess of power"

- see his paras.24 and 32.

10. Secondly, and again referring to the judgment of Lord Steyn at paras. 31 and 32 :

> "Section 68(2)(b) does not permit a challenge on the ground that the tribunal arrived at a wrong conclusion as a matter of law or fact. It is not apt to cover a mere error of law. … A mere error of law will not amount to an excess of power under the section".

11. Furthermore, as Hamblen J. (as he then was) put it in the case of *Abuja International v. Meridien* [2012] 1 Lloyd's Rep 461, at paras.49 to 50:

> "The focus of the inquiry under s.68 is due process, not the correctness of the decision. … For there to be a 'serious irregularity' because the tribunal has exceeded its powers it is necessary to establish that the arbitral tribunal purported to exercise a power it does not have. The erroneous exercise of a power which the tribunal does have involves no excess of power. It is not engaged if the tribunal merely arrives at a wrong conclusion of law. … An error, however gross, in the exercise of a power does not involve an excess of that power".

- see his paras.49, 50 and 52.

12. Finally, I refer to some observations of Cooke J. in *New Age v. Range Energy* [2014] EWHC 4358, at para.15, referring to Lord Steyn:

> "The erroneous exercise of an available power could not of itself amount to an excess of power. [It] is only engaged where there is no power at all under the Arbitration Agreement, the terms of reference or the 1996 Act to do what the Arbitrators did".

and at para.42:

> "Any error of law or fact, or error of reasoning … when making a declaration, an order for specific performance, any other mandatory order, or when granting other relief does not involve an exercise of powers which the Tribunal does not possess".

13. I now turn to the relevant provisions of the Act governing the question of costs. First of all, s.61(1) 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".

14. s61 (2) then provides that:

> "The tribunal shall Award costs on the general principle that costs should follow the event except where it appears to the tribunal that it is inappropriate".

15. Then, by s63:

> "(1) The parties are free to agree what costs of the arbitration are recoverable;
>
> (2) If there is no such agreement, the following provisions apply;
>
> (3) "The tribunal may determine by an Award the recoverable costs of the arbitration on such basis as it thinks fit. If it does so, it shall specify -
>
> (a) the basis on which it has acted, and
> (b) the items of recoverable costs and the amount referable to each".

16. Section 59 is a defining section. It states that:

> "(1) References in this Part to the costs of the arbitration are to -

(a) the arbitrators' fees and expenses, and
(b) the fees and expenses of any arbitral institution concerned, and
(c) the legal or other costs of the parties.

(2) Any such reference includes the costs of or incidental to any proceedings to determine the amount of the recoverable costs of the arbitration".

17. Article 31(1) of the ICC Rules provides in substantially the same terms and, in particular, says that the costs of the arbitration shall include the reasonable legal and other costs incurred by the parties for the arbitration.

18. In addition to referring to ss.59 and 63 of the Act and Article 31(1) of the ICC Rules, the arbitrator also referred to CPR 44.2 with its general provisions on costs and 44.3 on the basis of costs (i.e. standard or indemnity), and 44.4 on how to assess costs on either basis, including the conduct of the parties.

The arbitrator's decision

19. Norscot sought its costs of the litigation funding, and both sides made submissions to the arbitrator on this question. Norscot submitted that he could compensate it for the costs of the litigation funding, either through it being costs under s.59(1)(c) or by making an Award of interest at a very high implicit rate under s.49 of the Act.

20. At para.33, the arbitrator noted that the principal sources of jurisdiction were the Act and the ICC Rules, and noted that the concept of costs was not merely limited to legal costs, but extended to reasonable other costs. At paras.34 to 43, he dealt with the principles governing when Awarding indemnity costs and, at para.48, he considered that an Award of indemnity costs was appropriate.

21. I here refer to various observations that he made as to the conduct of Essar, which is relevant to one or more of the issues before me. In para.44, he said that Essar had set out to cripple Norscot financially by resolutely refusing to make payment and it had flouted its agreement to pay the crew wages. At paras.45 and 46, he said its conduct created a vicious circle by which their withholding of funds meant that the crew could not be paid, and Essar would not pay Norscot because of the lack of proof of payment. Also Essar had withheld payment to the suppliers and paid only after being ordering by the tribunal to do so some three years later. In para.50, he said it intended to exert and did, in fact, exert commercial pressure on Norscot before and throughout the arbitral process and it was a David and Goliath battle, and such conduct forced Norscot's managing director to re-mortgage his home for the best part of $1 million. At para.52, he said that for over three years, Essar made and persisted in unjustifiable personal attacks and allegations of fraud and dishonesty against Norscot's Mr. Tollefsen, a professional rig manager, and Mr. Sharma which were so serious and without foundation that Norscot was entitled to costs on an indemnity basis.

