

Kluwer Arbitration Blog

Dubai Courts Drastically Curtail Recoverability of Legal Fees in Arbitration under the ICC Rules

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On 5 February 2024, the Dubai Court of Cassation (“DCC”) issued a judgment in [Commercial Case No. 821/2023](#) (“DCC Judgment”). It upheld an earlier judgment of the Dubai Court of Appeal (“CoA”) which set aside an arbitration award issued under the [ICC Rules of Arbitration 2021](#) (“ICC Rules 2021”) in part concerning the recovery of legal fees of the successful respondent under Article 53(h) of the [UAE Federal Law No. 6 of 2018](#) on Arbitration (“UAE Arbitration Law”), as the CoA considered that the tribunal exceeded its jurisdiction by dealing with a matter not falling within the scope of the arbitration agreement.

Overview of the Proceedings

On 27 April 2023, the CoA handed down a judgment in [Commercial Case No. 4/2023](#) (“CoA Judgment”), where it held that the tribunal’s authority to award costs and expenses extended only to its own costs and those of the tribunal-appointed experts. Consequently, the tribunal could not award the parties’ legal and expert fees and expenses unless explicitly authorised to do so by (1) specific wording in the arbitration agreement, (2) agreement between the parties’ representatives, who are in turn specifically authorised to do so in their powers of attorney (“PoA”), in the course of proceedings, or (3) the arbitration rules. The CoA found that neither (1) nor (2) applied on the facts. As to (3), it held that Article 38 of the ICC Rules 2021 “does not explicitly provide that the arbitral tribunal has the power to decide on the legal costs of the legal representatives” (emphasis added) and therefore the tribunal did not have the authority to award the respondent’s legal fees.

Before the DCC, the respondent argued, first, that the claimant had waived its right to challenge the award on that ground pursuant to Articles 20(1) and 25 of the UAE Arbitration Law as it had not contested the tribunal’s jurisdiction to award legal fees during the proceedings and even had claimed its own legal fees. Second, the parties had agreed, by submissions in the arbitration and in the terms of reference that the tribunal should have the authority to award the parties’ legal fees. It further submitted that the claimant’s representatives had the requisite authority to enter into such an agreement under the PoA, which specified that they had “all the powers” in relation to the conduct of the arbitration and, more specifically, authorised them “to sign the arbitration document, sign and submit applications [...] file and submit counterclaims [...] and sign any documents”.

The DCC upheld the CoA Judgment in its entirety. First, it read Article 46(1) of the UAE Arbitration Law just as restrictively as the CoA did. Second, the DCC held that neither the arbitration agreement nor Article 38(1) of the ICC Rules 2021 explicitly granted the tribunal the authority to determine the parties' legal fees and that the parties' representatives were not specifically authorised in the PoAs to agree on the recoverability of legal fees.

Analysis of the CoA's and the DCC's Findings

First, Article 46(1) of the [UAE Arbitration Law](#) clearly does not curtail the tribunal's authority to determine the parties' fees and expenses as it contains a non-exhaustive list of "arbitration expenses", which is apparent from the term "including".¹⁾ One should be cognisant of the unofficial English translation of Article 46(1) published by the UAE government and the disclaimer contained in the publication website that the original Arabic text must be referred to for the purposes of interpretation and application. However, the original Arabic text of [Article 46\(1\)](#) similarly uses the expression "????? ???" (*wayashmal dhalika*) which in English, means "including".

Second, Article 38(1) of the ICC Rules 2021 explicitly provides that "[t]he costs of arbitration shall include [...] reasonable legal and other costs incurred by the parties" when dealing with costs of the arbitration.²⁾ As of the date of this post, the ICC has not yet published an Arabic translation of the ICC Rules 2021. However, since Article 38(1) has remained unchanged from the ICC Arbitration Rules 2017 ("ICC Rules 2017"), one should be able to rely on the ICC's Arabic translation of the ICC Rules 2017. Nonetheless, the DCC apparently read Article 38(1) to (1) provide for a closed list of "the costs of the arbitration" — which would presumably be limited to the fees and expenses of the tribunal, tribunal-appointed experts, and the ICC — and (2) exclude the legal fees of the parties' representatives.

It is regrettable that the DCC overlooked the non-exhaustive nature of the term "include" in Article 38(1). Further, it appears uncontroversial that "reasonable legal and other costs incurred by the parties", a standard provision found in some form or the other in most arbitration rules (please see below), include legal fees of the parties' representatives. Interestingly, Article 55(6)(f) of the [ADGM Arbitration Regulations 2015](#) and Article 38(5)(e) of the [DIFC Arbitration Law 2008](#) use an in-between expression of "the costs for legal representation and assistance".

Thus, the DCC's interpretation severely curtails the practical effect of Article 38(1) — as noted in a [2015 report by a Task Force of the ICC Commission on Arbitration and ADR](#):

"[p]arty costs (including lawyers' fees and expenses, expenses related to witness and expert evidence, and other costs incurred by the parties for the arbitration) make up the bulk (83% on average) of the overall costs of the proceedings".

Although there is no further appeal for the DCC Judgment, we are hopeful that the DCC's interpretation of Article 46(1) of the UAE Arbitration Law and Article 38(1) of the ICC Rules 2021 will be revisited by the General Panel ("General Panel") of the DCC. In accordance with Article 20 of [Dubai Law No. 13/2016](#) "Concerning the Judicial Authorities in the Emirate of

Dubai”, the General Panel has the jurisdiction to intervene, inter alia, when a DCC judgment “deviates from a legal principle which has been established by the [DCC] in a previous judgment” or there are “disputes arising from conflicting judgements rendered by the [DCC]”. The General Panel has been known to correct similar errors in the past, for instance, that the non-payment of the advance on costs does not invalidate the arbitration agreement and which continues to remain in force (see previous blog post [here](#)).

