

Kluwer Arbitration Blog

Is an Award on Attorneys' Fees Enforceable in The UAE?

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There has been a lot of debate in recent years on whether attorneys' fees, or in other words counsels' fees, can be awarded under the applicable laws in the United Arab Emirates ("UAE"). This post examines a recent decision, Cassation No. 990/2019 Commercial, issued by the Dubai Court which deals with attorneys' fees. Prior court decisions have set certain principles with respect to the question of attorneys' fees, but the recent decision examined in this post is noteworthy because it did not follow said principles and established an entirely new rule.

Case Summary

In a decision issued earlier this year, Cassation No. 990/2019 Commercial, the Dubai Court of Cassation upheld the decision of the Court of Appeal ("COA") in the partial nullification of an award which had awarded attorneys' fees (*see* Appeal No. 10/2019 Arbitral Award Nullification).

The Claimant had obtained an award for the value of AED 1,021,095 ("Award") in arbitration proceedings filed under the Dubai International Arbitration Center Rules ("DIAC Rules"). In the Award, the Claimant was ordered to pay part of the attorneys' fees incurred by the respondents as the Claimant was not successful in the entirety of its claims. Unfortunately for the Claimant, those fees were almost four times the value of the Award (the attorneys' fees were AED 4,310,005).

The Claimant filed a petition for the partial nullification of the Award before the COA. The Claimant put forward a number of arguments in an attempt to convince the COA that the arbitrator was not empowered to award attorneys' fees. Ultimately, the COA formulated its own (rather novel) justifications as to why attorneys' fees should not have been awarded.

Applicable Legal Provisions

Before examining the COA's decision and its reasoning, it is useful to briefly review the rules relating to arbitration costs and legal costs under the relevant legislation. Article 46 of the [Federal Arbitration Law](#) (????? ????? – ????? ??????????, "Arbitration Law") allows the arbitral tribunal to assess and award arbitration costs. It defines these costs as being the fees and expenses incurred by the tribunal and the costs of tribunal-appointed experts.

The same approach is adopted by the DIAC Rules which, in Article 37.10 and Article 4.2 of the Appendix – “Costs of Arbitration”, empower a tribunal to assess the arbitration costs and apportion them between the parties. The costs of the arbitration according to Article 2.1 of the DIAC Rules include DIAC’s administrative fees, the fees and expenses of the arbitral tribunal as well as the fees and expenses of tribunal-appointed experts.

It is clear from the above that both the Arbitration Law and the DIAC Rules expressly allow an arbitral tribunal to assess and award the costs of arbitration, which cover the costs related to the *tribunal* and administration of the case, but not the attorneys’ fees incurred by each respective party. Both the Arbitration Law and the DIAC Rules do not empower the tribunal to assess or award such fees.

Over the years, conflicting judgments were issued by the UAE courts until it was eventually largely settled that attorneys’ fees could be awarded if the parties had mutually agreed to empower the tribunal to award such costs (for further analysis on this point, see this prior [Blog post](#) by Gordon Blanke). As a result, whenever there is an agreement by the parties or their representatives to allow a tribunal to decide on any award of attorneys’ fees, such agreement is expected to be upheld by the courts.

The COA’s Reasoning

In the case at hand, the terms of reference, which governed the arbitral proceedings, did in fact empower the sole arbitrator to award attorneys’ fees. However, the COA was of the view that no such right should have been granted. According to the COA, the authorization granted to a party representative with respect to an arbitration relates to a specific dispute arising from a certain contractual relationship. As a result, the said authorization is limited to that specific contractual relationship and cannot cover any other.

The COA’s decision further explains that attorneys’ fees arise from the “attorney contract”, which is separate from the contract that is the subject matter of the dispute. Therefore, when an attorney is authorized to agree to an arbitration, to appoint an arbitrator and is authorized with respect to other matters related to a dispute, the authorization cannot be extended to cover the fees of the said attorney or those of the opposing counsel even if such fees are related to the arbitration. The entitlement to the fees arises from a contract that is distinct from the contract which is the subject matter of the dispute, and consequently, a special authorization is required.

The COA thus concluded that the Claimant’s legal representatives were not granted the powers to authorize the sole arbitrator to decide upon their own legal fees or those of the opposing party’s legal representatives. Therefore, by empowering the sole arbitrator in the terms of reference with the power to award attorneys’ fees, they exceeded the powers delegated to them.

The decision of the COA was upheld by the Dubai Court of Cassation.

Final Observations

It is worth noting that the COA prefaced its reasoning with the rationale that arbitration is an

exceptional route to resolving disputes, as the usual route would be for parties to have recourse to the courts. As a result, any arbitration agreement to arbitrate should be narrowly interpreted and applied. Such logic is consistent with prior case law in the UAE and although an arbitration-friendly trend has emerged in the UAE courts in recent years, a conservative approach when dealing with arbitration continues to prevail.