22. In para.84, the arbitrator referred to the exploitative manner in which Essar had acted towards Norscot prior to and during the dispute and said that:

> "As a consequence, Norscot had no alternative, but was forced to enter into the litigation funding to the full cost of 300 per cent of the sum advanced by the funder or 35 per cent of the sum recovered, whichever was the higher. The funding costs reflect standard market rates and terms for such facility, as evidenced by the expert statement of Mr. Blick, a broker in litigation funding".

23. In para.90, he observed that:

> "The magnitude of the arbitration resulted in a substantial amount for the claimant's costs in the region of US$3 million. Essar was undoubtedly aware that Norscot's costs could not be financed from its own resources … and it was forced into 'litigation funding'… "It was blindingly obvious to [Essar] that the claimant was at a distinct financial disadvantage … and would find it difficult if not impossible to pursue its claims by relying on its own resources. The respondent probably hoped that this financial imbalance would force the claimant to abandon its claims".

24. In para.91, the arbitrator said he was satisfied that the claimant was consequently forced to enter into a litigation funding arrangement, and accepted the evidence of Mr. Tollefsen that there was no credible alternative source of funding:

> "The conduct of the respondent before and during the dispute was a blatant attempt to drive Norscot 'from the judgment seat'. … They pursued their claims with courage and determination. They undertook a huge financial burden and gamble in entering into the funding arrangement. The claimant's conduct throughout … cannot be faulted. Justice and the merits point in [the direction of the claimant's]".

25. At para.92, he accepted Mr. Blick's evidence that the litigation funding costs reflect standard market rates in terms of such facilities:

> "This entails the higher of a fixed lump sum multiple of the [sum] advanced … or a percentage of the sum recovered".

26. Then he set out what the sums were.

27. Then, in para.94, he said there was no reason to believe that the deed of agreement was other than genuine and concluded that Norscot's impecuniosity was deliberately caused, or substantially contributed to by Essar".

28. Finally, in para.97, he said that:

> "The tribunal has a discretion to include in 'other costs' the costs of litigation funding … and it reflected market rates and the terms of such a facility. The claimant was forced to enter into such an arrangement if it was to secure justice. It succeeded substantially in all its claims".

29. As to the notion of "other costs", at para.85, the arbitrator noted Essar's submissions that that the costs of litigation were not recoverable, and that "other costs" could not mean all types of economic loss such might be sustained in litigation. He referred to the submission that:

> "The statutory focus is narrow. As a matter of natural and ordinary interpretation to the statute and the rules such funding is not included and has never been recoverable at common law".

30. He then referred to various submissions made by Mr. Hogan, Counsel for Essar, who also appears before me.

31. At para.86 under the heading "Discussion", he said that:

> "The [arbitrator] has no hesitation in deciding that the combined effect of the provisions in the Act and the rules give it a wide discretion as to what costs it can Award to the winning party. The discretion includes the power to include in 'other costs' the cost of litigation funding. Arguments based on 'maintenance' and 'champerty' are outdated and can be safely ignored".

32. Such a discretion was within the overarching consideration of 'what justice requires' this was a trend which was reflected in legislation and in the authorities.

33. At para.88, he agreed with the force and logic of Norscot's submission that:

> "As a matter of principle, it was difficult to see the difference between, on the one hand, allowing a party to recover pre-judgment on the interest on costs, which is routinely Awarded … and allowing a party to recover the interest it has had [itself] had to pay to the third party to cover those pre-judgment legal fees on his behalf".

34. In para.89 he said that:

> "In deciding whether to exercise its discretion, the arbitrator said it is entitled to take account of the conduct of the parties. The tribunal has already condemned the conduct of the respondent in severe terms in the previous Award and in the instant Award".

35. He then then went onto award those costs by reason of these key findings, which I have noted, that Essar had forced Norscot by its unreasonable conduct into a position where it had no alternative, but to obtain litigation funding from this particular source of the fees referred to.

