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Recent Decision of the General Assembly of the Dubai Court of Cassation Brings the Consequences of Non-payment of Arbitration Costs in DIAC Arbitration in Line with International Best Practice: Long Live the General Assembly!

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In a recent decision, [Case No. 10/2023 dated 24 October 2023](#), the General Assembly of the Dubai Court of Cassation decided to reverse a position introduced by the Dubai Courts of Cassation in around 2013 (see, e.g., [Case No. 379/2013 \(Real Estate\)](#), ruling of the Dubai Court of Cassation; and then also affirmed in [Case No. 505/2017 \(Real Estate\)](#), ruling of the Dubai Court of Appeal). Another [recent post](#) on the *Kluwer Arbitration Blog* discusses this decision and provides a courtesy translation.

Prior to this decision, the Dubai Courts of Cassation had consistently held that a party's failure to pay its share of the advance on costs or a failure to substitute a non-paying party prompted the closure of the arbitral proceedings in a Dubai-seated arbitration governed by the Dubai International Arbitration Center (DIAC) Rules of Arbitration. This, in turn, triggered the competence of the Dubai Courts by virtue of their general jurisdiction. In other words, a failure of the arbitrating parties to make full payment on account of the DIAC arbitration costs would be considered a waiver of the arbitration obligation, terminate the underlying arbitration process, and trigger the general jurisdiction of the Dubai Courts to hear the Parties' dispute. In the words of the Dubai Court of Cassation in Case No. 379/2013:

“the decision by DIAC to close the file for non-payment of arbitration costs results in the exhaustion of an arbitration clause as the purpose of arbitration is fulfilled by the non-possibility of pursuing the same. Thus, the parties can proceed to court to request their claims.”

In a later case in 2017, the Dubai Court of Appeal equally confirmed that the Parties' failure to pay the DIAC advance on costs:

“is considered a waiver of arbitration, and therefore it is not permissible to resort to arbitration for the same dispute under the same [arbitration] agreement, except by concluding a new arbitration agreement.”

To be fair, this position is not entirely nonsensical in that it is an established rule in DIAC arbitration that the arbitrating parties share the costs of the arbitration equally pending a costs decision by the tribunal, which allows the allocation of the arbitration costs on the basis of the basic principle of the costs that follow the event or the parties' relative success on the claims and counterclaims advanced in the arbitration as part of the costs exercise at the end of the arbitral process (see, e.g., Art. 37.1 of the 2007 DIAC Rules, read together with their Appendix on Costs; and Art. 36.3 of the 2022 DIAC Rules, read together with Appendix I). It is, after all, a fundamental trait of the DIAC and any other institutional arbitration that the arbitration costs are required to be deposited with the arbitral institution from the outset of the proceedings (to ensure liquidity as and when needed, and to safeguard the ready availability of funds to pay both the tribunal and the arbitral institution for their services). The timely defraying of the arbitration costs by the parties is hence a central feature of the arbitration agreement, incorporated by reference to the chosen institutional arbitration rules. A failure to pay constitutes a breach of the arbitration agreement and would, on the old reading of the Dubai Courts, "invalidate" (read: render impossible) the objective of the arbitration, hence requiring the termination of the proceedings, and as such, result in the exhaustion of the arbitration agreement.

The new position, adopted by the General Assembly, relies upon a combined reading of Arts. 45 and 54 of the UAE Federal Arbitration Law 2018 as amended (the "FAL") and, in essence, safeguards the parties' right to refer their dispute to arbitration, irrespective of their ability or willingness to pay the advance on costs the first time round. In other words, despite the closure of the arbitration process for reasons of the parties' failure to make payment of the full advance on costs, the parties' obligation to arbitrate remains intact and the parties will have to revert to arbitration to resolve their dispute. In practice, this means that the Dubai Courts will entertain an arbitration defense under Art. 8(1) FAL in the event that a party seeks to invoke the general jurisdiction of the Dubai Courts with respect to the same dispute.

The rationale behind this is that pursuant to Art. 45(1) FAL, the arbitral proceedings may only terminate upon the issuance of a final award ("*The arbitral proceedings shall be terminated by rendering the final award ending the dispute by the Arbitral Tribunal.*") and pursuant to Art. 54(4) FAL, the arbitration agreement and hence the obligation to arbitrate survives any instance of invalidation of the arbitral award ("*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 of the Agreement itself.*"). According to the General Assembly:

"[t]his means that the arbitration agreement remains valid even after the arbitration award is invalidated, meaning that the jurisdiction of the State courts is excluded as long as the arbitration agreement is concluded and if the arbitration agreement is valid and enforceable, the arbitration agreement is a fortiori not annulled before the arbitration itself begins without a clear will on the part of the parties [...]."

On this basis, the General Assembly concluded as follows:

"The General Authority of the Court of Cassation unanimously decided to reverse what the court had followed in previous rulings regarding the cancellation of the

arbitration clause with the decision of the Dubai International Arbitration Center to close the case file for non-payment of the arbitration costs in the absence of an arbitration ruling terminating the proceedings [...]. [Non-payment under] [t]he arbitration clause does not entail the waiver of the obligation to arbitrate and does not prevent either party from resubmitting the claim to the Center. Either party may adhere to the arbitration clause before the courts.”

This new position echoes the Dubai Court of Cassation’s ruling in Case No. 1514/2022 (see [here](#) for previous reporting), albeit the Court’s findings on costs there were only *obiter*.

For the avoidance of doubt, the General Assembly, also referred to as the General Authority, of the Dubai Court of Cassation was established by Dubai Law No. 13/2016 On the Judicial Authority in the Emirate of Dubai and is composed of the President of the Dubai Court of Cassation and at least eight cassation judges appointed by the President (see Art. 20a. of Dubai Law No. 13/2016). It is, amongst others, mandated to “*consider and settle [...] [a] reversal by [the General Assembly] of a legal principle adopted by the same Court in a previous judgment.*” (see Art. 20a.2. of Dubai Law No. 13/2016). Its decisions are taken by a majority (see Art. 20b. of Dubai Law No. 13/2016) and are binding on all Dubai Courts.

By way of conclusion, the General Assembly of the Dubai Court of Cassation must be congratulated on what is a distinctly arbitration-friendly decision, reigning in the overall misguided (albeit not entirely nonsensical) approach taken by the Dubai Court of Cassation on the subject of non-payment of the DIAC advance on costs in previous rulings (pre-dating the adoption of the FAL). This decision brings UAE court practice in line with international best practice on the subject in that it is generally understood in all leading arbitral jurisdictions worldwide, that the arbitrating parties’ failure to defray an institutional advance on costs does not result in a waiver of the obligation to arbitrate (not to mention the exhaustion or invalidation of the underlying arbitration agreement) and that recourse to arbitration remains contractually binding (even after a first attempt at arbitration that resulted in the premature, institutional closure of the proceedings for non-payment).

It is to be hoped that going forward, the General Assembly of the Dubai Court of Cassation will review the Court’s principled position on other issues of arbitration on which previous Courts of Cassation have been misguided. Long live the General Assembly!

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