While that reason in and of itself may not be so much of an issue in this specific case, the logic that a party representative should be specifically authorized to empower the tribunal with the right to award legal costs is nevertheless quite surprising. The COA's decision in this case is not in line with prior UAE court decisions, as no such requirement has existed previously. There have been decisions which denied the arbitral tribunal the power to award attorneys' fees, while other decisions allowed tribunals to award such fees when there's an agreement by the parties to empower the tribunal to do so (*see* Cassation No. 205/2019 Commercial and Cassation No. 333/2015 Commercial).

Several prior decisions issued by Dubai Courts examined the DIAC Rules as awards issued by DIAC would normally be ratified by the on-shore Dubai courts (as opposed to DIFC-LCIA awards which would be ratified by DIFC Courts). As explained above, the DIAC Rules do not expressly state attorneys' fees as being part of the costs that could be awarded by a tribunal. The applicable law before the promulgation of the Arbitration Law (in 2018) was the arbitration chapter of the UAE Federal Civil Procedures Law, which was silent on the question. Thus, conflicting decisions were issued until the Dubai Courts started, relatively consistently, adopting the principle that with the agreement of the parties, a tribunal may award attorneys' fees.

Since promulgation of the Arbitration Law, not much changed on the subject given the relevant text of the law set out above. It was therefore to be expected that the courts would continue adopting the view that with the agreement of the parties, an arbitral tribunal may award attorneys' fees.

The decision examined in this case completely ignores that previously adopted principle and sets a new principle. It is not enough for the parties to authorize the tribunal to award attorneys' fees. In fact, it would not even be relevant if the applicable law or rules have express provisions allowing a tribunal to award attorneys' fees. Instead, the court examined whether the parties granted their representatives an express power to agree to empower the tribunal to award attorneys' fees. This is a very restrictive approach and it is not yet clear whether this approach will be followed in future court decisions (and one hopes it will not be!). For now, it is advisable for parties to bear in mind this specific decision when drafting powers of attorney to their representatives pertaining to arbitral proceedings.

The author of this Blog post has been involved in the case discussed.

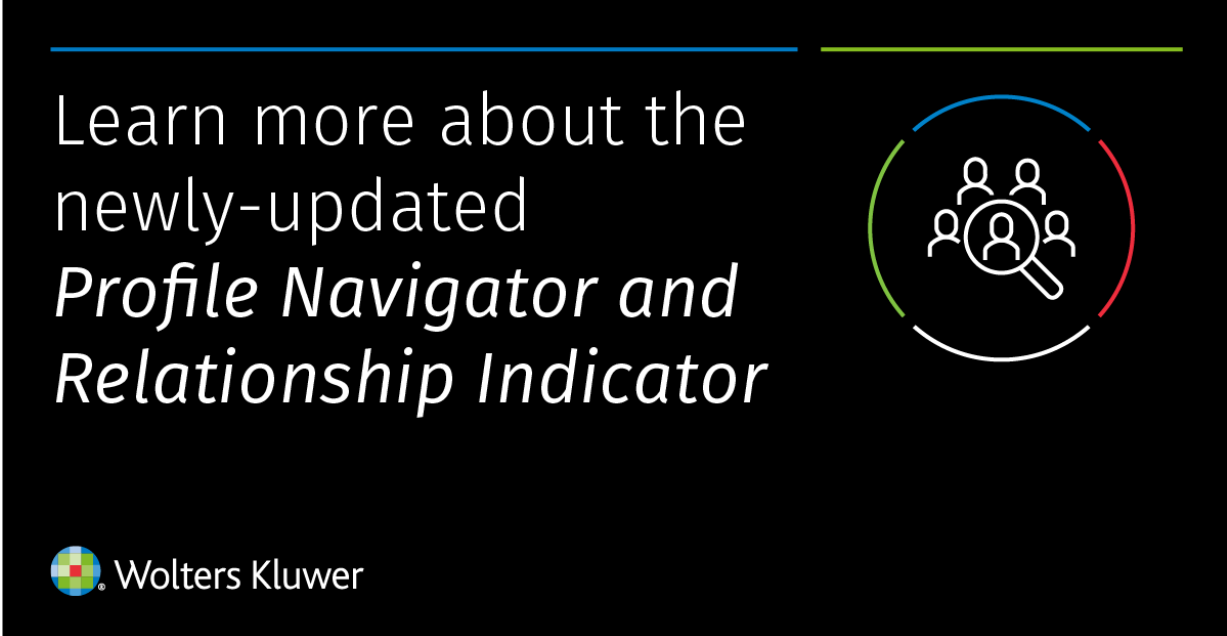
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