Clarification

36. On 13th January 2006, Essar sought clarification of para.86 as follows. It asked whether it was a combination of s.59 and ICC Article 31 which made specific reference to "other costs" upon which the tribunal based its decision to award the costs of litigation funding rather than s.63, which was concerned with the basis of costs, i.e. standard or indemnity basis.

37. The arbitrator dealt with this in the addendum as follows. He referred, first of all, to what he had said in para.86. In para.29, he referred to Article 31 of the ICC Rules, and then s.59 and s.63 of the Arbitration Act was set out at para.31 and Part 44 was set out at para.32. He then says that:

> "With hindsight and in the light of the respondent's helpful observations, it would have clarified the matter if the tribunal had expressly referred to sections 59 and 63(3) of the Act".

38. His revised version said as follows:

> "The tribunal has no hesitation in deciding that the combined effect of the provisions of the Act [and then he inserts 'i.e. s.59(1) and s.63(3)'] and both rules give it a wide discretion as to what costs it can Award. This discretion includes the power to include in 'other costs' the cost of litigation funding and, if so, whether on the indemnity and standard costs basis.

39. At para.32, he observed that it would not have caused the respondent to consider that the tribunal might have exercised its discretion whether to Award the costs in principle under s.63, rather than s59.

40. It is not suggested that his reasoning in the Addendum has any significant impact on the characterisation issue.

Analysis

41. As Lord Steyn noted, in order to see if what the arbitrator did fell within s.68(2)(b) as being in excess of his powers or whether it was no more than an erroneous exercise of a power that he did have, it is necessary to focus "intensely on the power concerned". In my judgment, the relevant power here is the undoubted power to award costs. If the arbitrator fell into error, it was an error as to the scope of such costs by reason of his allegedly erroneous interpretation of s.69(1)(c) and Rule 31(1).

42. I accept that, if one characterised the relevant power as being the power to order that one side pays the other side's costs of obtaining litigation funding, or conversely, the power to order by way of costs such sums which do not include the costs of litigation funding, one could say as a matter of language that he was exercising a power that he did not have. But, if that was the correct approach, one could re-describe many, if not all, errors of law in that way. Indeed, an erroneous exercise of power itself could in theory almost always be re-described as an excess of power. However, according to *Lesotho*, there is a real and vital distinction to be made between the two. In my judgment, to characterise the arbitrator's error here in that way would be wholly unrealistic and artificial, and it goes against the grain of the strict and narrow confines in which s.68 is to operate.

43. Mr. Hogan submits that this case is analogous to the example given by Lord Steyn of a true excess of power, where the arbitrator has an express power to award simple interest, but awards compound interest instead. I do not accept the analogy. One can see the force of his example, because the substantive power in question is expressly framed as one to award simple interest, and there was a straightforward and clear departure from that. Not so here. Again, it all depends in every case on what in substance power at issue really is. Put another way, it must be the exercise of a power which the arbitrator did not have "at all", to borrow from the words of Cooke J. in *New Age*.

44. Mr. Hogan also submits that, if in purported exercise of his power to Award costs the arbitrator awarded an amount to compensate the claimant for emotional or inconvenient "cost", that would have to be characterised as an excess of power, but, if so, why not here as well? Again, the analogy does not follow. In such cases, it is artificial to use the word "costs" at all and, therefore, there is little difficulty in saying that such an award would be wholly outside the arbitrator's powers to Award costs. The same could hardly be said of the costs of litigation funding, where the line to be drawn is a matter of construction of s.59(1)(c).

45. In my view, our case is analogous to *Lesotho* itself, where the majority of the House of Lords found that the erroneous award by the arbitrator in a currency converted from local currency at a particular date was no more than an erroneous exercise of its power to make Awards in "any currency".

46. Finally, although the arbitrator himself used the word "power" in para.86 of his Award, such a nomenclature is of little relevance when considering properly and objectively the characterisation of what he did in the context of s.68(2)(b).

47. For all of those reasons, I conclude that there was no serious irregularity within the meaning of s.68(2)(b), even if the arbitrator was wrong in his construction of "other costs". That disposes of this application altogether. But, in deference to arguments made on the other issues, I deal with them as well.

