

# Kluwer Arbitration Blog

## Non-Payment of the Advance on Costs Reversal by the General Assembly of the Dubai Court of Cassation

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In a recent decision, the General Assembly of the Dubai Court of Cassation (“General Assembly”) decided that non-payment of the advance on arbitration costs does not affect the arbitration clause which remains in force and can continue to be relied upon by the parties. This decision reflects a complete reversal of the prior majority view of the Dubai courts which have consistently declared that non-payment of the advance on costs renders the arbitration clause inoperable and that, as a result, the courts will have regained jurisdiction over the dispute. This blog post examines the said decision.

### The Dubai Courts’ Previous Approach

The non-payment of the advance on arbitration costs is a question that the courts have occasionally confronted when the claimant files proceedings before the courts as a result of the non-payment of the advance on costs in arbitral proceedings. Apart from a few recent exceptions indicating a changing tide, the Dubai courts have consistently held the same position: they would consider the arbitration clause as non-existent or incapable of being performed and conclude that the claimant can have recourse to the courts because they have the “*original*” or “*general*” jurisdiction to hear disputes. Relevant decisions have been previously examined in a previous blog post [here](#).

Two decisions issued recently adopted a different approach. In the first decision, the Dubai Court of Cassation (“DCC”) [Judgment No. 1782/2022 \(Commercial\)](#), the DCC did not allow the claimant to have recourse to the courts to hear his claim. In this case, the claimant filed proceedings before the court on the basis of non-payment by the respondent of the advance on costs. The claimant argued that the respondent waived the arbitration clause as it challenged the jurisdiction of the tribunal and the validity of the arbitration clause. The DCC dismissed this argument explaining that the respondent had engaged in the arbitral proceedings by agreeing to a three-member panel, appointing its arbitrator, and agreeing to conduct the proceedings in English. This engagement, in the DCC’s view, negated any argument that the respondent had waived the arbitration agreement.

In addition, the DCC took into consideration that the challenge made by the respondent to the arbitration clause was on the basis that the conditions precedent had not yet been fulfilled. As a result, the DCC found that there was no bad faith conduct by the respondent nor a waiver of the

arbitration clause. It is noteworthy that the DCC in this case also took into consideration whether there was good faith on the part of the claimant. The DCC invoked the principle that a party may not benefit from his own wrongdoing and concluded that the claimant may not claim waiver of the arbitration clause when he had the option to pay the respondent's share or provide a bank guarantee in line with the applicable rules in addition to the fact that the arbitral tribunal would have determined in its award each party's share of the costs.

The reversal in the position of the DCC became apparent in the second [DCC Judgment No. 1514/2022 \(Commercial\)](#) (also discussed in a prior [blog post](#)). This case pertained to the nullification of an award where amongst the grounds raised by the respondent was the non-payment of the advance on costs. The respondent argued that this rendered the arbitration clause unenforceable. The DCC dismissed the challenge as the advance on costs was in fact paid by the claimant but the DCC, in dicta, explained that even if the advance on costs had not been paid, the arbitration clause remained unaffected. According to the DCC, Article 54(4) of the [UAE Federal Arbitration Law No. 6/2018](#) ("UAE Arbitration Law") maintains the enforceability of an arbitration agreement even if the arbitral award is set aside. *A fortiori*, non-payment of the advance on costs cannot render the arbitration clause inapplicable. This decision ushered a shift in the position of the DCC, which was then formally settled through the recent decision of the General Assembly and which references Article 54(4) of the UAE Arbitration Law.

### **The Powers of the General Assembly**

As per Article 20 of the [Dubai Law No. 13/2016 on the Judicial Assembly in the Emirate of Dubai](#), the General Assembly (or what is sometimes translated as the General Authority) is constituted of eight judges including the president and the most senior judges. The General Assembly has a number of powers amongst which is the power to consider and decide on points of law, which are complex, new or of significant importance. In addition, the General Assembly has the power to decide on conflicting judgments rendered by the DCC. It is our view that the current issue falls within the above two categories:

1. It is a significant question of law because non-payment of the advance on costs was effectively used as a way to frustrate the parties' agreement to arbitrate. Allowing such conduct is not in line with the principle of party autonomy nor with the UAE's desire to become an arbitration-friendly jurisdiction.
2. There were conflicting judgments on the issue, such as the above-mentioned two recent cases conflicting with the majority view of the courts.

