

Kluwer Arbitration Blog

Dubai Court of Cassation finds against recoverability of Counsel fees in DIAC arbitration

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In a ruling of 3rd February 2013 (Case No. 282/2012 – Real Estate Cassation, judgment of 3rd February 2013 of the Dubai Court of Cassation), the Dubai Court of Cassation has found against the recoverability of Counsel fees in arbitrations under the 2007 Rules of the Dubai International Arbitration Centre (DIAC). In doing so, the Dubai Court has given a distinctly restrictive interpretation to the wording of the provisions on cost contained in the DIAC Rules. As a result, the Dubai Court of Cassation affirmed the enforcement of a DIAC arbitration award in part only, setting aside the award of Counsel fees in the minor amount of AED 110,000.

In the Dubai Court’s view, the cost provisions of the DIAC Rules do not make express reference to the recovery of legal and/or Counsel fees, as a result of which these must be unrecoverable in arbitrations conducted under the Rules unless a specific power to award such costs has been granted to the arbitration tribunal either in the original arbitration agreement (which, is rarely the case) or a later submission agreement, such as terms of reference. In the Court’s own words:

“... the costs, expenses and legal fees are imposed on either arbitrating party only by law, general rules or if provided for expressly and clearly in a submission agreement given that an arbitration award is a contractual decision in relation to which the arbitrator’s jurisdiction is based on an arbitration clause contained in the agreement concluded between both parties ...” (my translation)

The Dubai Court then continues to explain that references to arbitration under the DIAC Rules make binding upon the parties and the arbitration tribunal the rules on cost contained in the DIAC Rules. From amongst these, the Dubai Court cites in pertinent part in particular Article 37.10 of the DIAC Rules, which requires the tribunal to determine and apportion by way of award or order “the Arbitration Costs [sic] and fees ... in accordance with Appendix – Cost [sic] of Arbitration”, and Article 2.1 of the Appendix on Costs of Arbitration annexed to the DIAC Rules, which provides verbatim as follows:

“The costs of the arbitration shall include the Centre’s administrative Fees for the claim and any counterclaim and the fees and expenses of the Tribunal fixed by the Centre in accordance with the Table of Fees and Costs in force at the time of the commencement of the arbitration, and shall include any expenses incurred by the Tribunal, as well as the fees and expenses of any experts appointed by the Tribunal.” (my underlining)

On this basis, the Dubai Court of Cassation concludes in the following terms:

“All these provisions imply that in an arbitration conducted before the DIAC, the arbitration costs decided by the arbitration tribunal are in particular those related to the administrative fees of the claim and counterclaim and the fees and expenses of the tribunal as well as the fees and expenses of tribunal-appointed experts in accordance with the DIAC Costs Schedule. Such costs do not include the legal expenses paid by the parties to their attorneys representing them in the arbitration procedure or whoever prepares the claim or advises the parties before initiating the arbitration procedure. ... The DIAC Rules do not grant arbitrators the power to award Counsel fees.” (my translation)

With all due respect, in my view, the Dubai Court of Cassation misinterprets the express cost definition provided in the DIAC Rules. In doing so, it overlooks the semantic importance of “include” in the phrase “[t]he costs of arbitration shall include ...”. In the English language, the verb “include” is given a non-exclusive meaning and is commonly used to introduce a non-exhaustive list of examples. To emphasise this use of “include”, it is occasionally followed by the shorthand term “e.g.”, which stands for “example is given”. This is no different here in that (i) the DIAC administrative fees and expenses and (ii) the tribunal’s fees and expenses over the course of an arbitration are no more than two (non-exhaustive) instances of the type of arbitration costs that a tribunal is empowered to award and that may hence be recovered under the DIAC Rules. That this choice of words must have been intentional is also supported by the fact that the original drafting language of the DIAC Rules is English (vide DIAC Rules, at p. 1). Further support can be drawn from the Arabic translation of the English version of the DIAC Rules, which appears to preserve the non-exclusive meaning of “include” (i.e. “??? ?? ???”) and thus confirms the intended open-ended nature of “arbitration costs” within the meaning of the DIAC Rules (“[The 2007 DIAC Rules were] originally drafted in the English language and after its approval by the DIAC Board of Trustees it was translated into Arabic, special care being given to the accuracy of its translation.” (my underlining; vide DIAC Rules, at p. 1). Finally, the inclusion of Counsel fees into the definitional scope of “arbitration costs” is also intuitive from the point of view of the actual type and level of costs incurred by arbitrating parties over the course of an arbitration: most parties do rely on legal Counsel for representation in the proceedings and especially successful respondents should not be discouraged from doing so by having to bear their own costs.

Court practice to award nominal Counsel fees only (usually a token of a maximum of AED 3,000) even though authorized to award costs on a full indemnity basis under Article 133(2) of the UAE Civil Procedures Code (“The party against whom judgment is passed shall be ordered to pay the costs of the action. Costs shall include lawyers’ fees.”) cannot be decisive: (i) There is no doctrine of stare decisis under UAE law, so the case law of the UAE courts does not form binding precedent; and (ii) pursuant to Article 212 of the Arbitration Chapter of the UAE Civil Procedures Code, an arbitration tribunal is not bound by rules of process and procedure of the UAE courts in any event.

For the avoidance of doubt, in our proposition, the Dubai Court of Cassation erred in finding that the definition of “arbitration costs” within the meaning of the DIAC Rules was confined to fees and expenses incurred by DIAC and the tribunal. This, of course, is not meant to imply that any and all costs should be recoverable in arbitration references under the DIAC Rules. For instance, it may be controversial to what extent costs of the executive management of a party incurred in assisting in the preparation of the party’s case may be recoverable. This being said, to the extent that a particular type of cost is found to be recoverable, in my view and in keeping with best international practice, only reasonable amounts incurred under that cost heading are recoverable. To what extent amounts incurred are reasonable will largely be a question of (i) the particular facts

and overall value of the arbitration, (ii) the (legal and technical) complexity of the proceedings and (iii) the procedural course of the arbitration proceedings. Generally speaking, most tribunals accept that legal fees between 2.5% to 5% of the value of the overall claims in dispute are reasonable.

To close on a lighter note, the Dubai Court of Cassation's finding against the inclusion of Counsel or other legal fees into the definition of "arbitration costs" under the DIAC Rules may come to the rescue of a number of litigants in person, who – in order to avoid legal cost – opt for self-representation and hence – being non-lawyers themselves – succumb in the arbitration. On the other hand, however, financially weak claimants may be systematically discouraged from bringing DIAC arbitration proceedings in the knowledge that despite having a winning case, they will not be able to recover the legal costs to secure adequate legal representation. To note in this context that recoverability of legal/Counsel fees on a full indemnity basis in arbitration has been a main selling point to consumers of arbitration in the UAE over State court proceedings, which routinely result in nominal recovery of that type of costs only.

Whatever the correct position may be, the bottomline of the Dubai Court of Cassation's ruling is that parties referring their cases to DIAC have to be on their guard should they assume that in the event of a dispute, Counsel fees – or for that matter any fees and expenses that are not expressly referenced in the DIAC Appendix on Costs of Arbitration – can be recovered on a full indemnity basis: To be safe rather than sorry, they should make express provision for a future tribunal's power to award such costs in the original arbitration clause ... Beware that it may be too late to clinch an agreement with the opponent party to that effect through inclusion into the terms of reference (if any) once a dispute has arisen!

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