THE CONSTRUCTION ISSUE

The Context

48. This is the underlying substantive point of Essar's complaint, which is that the expression "other costs" does not, as a matter of construction, include the costs of obtaining litigation funding in respect of the arbitration in question. I have already set out the relevant provisions in the Act and the ICC Rules.

49. As a preliminary point, Essar contends that the relevant sections in the Act must be construed essentially by reference to what a court would or could allow by way of costs in litigation under the CPR. I reject that. Of course, both arbitration and litigation are forms of formal dispute resolution and there are many similarities, but it is crucial to keep in mind that the Act was designed to be and is a complete code as to the conduct of arbitration, subject to some well-established exceptions. In particular, s.81(1) of the Act provides that:

> "Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to -
>
> (a) matters which are not capable of settlement by arbitration; or
> (b) the effect of an oral arbitration agreement; or
>
> (c) the refusal of recognition or enforcement of an arbitral Award on grounds of public policy".

50. Mr. Hogan submits that this provision means that the Act and, in particular, ss.61 and 59 are to be read subject to whatever the common law rules as to recoverable costs under the CPR are. I reject that also. Section 81 is concerned with the particular matters as set out within it, all of which are fundamental questions going to jurisdiction, enforcement and the like. It is not concerned with procedural differences which may exist between the arbitral and CPR regimes on matters such as costs. Section 81 is, therefore, irrelevant.

51. The difference between these contexts is made abundantly clear where s.59(1)(c) defines the costs of arbitration as including, not just legal costs, but "other costs" too. There is no parallel provision in the CPR. The CPR's own definition of costs in 44.1 is clearly more limited. It is true that the arbitrator did refer in the Award and the addendum to CPR 44, but it is plain that this was essentially because of the provisions dealing with standard and indemnity costs and the different bases of assessments, as opposed to going to the meaning of "other costs". Accordingly, the approach taken by the courts under the CPR as to what can and cannot be Awarded by way of costs is of little direct relevance here. The relevant context is thus the Act itself and the wide scope of procedural powers conferred upon the arbitrator.

The language

52. In fact, of course, the correct starting point is not the wider context, but the language of the provisions themselves. 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.

53. Essar seeks to cut down on the scope of the provision by saying that the governing expression is really "costs of the arbitration" and that in itself would exclude the costs of third party funding, since the latter is not the cost of the arbitration, but the costs of funding it. However, that is the wrong way round. It is the collection of items in s.59(1) itself which defines what the costs of the arbitration are. "Costs of arbitration" is not some prior limiting definition.

54. I accept, of course, that "other costs" has to be seen as other costs which relate to the arbitration proceedings. But, in my judgment, that does not help Essar very much, because the question then is what such costs are or might be. Certainly, where a party to an arbitration is funding it by obtaining specific litigation funding which is now available in a variety of forms, so as to enable him to specifically enforce his legal rights, it is very hard to see how that is excluded for all purposes from the expression "other costs". Indeed, Mr. Hogan in his submissions came close to accepting that when he said that other costs connoted

"something necessary to get the arbitration off the ground or on the road". Here, at least, that could be said to include the costs of third party funding.

55. Essar, of course, has to volunteer something for "other costs" to cover otherwise the expression would be wholly meaningless. It says that it would include some costs not available in a court-based costs order, for example, internal expert fees or managerial time, but without extending to litigation funding. That is a somewhat arbitrary distinction to draw. The better view, as noted above, is to look at the expression functionally.

56. Subject to the question of assessments of, for example, proportionality and reasonableness and the like, conventional legal costs in the sense of lawyer's fees and disbursements are incurred in order to bring or defend the claim in question. There can be other costs also incurred to the same end. These could be management time and they could also be the costs of obtaining funding for the dispute.

57. Mr. Hogan also contends that the expression "other costs" must be construed *eiusdem generis* with legal costs being a residuary class, and accordingly, it is to be construed narrowly so as to cover only those costs that are truly analogous to legal costs. That would allow only modest extensions therefrom the examples that have already been cited.