Far-Reaching Negative Implications of the DCC Judgment in the UAE

Hopes for its reversal aside, the DCC Judgment may — as there is no system of judicial precedent in the UAE and the DCC has been known to issue conflicting judgments on the same issue (see previous blog post [here](#)) — pose a significant risk of partial set-aside or refusal of recognition for pending and concluded arbitrations, whether or not seated in the “onshore” UAE.

The DCC’s incorrect interpretation of Article 38(1) of the ICC Rules 2021 could be extremely far-reaching as this provision has not changed substantively since Article 31(1) of the [ICC Arbitration Rules 1998](#) (see Article 37(1) of the [ICC Arbitration Rules 2012](#) and Article 38(1) of the [ICC Rules 2017](#)). Further, other commonly used arbitration rules in the UAE may be impacted as they do not specifically refer to “legal fees”, for example:

- Article 50(6) of the [Arbitrate AD Arbitration Rules 2024](#) provides for “the parties’ legal costs and expenses”;
- Article 40(2) of the [SCCA Arbitration Rules 2023](#), Article 34(2) of the [SCCA Arbitration Rules 2018](#), and Article 34(2) of the [SCCA Arbitration Rules 2016](#) provides for “the reasonable legal and other costs incurred by the parties”;
- Article 28(3) of the [LCIA Arbitration Rules 2020](#), Article 28(3) of the [LCIA Arbitration Rules 2014](#), and Article 28(3) of the [LCIA Arbitration Rules 1998](#) provides for “the legal or other expenses incurred by a party”;
- Rule 37 of the [SIAC Arbitration Rules 2016](#), Rule 33 of the [SIAC Arbitration Rules 2013](#), Rule 33 of the [SIAC Arbitration Rules 2010](#), and Rule 35 of the [SIAC Arbitration Rules 2007](#) provides for “the legal or other costs of a party”;
- Article 41.2(g) of the [CRCICA Arbitration Rules 2024](#) and Article 42.2(g) of the [CRCICA Arbitration Rules 2011](#) provides for “[t]he legal and other costs incurred by the parties”; and
- Article 40.2(e) [UNCITRAL Arbitration Rules 2021](#) and Article 40.2(e) [UNCITRAL Arbitration Rules 2010](#) provides for “[t]he legal and other costs incurred by the parties”.

A notable exception here is Article 36(1) of the [DIAC Arbitration Rules 2022](#) (“DIAC Rules 2022”), which provides that:

“[t]he costs of the arbitration shall include amongst other things [...] the fees of the legal representatives and any expenses incurred by those representatives, together with any other party’s costs as assessed and determined by the Tribunal” (emphasis added).

As further explained by Gordon Blanke (see original posts [here](#) and [here](#)), the specific reference to legal fees in Article 36(1) was begot not so much by the Dubai International Arbitration Center’s

(“DIAC”) foresight, but rather the DCC’s historic ire directed at the previous version of that provision, namely Article 2(1) of Appendix to the [DIAC Arbitration Rules 2007](#) (“DIAC Rules 2007”). While the DIAC Rules 2007 do not mention the parties’ costs and expenses anywhere, the use of the term “include” when describing “[t]he costs of the arbitration” strongly suggests that they are not meant to be a closed list and do include, in particular, legal fees of the parties’ representatives. An equivalent term, “????” (*tashmal*), is also used in the Arabic translation of the [DIAC Rules 2007](#). However, on 3 February 2013, in [Real Estate Case No. 282/2012](#) the DCC set aside a DIAC award in part concerning the recovery of legal fees for it had found that Article 2.1 did not grant the tribunal the power to award legal costs and their recoverability was not specifically addressed in the arbitration agreement or a later submission agreement.

Whereas DIAC eventually revised the provision on costs in the DIAC Rules 2022, this time one can hardly expect a similar approach from the ICC, not to mention other “affected” arbitral institutions. Thus, arbitration practitioners await the DCC’s interpretation of Article 38(1) of the ICC Rules 2021 to be reversed. Meanwhile, the parties and their representatives, conducting proceedings in the UAE, presently, should err on the side of caution and make sure that the tribunal is expressly granted the authority to determine fees of the parties’ representatives, either by the arbitration agreement or a subsequent agreement of the parties or their representatives, who are, again, expressly authorised to enter into such an agreement through a valid PoA.

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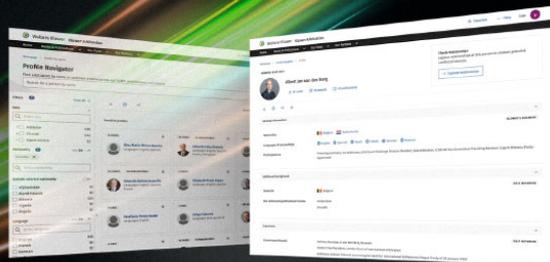
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References

?1 Article 46(1) of the UAE Arbitration Law provides: Unless the parties agree otherwise, the arbitral tribunal shall be allowed to evaluate the arbitration expenses, including the fees and expenses incurred by any member of the Arbitral Tribunal in order to carry out his duties and the expenses of appointment of experts by the Arbitral Tribunal.” (emphasis added)

?2 Article 38(1) of the ICC Rules 2021 states: “The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scales in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.” (emphasis added)

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