### **The Decision of the General Assembly**

On 24 October 2023, [Decision No. 10 of 2023](#) (courtesy translation by the authors) was rendered by the General Assembly. The General Assembly unanimously decided to reverse the prior majority view position adopted by the courts, which concluded that the arbitration clause lapsed or was ineffective upon the closure of the arbitration proceedings by the Dubai International Arbitration Centre ("DIAC") as a result of non-payment of the arbitration costs. Contrary to previous decisions, the General Assembly decided that putting an end to the arbitral proceedings and closing the case for non-payment of the costs would not render the arbitration clause

ineffective and that non-payment of the costs would not be an inference of waiver of the arbitration clause. Accordingly, for as long as an arbitral award ending the dispute is not rendered, either party may file proceedings anew with DIAC and may challenge the jurisdiction of the courts on the basis of the arbitration clause, should proceedings be filed before the courts.

In reaching its conclusion, the General Assembly relies on two provisions of the UAE Arbitration Law:

1. Article 45(1), which states that the arbitral proceedings shall end with the rendering of a final award by the arbitral tribunal that concludes the dispute, and
2. Article 54(4), which states that “*Unless otherwise agreed by the parties, the Arbitration Agreement shall remain valid in accordance with the provisions of this Law after annulment of the arbitral award, unless such annulment is based on the absence, extinction, nullity or non-enforceability thereof.*”

Accordingly, the arbitration agreement shall remain valid even after the set aside of the arbitral award. *A fortiori*, without clear intent of the parties to forego the arbitration agreement, the arbitration agreement cannot lapse when the arbitral proceedings themselves have not been commenced.

## Concluding Remarks

General Assembly’s Decision No. 10 of 2023 is a positive development for arbitration in the United Arab Emirates and provides certainty on how Dubai courts are to treat claims filed before them in circumstances where arbitration proceedings are terminated due to non-payment of an advance on costs: that the Dubai courts are to declare that the arbitration agreement remains valid and effective and dismiss the claim in circumstances where one of the party has failed to make payment of the advance on costs resulting in the claim being considered withdrawn (see Article 3.4 to Appendix I of the DIAC Arbitration Rules 2022).

Conversely, according to DIAC’s Annual Report 2022, the amounts in dispute in 45% of cases that DIAC registered in 2022 (152 of 340) did not exceed AED 1,000,000 (approximately USD 272,000). In such cases, many claimants find it unfeasible, from an economic and time perspective, to engage in arbitral proceedings. Previously, one way of getting out of the obligation of arbitrate the dispute was, indeed, the route of non-payment of the advance on cost and filing the claim in Dubai Courts. As this is no longer possible, the authors recommend to explore the possibility of expedited proceedings in arbitration, e.g. Article 32 of the DIAC Arbitration Rules 2022. Some of the benefits of expedited proceedings under Article 32 are (i) a relatively-rapid appointment of a sole arbitrator, (ii) providing discretion to the sole arbitrator on how to conduct the proceedings (for example, limiting the scope of evidence), (iii) a default 3-month period to issue the Final Award, and (iv) the likely result of lowering the arbitration costs and legal fees.

It is also common for respondent(s) to be reluctant to pay their share of the advance on costs (which may come to millions of AED) as a tactic to exert financial pressure on the claimant(s) until the issuance of the Final Award or, even later, until enforcement of the Final Award. In these circumstances, similarly, the claimant(s) previously could choose the route of non-payment of the advance on cost and filing the claim in Dubai courts. Post-Decision No. 10 of 2023, the authors would note the possibility of making a substitute payment of the other party’s share of the advance

on costs and, subsequently, recovering the substitute payment immediately after the constitution of the arbitral tribunal in accordance with Article 3.3 of Appendix I to DIAC Arbitration Rules 2022: substitute payments “*may be recoverable by the substituting party, including immediately after transmission of the file by requesting the Tribunal to issue an award on costs in accordance with Article 36.2.*”

It should also be noted that in view of the several references to ‘DIAC’ in Decision No. 10 of 2023, it remains unclear whether the General Assembly’s decision only pertains to DIAC arbitrations or may be extrapolated to arbitrations with a seat in onshore Dubai but conducted under other rules, e.g., ICC, SIAC, SCCA.

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