58. I do not accept that the *eiusdem generis* rule can be said to apply in this way here. "Legal costs" is not some defining "genus" whereby the use of "other" may be expressed simply to catch any costs which almost by accident, as it were, fall outside the definition of "legal costs". The better "genus", in my view, is the costs of the arbitration to be regarded in a broad sense. There are legal costs of the arbitration and there are other costs of the arbitration. The real limiting factor, in my view, is the functional one. Do the costs relate to the arbitration and are they for the purposes of it? If the costs have not been incurred in order to bring or defend the claim in question, I would accept that they fall outside the definition of "other costs" and they would not relate to the arbitration - but that is not the case here.

59. Mr. Hogan also points to the fact that s.59(1) does not refer expressly to costs of obtaining third party funding, but that is hardly surprising, for, if it were otherwise, s.59(1) would have to include each and every example of what could or did include "other costs". The lack of a specific reference to third party funding is immaterial, in my view.

60. Mr. Hogan also contends that the true source, if any, of the arbitrator's ability to award the costs of third party funding is not this part of s.63 and s59 on costs, but rather, its power to Award interest under s.49. He accepts that, if the current Award was set aside, it would have to be remitted to the arbitrator and Essar would have to deal with the merits of an argument that Norscot was entitled to such costs by way of an interest Award. I do not here analyse the scope of s.49. But, even if the arbitrator could so Award on that basis, I fail to see why that, in and of itself, narrows the scope of s.59(1)(c). Such entitlement on the part of Norscot could exist side by side. For the same reason, I do not see how the Award is somehow in fundamental conflict with the scheme of the Act.

61. Since Rule 31(1) of the ICC Rules is expressed in substantially the same terms as s.59(1)(c), the ICC Commission Report of 2015 headed "Decisions on Costs in International Arbitration" is relevant. Its preliminary note reads:

> "The considerations contained in this Report are intended to inform users of arbitration how tribunals may allocate costs in accordance with the parties' agreement and/or any applicable rules or law. However, they should not be regarded as affecting a tribunal's discretion to allocate costs".

62. The Report did not endorse any particular approach to decisions on costs, nor establish guidelines or checklists.

63. Then, under the heading "Third Party Funded Costs", at para.87 it said:

> "The successful party will itself ultimately be out of pocket upon reimbursing such costs to the third-party funder and may therefore be entitled to recover its reasonable costs, including what it needs to pay to the third-party funder, from the unsuccessful party. The tribunal will need to determine whether these costs were actually incurred and paid or payable. The fact that the successful party must in turn reimburse those costs is, in itself, largely immaterial".

64. And at para.90:

> "If there is evidence of a funding arrangement that is likely to impact on the non-funded party's ability to recover costs, that party might decide to apply early in the proceedings for interim or conservatory measures".

65. Then, at para. 92, under "Success fees and uplifts", it says that:

> "In reality, funding arrangements are rarely limited solely to the costs of the arbitration. Usually, the third-party funder will require payment of an uplift or success fee. … As a tribunal only needs to satisfy itself that a cost was incurred specifically to pursue the arbitration, has been paid or is payable, and was reasonable, it is feasible that in certain circumstances the cost of capital, e.g. bank borrowing specifically for the costs of the arbitration or loss of use of the funds, may be recoverable".

66. And finally at para. 93:

> "The requirement that the cost be reasonable serves as an important check and balance in protecting against unfair or unequal treatment of the parties in respect of costs, or improper windfalls to third-party funders. Tribunals have from time to time dealt with this when assessing the reasonableness of costs in general, sometimes including the success fee in the allocation of costs and sometimes not, depending on their view of the case as a whole".

67. I regard all of those observations as highly pertinent here. Of course, they are not determinative on the issue, nor are they authorities, but they do in their reasoning support the functional view that I have expressed above and the notion that the ICC regime is not to be regarded as subservient to the CPR regime on such costs issues.

Conclusions

68. Therefore, as a matter of language, context and logic, it seems to me that "other costs" can include the costs of obtaining litigation funding. The expression should not be confined by some legal straightjacket imposed by reason of what a court might or might not be permitted to order. All that this conclusion entails is that such litigation funding costs falls within the arbitrator's general costs discretion. Whether and, if so, how the arbitrator exercises that discretion in any particular case is an entirely different matter. Indeed, the ICC bulletin at para.93 reminds one that the overall requirement of reasonableness can act as an important check and balance here.

