# Kluwer Arbitration Blog

## The liability of arbitrators in the UAE: Quod novi sub sole?

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Two recent Dubai Court of Cassation cases shed light on the question of the liability of arbitrators in the UAE (see Case No. 212/2014 – *Meydan Group LLC v. Alexis Mourre*, ruling of the Dubai Court of Cassation of 8 October 2015; and Case No. 284/2015 – *Meydan Group LLC v. Doug Jones, Humphrey Lloyd QC and Stephen Furst QC*, ruling of the Dubai Court of Cassation of 17 December 2015). These cases are a result of a number of challenges that have reportedly been mounted against arbitrators appointed by the Dubai International Arbitration Centre (DIAC) for procedural misconduct over the past couple of years. This being said, given in particular the high profile nature of the subject arbitration tribunals (including the likes of Alexis Mourre and Doug Jones, both practicing arbitrators of the highest calibre), it is more likely than not that the challenges were motivated by considerations of vexation rather than a genuine failure to perform. It is reassuring to see that in both cases the Dubai Court of Cassation has taken a firm stance *in favorem arbitris* and rejected the challenges outright.

It bears mentioning that the liability of arbitrators is somewhat underdeveloped under UAE law as there is precious little precedent on the subject-matter nor sufficient legal guidance from the prevailing sources of law. Given the highly controversial nature of the question of liability, this is hardly surprising: Similar difficulties will be found in other jurisdictions. This being said, there can be little doubt that the question of the liability of arbitrators carries significant importance in the world of arbitration, which largely operates behind closed doors and is (at least in theory) open to individuals from non-professional backgrounds, including non-lawyers. The appointment of lay arbitrators may cause more harm than benefit to the arbitrating parties, who may therefore wish to reassure themselves that appropriate safeguards are in place to protect the professionalism of arbitration as an alternative dispute resolution mechanism. This desire for reassurance on part of the arbitrating parties directly translates into the question as to whether suitable remedies for an arbitrator's failure to perform in the target jurisdiction, typically the seat of the arbitration, are available or not. On the other hand, in order to ensure that arbitrators are not inhibited in the exercise of their decision-making powers and disincentivised from accepting mandates, arbitration laws and/or arbitration rules commonly provide for arbitrators to be exempted from liability save in the most egregious circumstances.

With this objective in mind, Art. 40 of the DIAC Rules of Arbitration, for example,

provides that *“[n]o member of the Tribunal shall be liable to any person for any act or omission in connection with the arbitration”*. Even though the wording of this Article appears to accord arbitrators under the DIAC Rules *carte blanche*, the width of its meaning is reigned in by the narrower wording of Art. 24 of the DIAC Statute Rules (see Decree No. (10)/2004 of 17 July 2004 regarding the establishment of DIAC, as amended), which provides as follows: *“Neither the Centre nor any of its employees, members of the Board of Trustees, its Committees or members of any dispute settlement panel shall be held liable for any unintentional error in their work related to the settlement of disputes by the Centre.”* (my underlining) In other words, a DIAC arbitrator will only be exempt from liability for errors committed unintentionally: A DIAC arbitrator will therefore have to bear responsibility and will hence be liable for any errors made intentionally or on purpose over the course of his or her mandate. Thus, a DIAC arbitrator does not benefit from a blanket exemption from liability, which no doubt would be too extreme a position to defend. For the avoidance of doubt, both the DIAC Arbitration and the DIAC Statute Rules have been adopted by decree of the Ruler of Dubai, hence constituting proper laws in their own right, the more specific or restrictive outweighing the more general or generic one.

In Case No. 212/2014, in which the Claimant sought compensation from the sole arbitrator in a sum of AED 7 mio for damage caused by the sole arbitrator’s purported failure to suspend the case pending an application to the Dubai Courts in relation to the DIAC Executive Committees extensions of time for rendering a final award, the Dubai Court of Cassation placed unreserved reliance on Art. 24 of the DIAC Statue Rules read together with Art. 40 of the DIAC Rules, concluding in the following terms:

> “[on the basis of those provisions] the arbitrator is not responsible for any unintentional error […] based on authorities provided under the prevailing laws, according to which the power to judge is left to the arbitrator’s discretion. This means that the arbitrator enjoys the protection of the law in the exercise of his duties unless the arbitrator commits a fundamental error. A fundamental error is defined as a failure to comply with unambiguous legal principles or ignore clear-cut facts while the judgement is left to the arbitrator’s own consideration.” (my translation)

In other words, it would appear from the Dubai Court of Cassation’s wording that an error short of gross (professional) negligence will not attract an arbitrator’s liability under the DIAC Rules. According to the Dubai Court of Cassation, a DIAC arbitrator is left with a margin of discretion in passing a decision on the procedural and substantive matters before him or her and only if an error is “fundamental” will the arbitrator be liable: An error, in turn, only qualifies as “fundamental” if it is the result of the arbitrator’s intentional disregard of the underlying facts (and hence a purposeful misinterpretation of the evidence) or an incompetent application of the law. Other than that, a misinterpretation or misapplication of ambiguous provisions of law or a failure to correctly appreciate unclear evidence will not trigger the arbitrator’s liability. The arbitrator’s power to assess the evidence before him or her and to apply the law as he or she deems appropriate in the light of the arbitrating parties’ pleadings stands, of course, confirmed by a prohibition placed upon the

supervisory court to review an arbitration award on the merits under Art. 217 of the UAE Arbitration Chapter.

