

Recovering legal costs in DIAC Arbitrations

by Robert Karrar-Lewsley - r.lewsley@tamimi.com -

July – August 2013

The Dubai International Arbitration Centre (DIAC) is the most widely used arbitration centre in the region. It has a modern set of rules that generally work well. However a recent Dubai Court of Cassation judgment has confirmed what many believe to be a flaw in its rules: they do not grant the tribunal power to order the recovery of legal costs.

Therefore in the absence of express agreement by the parties, legal costs are not recoverable in a DIAC arbitration. This article puts this recent judgment in context and offers guidance as to how parties might still recover their legal fees in a DIAC arbitration.

Recovering Legal Costs in Arbitration Generally

A party to an arbitration will usually incur three types of costs:

1. Administrative fees charged by any institution administering the arbitration (such as DIAC).
2. Tribunal fees.
3. Legal fees, being those of its legal representatives and any disbursements (such as expert fees).

The legal fees will usually be the main expense incurred by a party and they can run to thousands, and sometimes millions, of dirhams. It is often said that one of the benefits of using arbitration in the UAE is that it is possible to claim these legal fees should you win, which is not the case in the local courts where only nominal amounts are ever awarded.

Allowing the winner in a dispute to recover its legal fees is not a universal principle. In the USA for example, the usual practice is for each party to bear its own costs, and to share the administrative costs equally. However the rules of most international arbitral institutions explicitly allow the tribunal to order the losing party to pay the legal costs incurred by the winner (see for example the DIFC-LCIA Rules (art. 28.3); ICC Rules (art. 37.1); and UNCITRAL Rules (art.40)).

The DIAC Rules

The original DIAC rules were drafted in 1994. In this version it was mandatory for the tribunal's final award to include a finding as to the 'costs of the arbitration and the party who will bear them or the proportions allocated among the parties' (article 459(f)). The 'costs of the arbitration' were defined at article 48 to include the 'normal expenses incurred by the parties in preparation of their pleadings', which would allow legal fees to be claimed.

The DIAC Rules were however revised in 2007. Under the 2007 Rules, although the tribunal must still fix in the award the costs of the arbitration and their apportionment (article 37.10), the definition of the phrase 'costs of the arbitration' was revised as follows:

'The costs of the arbitration shall include the Centre's administrative Fees for the claim and any counterclaim and the fees and expenses of the Tribunal fixed by the Centre in accordance with the Table of Fees and Costs in force at the time of the commencement of the arbitration, and shall include any expenses incurred by the Tribunal, as well as the fees and expenses of any experts appointed by the Tribunal.'

As can be seen, the definition no longer contains reference to the 'normal expenses incurred by the

parties in preparation of their pleadings'. This has led to confusion as to whether legal fees can be claimed under the DIAC Rules.

Recent Court of Cassation Judgment

Earlier this year the Dubai Court of Cassation directly considered whether legal fees could be awarded under the DIAC Rules. In Case No. 282/2012, a claim had been filed to enforce a DIAC arbitration award which included an order that the losing party pay the successful parties legal costs of AED 110,000.

In its judgment the Court of Cassation began by noting that a tribunal only has the power to order a party to pay the opposing party's legal fees if given that power by one of the following:

1. The applicable procedural law; or
2. The arbitral rules agreed by the parties; or
3. By an explicit reference in the arbitral agreement granting the power.

The arbitration law in the UAE does not grant the power, nor was there an express agreement by the parties in the arbitration clause. The power would therefore need to be found in the DIAC rules. As noted above the DIAC Rules grant the tribunal power to apportion the costs of the arbitration, but does not explicitly refer to legal fees in its definition of what the 'costs of arbitration' consists of. The Court held that this list was exhaustive, and that since it did not include legal fees or any other costs incurred by the party in presenting its case, the DIAC rules do not confer such a power on the tribunal. In the words of the Court: 'Where the law is silent, fees and expenses that are not clearly and expressly referenced in the arbitration clause are not recoverable as incidental costs [of the arbitration]'. The section of the award regarding legal fees was therefore annulled, but the rest of the award was upheld.

Discussion

There has already been some criticism of this judgment. The issue revolves around how the verb 'include' in the definition of Costs of Arbitration is to be interpreted. The rules were drafted in English and it has been argued that in English the verb 'include' is normally used to introduce a non-exhaustive list. On this view the Court erred in its interpretation that the definition is exhaustive. However there are three problems with this argument:

1. Whilst the verb 'include' can denote a non-exhaustive list, it can also be used to describe the individual parts of a total, such as when a box of equipment has written on it 'this box includes...' before listing the contents. This ambiguity is often avoided in legal documents by the use of the phrase 'includes (but is not limited to) the following...'.
2. The argument does not address the key issue raised by the Court that in the absence of a legal provision granting the power to the tribunal, the power can only come from the consent of the parties and this must be clear and explicit. The current 2007 DIAC Rules are at best ambiguous.
3. It is unlikely that the drafters of the 2007 Rules either overlooked legal fees or assumed their recovery would be implied. Legal fees in arbitration are substantial and their recovery is routinely sought by parties. Such fees were covered by the 2004 rules, the wording of which could easily have been carried over. Anyone revising the rules would know that almost all other international arbitration rules, including the UNCITRAL rules, explicitly allow for the recovery of legal fees.

Conclusion

The confusion regarding the recovery of legal fees under DIAC rules has now been resolved – in the absence of any agreement by the parties or provision in the local arbitration law, the tribunal has no power to allow the recovery of legal fees under the DIAC rules.

If the DIAC rules are revised then no doubt the new rules will make it clear whether legal fees are recoverable. Until then there are two ways in which parties can ensure that they have a right to recover legal fees in a DIAC arbitration:

1. Include in the arbitration agreement the words 'The arbitral tribunal may include in its award an allocation to any party of such costs and expenses, including lawyer's fees, as the arbitral tribunal shall deem reasonable'.
2. Ensure that the terms of reference prepared during the arbitral proceedings include a power to award legal costs, in the same language as (1) above.

Finally, if both parties claim their legal fees during the arbitration the tribunal can arguably infer from this the parties' mutual consent to confer on the tribunal a power to award legal fees as part of the costs. It is recommended however that any doubt be removed by explicitly recording the power in the terms of reference.