69. The arbitrator's exercise of his discretion here to award to Norscot the costs of its third party funding, while, of course itself not under challenge, is nonetheless a telling example of the good sense of reading "other costs" in this way. This was a case, perhaps unusual, where

the arbitrator ruled in detailed and robust terms that Essar drove Norscot into this expensive litigation because of its own reprehensible conduct going far beyond technical breaches of contract, in order to vindicate its rights. Further, as the tribunal found, Norscot had no option, but to obtain this funding from this third party funder. As a matter of justice, it would seem very odd and certainly unfortunate if the arbitrator was not entitled under s.59(1) (c) to include the costs of obtaining third party funding as part of "other costs" where they were so directly and immediately caused by the losing party.

70. In my judgment, therefore, I unhesitatingly conclude that the arbitrator's interpretation of "other costs" was correct, in that it extended in principle to the costs of obtaining third party legal funding. Whether then to Award it is a matter of discretion.

71. There is a subsidiary issue between the parties as to whether, in fact, the court could not order by way of legal costs some of the items that Essar said it could not and which Norscot said it could or might. A further group of cases was debated here. I accept that there are instances where the court has been prepared to include by way of costs under the CPR somewhat more than Essar would allow, but nothing much turns on this for the reasons already given.

72. Thus the arbitrator was entitled to interpret "other costs" so as to include the costs of third party funding. There was therefore no error of law anyway. Given my decisions on the two key issues of Characterisation and Construction in favour of Norscot, I deal with the remaining issues somewhat more shortly.

SUBSTANTIAL INJUSTICE

73. Even if there had been serious irregularity, it must have caused substantial injustice to the party now complaining of it. In one sense, it can be said that it did, because, as a result, Essar has to pay something approaching £2 million, which, on this hypothesis, it could and should never have been ordered to pay by the arbitrator.

74. However, Norscot argues that there is no substantial injustice since it was Essar which, on the clear findings of the arbitrator, forced Norscot into purchasing the third party litigation funding in order to vindicate its rights anyway, and I have referred to the relevant paragraphs above. Norscot further contends that, in deciding if there has been substantial injustice, the court must enter into some sort of balancing exercise and pay regard to the justice or otherwise of the other party's position if the serious irregularity is not set aside.

75. Mr. Karia referred me, in particular, to the decision of Burton J. in *CNH v. PGN* [2009] 1 CLC 807. Here, the arbitrator had power to award interest on damages from the date of breach, but, for some reason, only awarded them from the date of the claim. The arbitrator subsequently purported to correct the award by adding a further and very substantial amount for interest; i.e. doing what he could and should have done in the first place. Having found that the arbitrator had no power to take that course by means of a corrective power, Burton J. went onto consider the question of substantial injustice. He said here that:

> "All that is required is to reverse the procedural irregularity. A reversal of this procedural irregularity [he said] would then cause that substantial injustice - namely [to pay the interest be removed]. In my judgment it cannot be possibly arguable that it would cause substantial injustice to the Claimant if the procedural irregularity were reversed and the correction of the howler prevented, if so doing, would cause, on the one hand, a substantial injustice to the Defendant and, on the other, a wholly undeserved windfall to the Claimant".

He said much the same in para.43.

76. I follow all of that, but the core point on those facts surely was that there was no true injustice caused to the claimant in that case, because, had the arbitrator not made the original error, he would have made the payment of interest all the way through at the outset and it could not be just for the claimant to escape that by reason of the irregularity. The converse, of course, was that it would be unjust to deprive the other party of such interest. I do not read from that a principle that the court should, in fact, undertake a wide-ranging balancing exercise looking at justice in the round. The question of whether substantial injustice has been caused may arise more acutely where it is not clear if the irregularity has led to any loss at all. But, in our case, at least on the footing that the arbitrator was wrong and it was an irregularity, he could not have Awarded the third party funding in the first place. So, in setting that order aside, it could not be said that Essar was obtaining a windfall.

77. I accept that, on the arbitrator's finding on the facts, Essar did cause Norscot to incur the third party funding costs. But, if, in truth, they were irrecoverable in the arbitration, then its conduct in this context is much less relevant. The more important direct point, therefore, is that, absent the irregularity, Essar would not have had to pay the substantial sum awarded against it. Wider questions of justice and fairness in respect of Norscot do not trump that, in my view. Accordingly, had s.68(2)(b) otherwise been made out, the serious irregularity here on substantial injustice would also have been made out. In the event, it is academic.

