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Dubai Courts' Reversal on Recoverability of Legal Fees in Arbitration under the ICC Rules

Sergejs Dilevka (Galadari Advocates & Legal Consultants) · Tuesday, March 4th, 2025

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Earlier this year, the Dubai Court of Cassation (“**DCC**”) issued a [judgment](#) (“**DCC Judgment 1**”) setting aside an arbitral award issued under the [ICC Rules of Arbitration 2021](#) (“**ICC Rules 2021**”) in part, concerning the recovery of legal fees of a successful respondent on the basis of Article 53(h) of the (“**UAE Arbitration Law**”). A commentary of [DCC Judgment 1](#) was reported in a previous [blog post](#).

Article 53(h) of the UAE Arbitration Law provides:

“An objection against an arbitral award may not be accepted unless by lodging an action in nullity with the Court or during the examination of the request for recognition of the award, and the applicant for annulment shall provide a proof that: [...]

(h) The arbitral award has decided on matters not covered by the Arbitration Agreement or falling beyond the scope of said arbitration. Nevertheless, if the decision on matters submitted to arbitration can be separated from those not so submitted, then only the last said parts of the award may be deemed null and void.”

In interpreting Article 38(1) of the ICC Rules 2021, which deals with the costs of the arbitration, the DCC decided that Article 38(1) does not grant authority to arbitral tribunals to award parties' legal fees incurred in arbitration. Article 38(1) 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.”

In the concluding paragraph of the [blog post](#), the authors anticipated that the [DCC Judgment 1](#), entailing a restrictive interpretation of Article 38(1) of the ICC Rules 2021, may be reversed in due course. This judgment featured prominently during panel discussions at the Dubai Arbitration Week 2024. The general consensus was that the decision was incorrect, and it was expected, especially by the veterans of the UAE arbitration scene, that a new decision by the DCC with a more nuanced and appropriate interpretation of Article 38(1) will be issued sooner rather than later.

DCC Judgment 1

In the DCC Judgment 1, the DCC went through a relatively lengthy discussion trying to identify a potential source of arbitral tribunal's authority to grant the parties' legal fees, including analysis of relevant provisions of the UAE Arbitration Law, ICC Rules 2021, the arbitration agreement, the terms of reference, and the parties' power of attorney documents. Ultimately, the DCC came to the conclusion that none of the considered documents granted the arbitral tribunal the authority to award the parties' legal fees as legal costs in the arbitration.

The interpretation of Article 46(1) of the UAE Arbitration Law has been subject to much debate and it was not a surprise that the DCC decided to read the provision narrowly so as not to include the parties' legal fees.

The most unexpected and concerning part of DCC Judgment 1 to arbitral practitioners was, of course, the DCC's finding that Article 38(1) of ICC Rules 2021 contains (i) an exhaustive list of fees and costs that (ii) does not include the parties' legal fees. The DCC apparently overlooked the non-exhaustive nature of the term "*include*" in Article 38(1) and interpreted the phrase "*the reasonable legal and other costs*" in a restrictive manner. A thorough analysis of DCC Judgment 1 is contained in an earlier [blog post](#).

DCC Judgment 2

On 19 November 2024, the DCC issued a pro-arbitration judgment in [Commercial Case No. 756/2024](#) ("**DCC Judgment 2**") effectively reversing its position on Article 38(1) of ICC Rules 2021 by declaring that, among other things, "*the reasonable legal and other costs incurred by the parties for the arbitration*" includes parties' legal fees.

DCC Judgment 2 concerned an attempt to set aside an ICC arbitral award issued in ICC Case No. 26800, on 14 February 2024, including the part concerning an award of legal fees in the amount of USD 1,542,376.

While the DCC held that Article 46 of the UAE Arbitration Law does not include parties' legal fees it applied a less formalistic approach and considered the background and context of the issue at hand, including the international approach to generally accepting tribunal's discretion toward parties' legal fees and a more inclusive interpretation of terms 'costs' and 'fees' that are often used interchangeably.

In the DCC Judgment 2, the DCC also analysed previous editions of the ICC Rules and [the Secretariat's Guide to ICC Arbitration 2012](#), to ascertain the position in terms of whether the costs of the arbitration include parties' legal fees. In this regard, the DCC's analysis was as follows:

"Article 37(1) of the 2012 version of the rules included the phrase "reasonable legal costs and other expenses incurred by the parties in the arbitration," and the ICC's Guide, which comments on these rules in paragraph 1490(3), states that the arbitral tribunal considers the following categories of recoverable costs: (a) attorneys' fees and expenses. This same text appeared in Article 38(1) of the ICC rules from 2017 onward, and international arbitration practices applying these rules have treated attorneys' fees as part of the reasonable costs incurred by the parties in the arbitration, which the arbitral tribunal estimates and rules upon."

Ultimately, in the DCC Judgment 2, the DCC held that the list of fees and costs at Article 38(1) of

ICC Rules 2021 is not exhaustive but “*general and unrestricted*”. Further, the DCC expressly confirmed the arbitral tribunal’s discretion to award “*all reasonable costs incurred by the parties in the arbitration, including legal fees such as attorney’s fees.*” [emphasis added]

Conclusion

The arbitral community met DCC Judgment 2 with cautious optimism. The decision marks an important and timely correction, especially for parties considering Dubai as a preferred seat for arbitration, which may be conducted under different institutional arbitration centers’ rules, that may omit an explicit authority for an arbitral tribunal to decide on the parties’ legal fees.

In the author’s view, the DCC Judgment 2 (issued nine months after DCC Judgment 1) represents a correct interpretation of Article 38(1) of ICC Rules 2021. In absence of a case law system in the UAE, the DCC Judgment 1’s impact on arbitration in the UAE appears to have been limited. Hopefully, it is likely that the Article 38(1) interpretation in DCC Judgment 1 will be a non-persuasive outlier going forward. Furthermore, by handing down the DCC Judgment 2, the DCC has sent a clear positive signal that Dubai remains an arbitration-friendly seat for international arbitrations recognising and respecting top international standards and practices. This is yet another step to make Dubai, and the UAE overall, a more attractive destination for international arbitration in the future

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