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Full Recovery of Alternative Funding Costs, *to be or not to be?*

Kiev Arbitration Days 2017

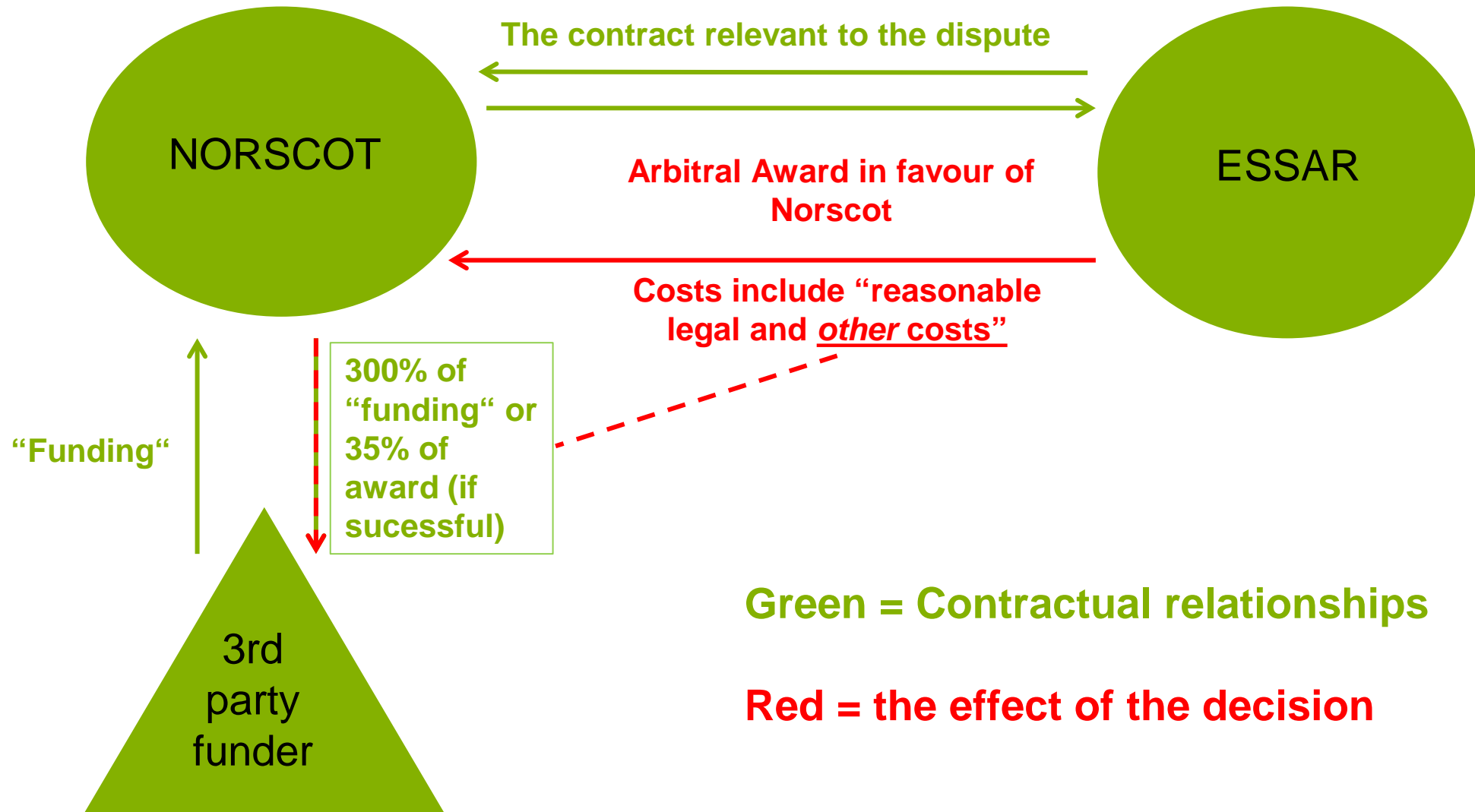
**Kyiv, Ukraine
3 November 2017**

Full Recovery of Alternative Funding Costs, *to be or not to be?*

1. The Issue
2. A Brief Introduction to the *Essar* decision
3. Key Elements of the *Essar* Decision
4. The Dangers of Allowing Full Recovery of Alternative Funding Costs
5. A Critique of the *Essar* Decision
6. The Effect of the *Essar* Decision
7. Conclusion and Recommendations

The *Essar* Decision

Essar Oilfields Ltd. V Norscot Rig Management PVT Ltd [2016] EWHC 2361 (Comm)



The *Essar* Decision: key points

1. **“Construction Issue“**: As a matter of language, context and logic...
other costs can include the costs of obtaining litigation funding
2. **Justice** supported allowing recovery of third party funding