WAIVER

78. Section 73 of the Act provides that

> "If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this part, any objection *inter alia* that the proceedings have been improperly conducted or that there has been any other irregularity affecting the tribunal or the proceedings, he may not raise that objection later, before the tribunal or the court, unless he shows that at the time he took part or continued to take part in the proceedings".

79. Norscot contends that, on any view, Essar waived its right to object by way of its present s.68(2) claim, because it took part in and continued to take part in the arbitration without making any objection that the arbitrator had improperly conducted the proceedings or that there had been any other irregularity. It is common ground that the complaint now made is subject to the s.73 regime. It is also common ground that the time for any objection will be or will start in advance of any proposed course of action intimated by the arbitrator which is then complained of later under s.68(2) once it is done.

80. Norscot contends that waiver has occurred for two reasons:

(1) While Essar contended that Norscot was not entitled to any sum by way of the cost of litigation funding, it did not express that in terms of an irregularity or improper conduct and, in the context here, an excess of power;

(2) After the Award, it continued to participate in the remaining arbitral questions, including the form of the order regarding third party funding and quantum issues relating to that without objecting at all. In response, Essar contends first that, in making the objections that it did in the form of its written submissions as to the correct construction of "other costs" and whether they would allow for third party

funding costs, it had done enough for the purpose of s.73. Second, as to the lack of objection post the Award, that was immaterial.

81. Norscot relied upon the judgment of Cooke J. in *New Age*, where a number of alleged irregularities were, on any view, found to be dressed up errors of law, as he went onto find. But he said that the parties had engaged in the question of the content of orders which it was now said were remedies which there was no power to award at all. He said that entirely different arguments had been put previously as to why the orders should not be made and this was a paradigm case for the operation of s.73(2) of the Act. The orders were specifically sought and known to be sought during the course of the arbitration, though sometimes in wider terms without any objection being made that there was no power to make such orders.

82. I accept that the paradigm case for the operation of s.73 might be where there is a procedural irregularity later complained of and which the arbitrator might have put right, had the objection been made at an earlier stage (see, for example, the observations of Popplewell J. in *Terna v. Al Shamsi* [2013] 1 Lloyd's Rep 86, at paras.126 and 127). But the words of s.73 are plain, and the statutory waiver is not confined to cases where an earlier objection might have brought about a different course of action on the part of the arbitrator or indeed the other side at the time. There is no causal requirement in s.73.

83. Furthermore, I consider that it should be applied strictly in order to give effect to the underlying aim which is that any intended objection based on irregularity or improper conduct of the arbitrator should be expressed by the party complaining about it in those terms at the time, so that there is no doubt about it.

84. Against that background, I conclude that there was a statutory waiver here. It is true that Essar made clear in its submissions prior to the Award that the other costs did not include third party funding costs, but it did not state that this was something which amounted to an irregularity or improper conduct in the proceedings. Secondly, what happened after the Award is not immaterial, because the parties took forward the issue of the wording of the order about third party funding and then discussed the question of assessment. At that stage, there was no further objection in substance to the arbitral award already made, and that involvement persisted for some time through the addendum submission process until 31st March, when this claim was finally made.

85. Mr. Hogan suggests that, provided the claim form here is itself issued on time, whether with or without the benefit of an extension, then s.73 must be satisfied, but I disagree. The time limits and the waiver provisions are two entirely different things. Accordingly, had it been relevant (and it is not), I would have found that there was a statutory waiver so as to defeat the claim.

THE TIME ISSUE

When does time start to run?

86. Section 70(2) provides that:

> "An application or appeal may not be brought if the applicant has not first exhausted -
>
> (a) any available arbitral process of appeal or review, and
> (b) any available recourse under section 57 (correction of Award or additional Award)".

87. Subsection (3) says that:

> "Any application must be brought within 28 days of the date of the Award or, if there has been any arbitral process, of the date when the applicant or appellant was notified of the result of that process".

88. I now consider the position on time if, contrary to above, the claim was otherwise well-founded. Here, among the other clarifications sought, Essar had sought clarification from the arbitrator as to whether his conclusion at para.86, which referred to the provisions in the Act and the Rules, was based upon s.59 and Rule 31, as opposed to s.63. The arbitrator's addendum dealt with that at paras.28 to 31, as I have read.

