Dubai Court of Cassation
Cassation 756-2024
19.11.24

In this judgment, the DCC has articulated very important and progressive legal principles concerning the arbitration industry, including:

1. **Implications of the Parties' Selection of the Seat:** The DCC, unlike the Abu Dhabi Court of Cassation, held that the ADGM Courts lack jurisdiction to hear set-aside actions related to ICC Awards seated in Dubai, regardless of the presence of the ICC Rep Office in ADGM.

2. **Scope of Article 38 of the ICC Rules:** The DCC confirmed, unlike earlier judgments issued by the DCC, that Article 38 of the ICC Rules authorizes arbitral tribunals to rule on legal costs, including counsel fees.

3. **Extension of Arbitration Agreements:** The DCC also held that a party to an arbitration agreement is not necessarily the signatory but may instead be the party who issued the instructions and exercised decisive control over the contract's execution or performance. Accordingly, an arbitration clause may extend from a subsidiary company to its parent company, and vice versa.

****

[redacted]
\- Appellant

[redacted]
\- Respondent

Background:

The Respondent filed Action No. 12-2024 [Set Aside of Arbitral Award] against the Appellant before the Dubai Court of Appeal, seeking to set aside the arbitral award issued in ICC Arbitration Case No. MDY-OSI-KFH-26800, dated 14 February 2024. The Respondent challenges the award on the grounds of the ruling against it for US$1,542,376, covering the Appellant's legal costs and consultant and counsel fees.

The Respondent argued that the Appellant initiated the arbitration based on a construction contract to which the Respondent was not a party. Furthermore, the Respondent claimed that the preconditions for arbitration, as specified in the contract, had not been fulfilled. The arbitral tribunal issued an award that required the Respondent to pay the Appellant's counsel fees, despite the arbitration agreement not granting the tribunal authority to decide on such fees. As a result, the Respondent filed their action.

The Appellant countered that the action was inadmissible, asserting that the Court of Appeal lacked jurisdiction, which, according to the Appellant, lay with the ADGM Courts.

Court of Appeal:

On 27.05.24, the Court of Appeal set aside the arbitral award concerning the Appellant's counsel fees, while dismissing the action in all other aspects.

Court of Cassation:

The Appellant filed a cassation appeal (Cassation No. 756-2024 [Commercial]) on 26.06.24, seeking to overturn the decision. In response, the Respondent's counsel submitted a timely defense brief requesting the dismissal of the appeal. Additionally, the Respondent filed their own cassation appeal (Cassation No. 760-2024 [Commercial]) on 25.06.24, aiming to overturn the ruling and set aside the entire arbitral award. The Appellant's counsel filed a timely defense brief, arguing that the cassation appeal should be rejected on the grounds that the Respondent's Power of Attorney (PoA) to their counsel had expired on 30.04.24, prior to the filing of the cassation appeal, and that the Respondent's license was not registered.

The cassation appeals were reviewed by the Court of Cassation in chambers, which deemed them worthy of consideration and scheduled a hearing. At the hearing, the related appeals were consolidated for a joint decision.

Cassation No. 760-2024 [Commercial]:

The Respondent's defense against the admissibility of the cassation appeal, based on the expiration of the Appellant's PoA to their counsel on 30.04.24, before the appeal was electronically filed, is dismissed. It is firmly established in the case law of the Court of Cassation that the Court will not intervene in the relationship between litigants and their counsel unless a party denies the validity of their counsel's power of attorney (PoA), or where the law provides otherwise. The Respondent's challenge to the Appellant's counsel's standing is unfounded, as this matter is solely within the rights of the principal. In this case, the Appellant has not disputed the validity of their counsel's PoA, who filed the cassation appeal. Furthermore, on 27.08.24, prior to the appeal being set down for judgment, the Appellant filed a new PoA issued in China, dated 27.08.24, valid until 30.04.26, authorizing their counsel, including the delegating counsel, to file a cassation appeal. On 13.07.20, the delegating counsel appointed substitute counsel to file the current cassation appeal, via a notarized PoA. Therefore, the Respondent's objection to the standing of the substitute counsel and the validity of the PoA is without merit.

****

The Respondent's defense against the admissibility of the cassation appeal, based on the Appellant's failure to register its license with the Department of Economic Development, is dismissed. The failure of the Appellant – a foreign company – to register its license with the Department of Economic Development does not preclude it from exercising its right to litigate, nor does it invalidate any legal actions taken. Non-registration only prevents the Appellant from conducting business within the UAE, as per Article 336(1) of Federal Commercial Companies Law No. 32 of 2021. Engaging in business activities before completing the registration formalities merely renders the individuals who engaged in such activities personally and jointly liable for their actions under Article 336(2) of the same law. Thus, this defense is baseless.