In Case No. 284/2015, the Claimant sought compensation in an amount of AED 50 mio from a DIAC tribunal of three for (i) failure to suspend the arbitral proceedings pending completion of a parallel arbitration process; (ii) failure to respect the terms of a confidentiality agreement concluded between the arbitrating parties and (iii) failure to stay within its mandate. The Dubai Court of Cassation confirmed the rejection of the Claimant's claims on the basis that the Claimant had failed (i) to submit sufficient evidence in support of its claims and (ii) to establish liability in tort on part of the tribunal. In the Court's own words, *"it is established that liability in tort requires proof of three elements, namely error, damage and a causal relationship between the two; failure to prove any one of these will mean that no liability has been established."* (my translation) In application to the facts of the case, the Dubai Court of Cassation found that none of the errors that the tribunal had purportedly committed had been proven. There was hence no liability on part of the tribunal.

From a reading of the preceding two cases, it would appear that the prevailing nature of a DIAC tribunal's liability for failure to perform under UAE law is one in contract or in tort. It is arguable that a duty of care is (i) an implied term into an arbitrator's contractual mandate (whether concluded by execution of terms of reference or by conduct in the terms of UAE law) under the DIAC Rules (e.g. by virtue of Art. 40 of the DIAC Rules read together with Art. 24 of the DIAC Statute Rules) or (ii) derived from obligations owed by a tribunal to the arbitrating parties in tort, to the extent that those obligations are not contractual. Remains the difficulty of squaring a claim for tortious liability against a contractual counterparty (an arbitration tribunal with a contractual mandate) with the existence of a violation of contract under UAE law. Whatever the technical difficulties of framing a claim (of professional negligence) accurately under UAE law, it is no doubt reassuring to see that the Dubai Court of Cassation has been resolute in its rejection of the claims mounted in the preceding two cases. This will no doubt consolidate both investor and arbitrator confidence in a jurisdiction that is proving more arbitration-friendly than commonly suspected. Nothing less should have been expected of the Dubai Courts, which have become a major positive contributor to arbitration as an alternative dispute resolution mechanism in the Middle East over the past couple of decades: *Nihil novi sub sole*!

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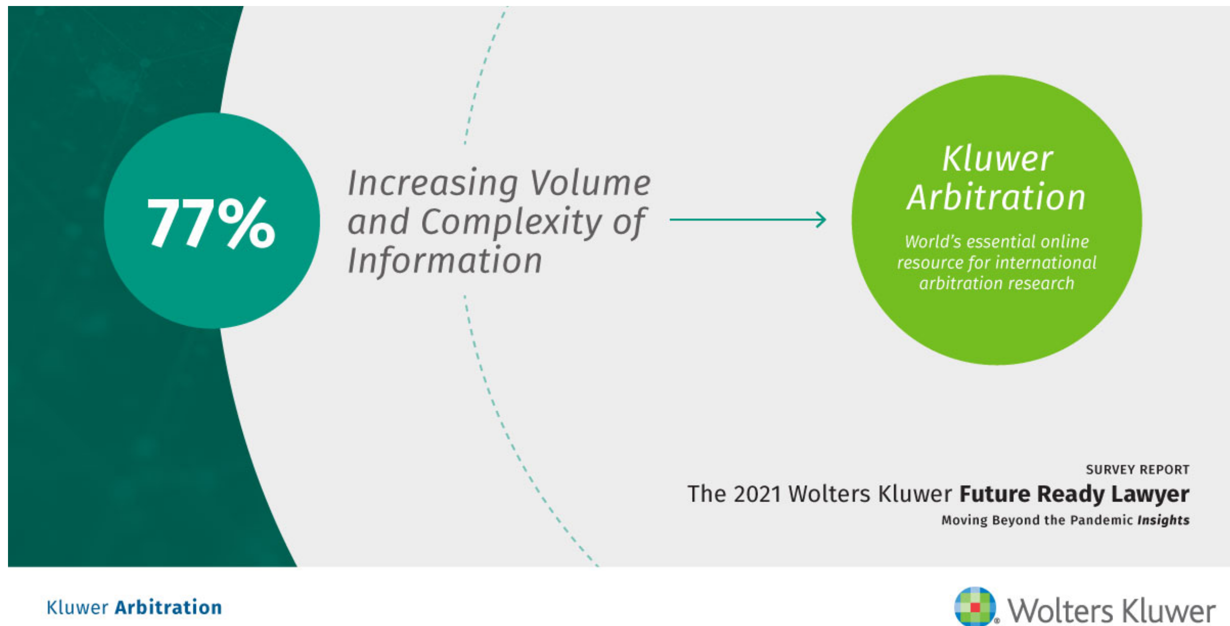


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