89. On the question of time, Essar submitted, first, that the 28 day time limit only ran from the addendum, in which case, the claim was filed in time. But, if not, an extension should be granted now and retrospectively pursuant to court's power under s.85, and it should be given permission to amend to seek it.

90. I deal first with whether the claim was made in time. The legal position regarding corrected Awards in this context emerged clearly from the observations of Teare J. in *K v. S* [2015] 2 Lloyds Rep 363, which I gratefully adopt. First, the reference to arbitral review in s.73 which could be the starting point for the 28 day period, if there was such a review, does not apply to corrected Awards, which are not the same thing. The fact that the arbitrator has power to correct an Award under s.57 is not to the point (see the judgment at paras.17 to 19).

91. As to corrected Awards, the position on time was as follows. Merely because the relevant party had sought a corrected award pursuant to s.57(3), that does not without more extend time, so that the 28 days now runs from the date of the corrected award. In that regard, I respectfully prefer the view of Teare J. to the very brief observations of Jackson J. in *Surefire v. Guardian* [2005] EWHC 1860. However, if the application to correct was material to the issue now being raised under s.68(2), then the 28 days would indeed run only from the date of the corrected Award (see paras.18 to 20 of the judgment).

92. As to what is material, I again respectfully adopt the formulation of Teare J. in para.24, which is that the correction is material if it is "necessary to enable the party to know whether he has grounds to challenge the Award or not". As Teare J. went onto say, if the grounds of challenge were known and were not dependent on the outcome of the correction application, time indeed should run from the date of the original Award.

93. Both parties before me accepted that, for present purposes, the materiality test is the right one with Norscot reserving its position, should the matter go further, given the Jackson reforms and the advent of the stricter approach to noncompliance with court orders, as set out in cases such as *Denton*. As to the question whether Essar's application to correct was material, it is true that it always knew what its key point was. It was, on the present hypothesis, that this claim is otherwise well-founded, and that an award of costs could not include costs of third party funding. But that does not mean that there was no point in seeking clarification. As Mr. Hogan says, Essar was still entitled to see why the arbitrator so found and, in particular, which provisions he ultimately relied upon as supporting his conclusion. The arbitrator clearly thought it was a useful point to be raised as well. The fact that thereafter the submissions in support of the claim do not especially turn on the outcome of the requested correction is not fatal, because that would be to apply hindsight. On balance, I think that the correction sought here was material and so time did not run until 3rd March, in which case, the claim was made in time.

Extension of time

94. This would now only arise if (a) the s.68 claim was itself well-founded, but (b) time only ran from the 17th September, so that (c) an extension was necessary, contrary to what I have just found. On this (by now) highly artificial footing and having regard to the factors relevant to the exercise of the court's power to extent time under s.85, as set out by Popplewell J. in *Terna*, at paras.27 to 31, I would have concluded as follows:

(1) There was a long delay in making the application to extend time or applying for leave to amend the claim form to ask for it 77 days from the expiring 28 day period;

(2) Although not supported by much detail, Essar's evidence is that it worked on the erroneous assumption that time only ran from 3rd March and it was only later that it became aware that Norscot was saying that it was out of time. Mr. Hogan here relied on Norscot's respondent's notice of 11th May 2016;

(3) In fact, Essar was first put on notice somewhat earlier, on 4th April, and there is no explanation as to why it took until 20th May to seek extra time. However, on the facts of this case, I can see how Essar and its legal team might have thought, even if wrongly, that time did not run until 3rd March;

(4) No specific prejudice to Essar has been caused by this delay. It is not as if, for example, the application has had a material impact upon the remaining parts of the arbitration;

(5) On this footing, where the extension of time is to be considered by this court (i.e. me) at the same time as the substance of the application itself, it would be wholly artificial to view the question of merits by reference to anything other than what the court has now decided (see the observations of Popplewell J. in paras.32 to 33 of his judgment in *Terna*). Thus, on this hypothesis, the merits become a powerful factor in favour of granting the extension;

(6) There is no basis for me to conclude such delay as there was resulted from a deliberate decision to gain some advantage.

95. In all those circumstances, I would, on these assumptions, have allowed Essar to seek the extension of time and then granted it. Again, in the event, that is academic.

96. For the reasons given above, this application must be dismissed, and I will now hear counsel on all consequential matters.