****

The appeal is based on 1 ground: a misapplication of law. Specifically, the Appellant argues that the arbitral award is invalid due to their lack of standing as a party in the arbitral proceedings. The Appellant, a company registered in China, is not a party to the underlying construction contract between the Respondent and [redacted] (Dubai Branch), which includes an arbitration clause. The Appellant did not sign the contract, and as such, it does not bind them, and there is no valid arbitration agreement. The Respondent acknowledged this by attempting to amend the arbitration filing and request the inclusion of the company that actually signed the contract. This was further confirmed by the Respondent in their brief of 02.04.24, where they clarified that the actual party to the contract was the aforementioned company. Additionally, the signatory of the contract did not have any mandate or specific power of attorney (SPoA) from the Appellant to agree to arbitration on their behalf. However, the Court of Appeal rejected the Appellant's defense, deeming the issue to be related to rules of evidence and the discretion of the arbitrators, which are not subject to the Court of Appeal's review. Yet, the Appellant's argument constitutes a valid ground for setting aside the arbitral award.

<u>Court of Cassation's response</u>:

Dismissed. It is firmly established in the Court of Cassation that Article 19[1] of Federal Law No. 6 of 2018 on Arbitration stipulates a 15-day deadline (from the date of notification of the arbitral tribunal's preliminary decision affirming its jurisdiction) for challenging the decision before the competent court. Once the decision becomes final, the parties involved cannot revisit the issue in any subsequent proceedings, even with new legal or factual evidence that was either not raised in the initial proceeding or was raised but not addressed in the decision. The court is not permitted to disregard the finality of the prior decision, even if it contravenes a mandatory legal rule related to public policy, as the principle of res judicata prevails over public policy rules.

It is well-established that a ruling remains valid, even if it contains incorrect legal determinations in its reasoning, as long as the overall conclusion is legally sound. The Court of Cassation can amend such determinations without reversing the decision.

Furthermore, it is a well-established principle that a party to an arbitration agreement is not necessarily the signatory but may instead be the party who issued the instructions.

---

[1]1. The Arbitral Tribunal shall decide on any challenge to its jurisdiction, including those based on the non-existence or invalidity of the Arbitration Agreement, or on the grounds that the agreement does not cover the subject matter of the dispute. The Tribunal may issue its decision either in a preliminary ruling or in the final arbitral award on the substance of the dispute.
2. If the Arbitral Tribunal issues a preliminary ruling affirming its jurisdiction, any party may, within 15 days of being notified of the decision, request the court to adjudicate the matter. The court shall issue its ruling within 30 days of the request, and such ruling shall be final and not subject to appeal. The arbitral proceedings shall be stayed pending the court's decision, unless the Arbitral Tribunal determines to proceed at the request of one of the parties.

Accordingly, an arbitration clause signed by a subsidiary company may extend to its parent company and vice versa, depending on which party exercised decisive control over the contract's execution or performance.

In this case, the arbitral tribunal issued a preliminary decision on 23.08.22 affirming its jurisdiction in response to the Appellant's challenge. The tribunal confirmed that the Appellant was a party to the contract in question and that the proceedings had been properly initiated by the Respondent against the correct party. The Appellant's challenge on this issue was dismissed. The Appellant should have appealed this preliminary decision under Article 19 of the Federal Arbitration Law within the statutory deadline, but, by their own admission, did not. Therefore, the Appellant may not challenge the arbitral tribunal's jurisdiction again. The tribunal's decision on jurisdiction is now final and cannot be appealed. The Court of Appeal dismissed the Appellant's defense on this point. Its conclusion is legally sound and cannot be faulted for any legal errors in its reasoning. The Court of Cassation may correct the reasoning without reversing the decision itself. Accordingly, the Appellant's objection to the Court of Appeal's decision is unfounded. For these reasons, the cassation appeal is dismissed.

<u>Cassation No. 756-2024 [Commercial]</u>:

The appeal is based on 3 grounds:

<u>Ground 1</u>:

The Appellant argues that the Court of Appeal contradicted and misapplied the law by rejecting their defense that the Court of Appeal lacked jurisdiction, which, according to the Appellant, should lie with the ADGM Courts. The Appellant asserts that the rejection was based on the premise that both parties had agreed on Dubai as the seat of arbitration, despite the arbitration proceedings being administered under the ICC Arbitration Court at the ADGM. Additionally, the arbitration agreement did not specify the seat of arbitration but merely stated that the arbitration would take place in the UAE.