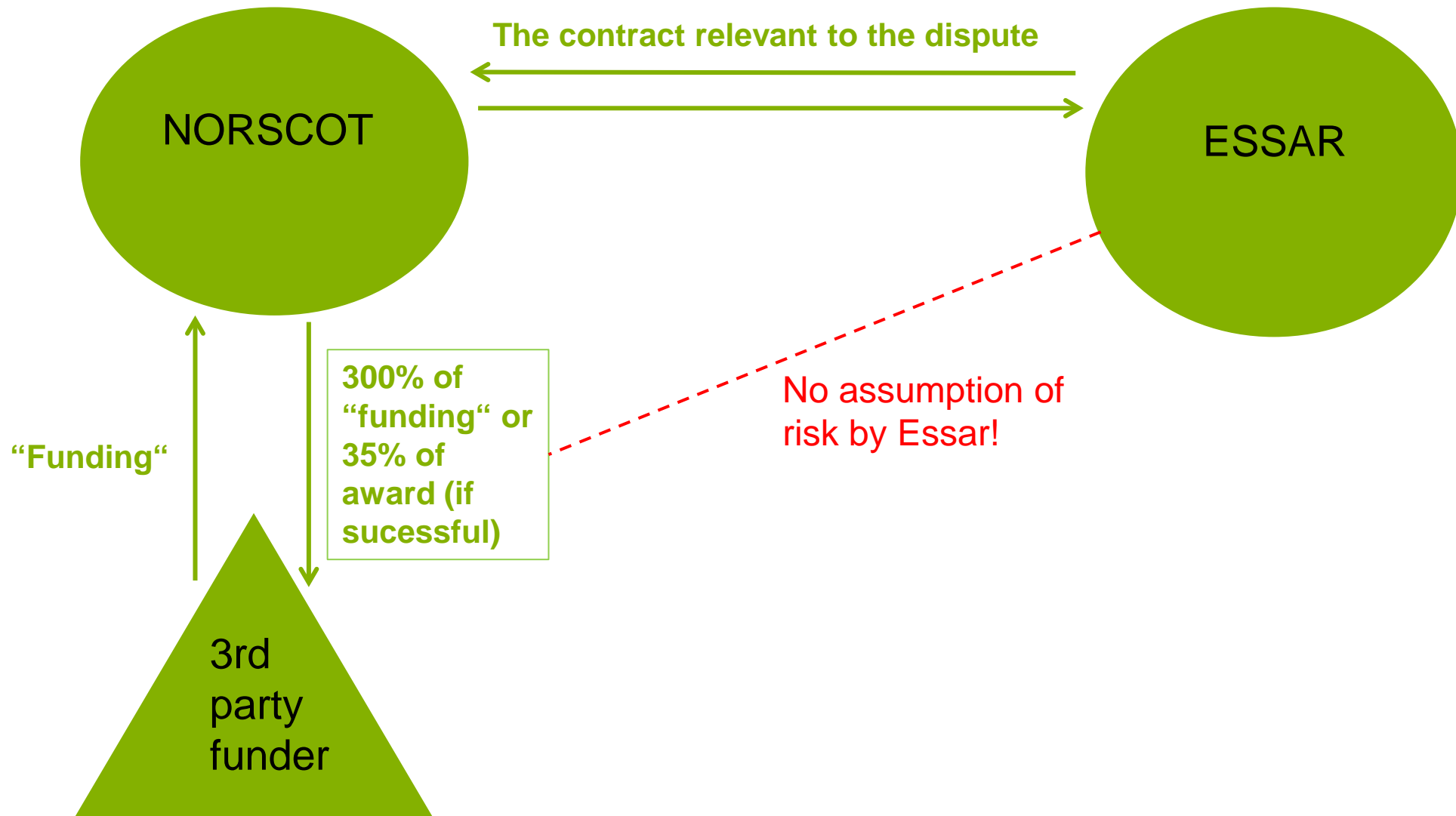
*“The conduct of the respondent before and during the dispute was a blatant attempt to drive Norscot from the judgment seat... The claimant’s conduct throughout cannot be faulted. Justice and the merits point in [the direction of the claimant’s [sic]]”**

*Comments of the arbitrator cited in the judgment at [23].

The Dangers of Recovery of Alternative Funding Costs

- 1. A threat to the legitimacy of arbitral proceedings**
- 2. Lack of foreseeability**

The *Essar* Case: lack of foreseeability



Critique of the *Essar* Decision

1. A Lack of Legal Basis
2. A “Matter of Justice”
3. The Punitive *Quantification* of Costs

“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 relying on its own resources.”

*Comments of the arbitrator cited in the judgment at [23].

Effect of the *Essar* Decision

SIAC: “The Tribunal shall have the authority to order in its Award that all or a part of the *legal or other costs* of a party be paid by another party.” (Article 37)

LCIA: „The Arbitral Tribunal shall also have the power to decide by an award that all or part of the legal or other expenses incurred by a party (the “Legal Costs”) be paid by another party... [and] shall decide the amount of such Legal Costs on such reasonable basis as it thinks appropriate.” (Article 28.3)

DIS: “Unless otherwise agreed by the parties, the arbitral tribunal shall also decide in the arbitral award which party is to bear the costs of the arbitral proceedings, including those costs incurred by the parties and which *were necessary for the proper pursuit of their claim or defence.*” (Section 35)

Recommendation: Foreclosure of Costs

1. The Importance of the *Essar* decision should not be understated: *it will come back to haunt us...*
2. For the avoidance of doubt: clarify the quantification of costs in the contractual arbitration clause (consistently with the applicable procedural law)

“Any award of costs by the arbitral tribunal shall not include the costs of any third party or alternative funding arrangement”

Thank you!

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