<u>Court of Cassation's response</u>:

Dismissed. It is firmly established in the case law of the Court of Cassation that Article 1 of Arbitration Law No. 6 of 2018 defines the term "Court" as the Court of Appeal—whether federal or local—that is agreed upon by the parties or within whose jurisdiction the arbitration takes place. Furthermore, Article 41(6) of the same law stipulates that an arbitral award is deemed to have been rendered at the seat of arbitration.

The principle is clear that the parties to an arbitration agreement may agree on the seat of arbitration. If no such agreement is reached, the arbitral tribunal may designate the seat, considering the circumstances of the case and the convenience of the location for the parties. The arbitral tribunal has the authority to hold hearings at any location it deems appropriate for conducting arbitration procedures, including deliberations. Therefore, choosing a specific location for arbitration does not imply that all proceedings must take place there. Notably, the seat of arbitration is essential in determining whether the arbitral award is domestic or foreign, which has important legal consequences, such as determining the courts with jurisdiction over certain arbitration-related matters and the competent court for set-aside or enforcement proceedings.

Moreover, the parties' selection of a specific seat for arbitration implicitly indicates their choice of that seat's procedural law to govern the arbitration, unless they expressly state otherwise. It is important to distinguish between the physical venue of arbitration—where the hearings take place—and the seat of arbitration as a legal concept, with its corresponding legal consequences.

Arbitration hearings may occur in various physical locations; however, the seat of arbitration remains consistent as a legal concept. The legal seat/place of arbitration refers to the jurisdiction in which the arbitration occurs—whether a country, city, or independent financial zone with its own administrative, financial, and judicial authority. The legal seat has significant legal implications, including determining the applicable law for the arbitration proceedings, the court responsible for supervising the arbitration and hearing any set-aside actions, the nationality of the arbitral award (domestic or foreign) in accordance with Article 3(2)(a) of Federal Arbitration Law No. 6 of 2018, and the place where the arbitral award is deemed to have been rendered according to Article 41(6) of the same law.

Typically, the parties may explicitly agree on the seat of arbitration. Alternatively, they may implicitly select the seat by choosing institutional arbitration rules that either provide a default seat or a method for determining the seat if no explicit agreement is made. If no explicit or implicit agreement exists, the arbitral tribunal is responsible for determining the seat of arbitration, as stated in Article 28(1) of the Arbitration Law, as amended by Federal Decree-Law No. 15 of 2023.

There is no inherent connection between the legal seat of arbitration as a legal concept and the actual geographical location of arbitration hearings, which have no legal implications. Furthermore, the location of arbitration centers and their rules do not determine the competent court for hearing a set-aside action; this is determined solely by the legal seat of arbitration. Thus, the arbitration center's location does not determine the competent court for a set-aside action; what matters is the parties' clear agreement on the legal seat.

In this case, the parties have chosen to adopt the ICC Arbitration Rules, effective from 01.01.21, which thus govern the arbitration proceedings. Article 18[2] of the ICC Arbitration Rules affirms the parties' right to determine the legal seat of arbitration. The Appellant's counsel, in a request dated 31.12.21, proposed that the parties agree to Dubai as the seat of arbitration (para 156). Clause 8-6 of the Respondent's counsel's

[2] 1) The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties.
2) The arbitral tribunal may, after consulting the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties.
3) The arbitral tribunal may deliberate at any location it considers appropriate.

response to the arbitral tribunal, dated 13.04.22, confirms their agreement to this proposal. Additionally, clause 26 of the terms of reference clearly states that both parties agreed to make Dubai the seat of arbitration, as reflected in the arbitral award, which states: "Place of Arbitration: Dubai, United Arab Emirates." Therefore, jurisdiction for the set-aside action lies with the Dubai Court of Appeal. The Court of Appeal followed this principle, and the Appellant's objection to this finding is without merit.

The Appellant's claim that the arbitration proceedings were administered by the ICC Arbitration Court in the ADGM, and that judicial precedent mandates arbitration agreements governed by the ICC Rules fall under the jurisdiction of the ADGM Courts, is incorrect. There is no connection between the ICC Representative Office, established by the ICC in the ADGM to facilitate arbitration proceedings under the supervision of the ICC in the region, and the ADGM Arbitration Centre. The latter is not an arbitration institution in the strict technical sense but merely a state-of-the-art facility for hosting arbitration hearings. It provides services to all parties, irrespective of the arbitration institution overseeing the case, and has no role in the arbitration process itself.

Furthermore, the choice of English as the language of arbitration and the Appellant's request for the recognition and enforcement of the arbitral award before the ADGM Courts do not impact the jurisdiction of the court (for the set-aside action) within whose jurisdiction the arbitration was held.

Finally, the Appellant's claim that the arbitration agreement did not designate a seat of arbitration, but only stated that the arbitration would take place in the UAE, does not preclude the parties from subsequently agreeing on the seat of arbitration and enforcing that agreement.

The parties' agreement on 21.07.23 to hold the arbitration hearings at the ADGM Arbitration Center, along with the hearings held there from 21-25.09.23, does not impact the determination of the legal seat of arbitration or the jurisdiction of the competent court for a set-aside action. The venue of the hearings, selected due to availability, is distinct from the legal seat. The Respondent's counsel clearly stated that, for the avoidance of doubt, the seat of arbitration remains as outlined in paragraph 26 of the terms of reference, with the ADGM center serving solely as the venue for the hearings, as allowed by paragraph 27. Accordingly, the Appellant's objection to the Court of Appeal's decision is unfounded.

<u>Ground 2</u>:

The Appellant contends that the Court of Appeal erred in its application of the law. Specifically, the Appellant asserts that when the Respondent filed the set-aside action on 14.02.24, the copy of the arbitral award submitted was not certified by the ICC Secretary General, as required by Articles 34 and 35 of the ICC Arbitration Rules. This omission deprives the award of a key condition under Article 35, which governs the supervision of ICC-issued arbitral awards. Additionally, the arbitral award was not certified by the ICC's Assistant Secretary General until 03.04.24, constituting a breach of public policy, which the Appellant asserts can be raised for the first time before the Court of Cassation.

<u>Court of Cassation's response</u>:

Dismissed. It is well established in the case law of the Court of Cassation that, although the law does not provide an explicit definition of what constitutes public policy, it is generally understood to include rules designed to serve the highest interests of the state, whether political, social, or economic. These rules pertain to both the material and moral well-being of an organized society, where the public interest prevails over individual interests. The concept of public policy is rooted in the collective interest of society as a whole, reflecting matters that are fundamental to the state's essence or that concern a significant and general interest of the community.

Article 35[3] of the ICC Arbitration Rules, effective as of 01.01.21, provides that once the arbitral tribunal issues its award, the ICC Secretariat will notify the parties of the award text, which is signed only by the arbitral tribunal, either electronically or in hard copy, as per the parties' agreement, without requiring additional seals or signatures. Additional copies certified true by the Secretary General are made available to the parties upon request, but not to any third parties.

This clearly indicates that the certification of the award by the ICC Secretary General takes place only when additional certified copies are requested after the award has been issued and communicated to the parties, and is not a prerequisite for the award's validity. Therefore, the certification by the ICC Secretary General does not impact the issuance of the award and is only necessary if further copies are requested post-issuance. Consequently, the Appellant's argument lacks merit.

<u>Ground 3</u>:

The Appellant argues that the Court of Appeal misapplied the law in partially setting aside the arbitral award regarding the Respondent's obligation to pay the legal fees of the Appellant's counsel on the premise that Article 38(1) of the ICC Arbitration Rules does not explicitly grant the arbitral tribunal authority over the legal fees of the parties' counsel. The Appellant points out that while this article refers to costs mentioned in its counterpart - Article 46 of Federal Arbitration Law No. 6 of 2018 - it also encompasses reasonable legal costs, which are not addressed in the latter provision. Additionally, the Appellant notes that recent revisions to arbitration rules, such as those of the DIAC and the LCIA (2022), explicitly recognize legal fees of (party counsel) as part of arbitration costs.

---

[3] 1. Once an award has been made, the Secretariat shall notify to the parties the text signed by the arbitral tribunal, provided always that the costs of the arbitration have been fully paid to ICC by the parties or by one of them.
2. Additional copies certified true by the Secretary General shall be made available on request and at any time to the parties, but to no one else.

The Appellant further argues that the interpretation of any provision of the ICC Arbitration Rules should be based on the intent of the legislator who drafted those rules—the ICC itself—rather than the UAE national legislator. In 2015, the ICC issued an official report clarifying that "costs in arbitration include not only the legal fees and costs of the parties (party costs) but also the costs of the tribunal, institution, and any facilities used (sometimes called arbitration costs). This clarification underscores that the ICC considers party costs to be part of the overall arbitration costs. This is particularly relevant given that the Respondent (the Claimant in the set-aside action) had, on 10.11.23 and 11.12.23, submitted requests to the arbitral tribunal to rule on arbitration costs and explicitly acknowledged the tribunal's authority to decide on the legal fees of lawyers and consultants.

Additionally, the Appellant argues that the Respondent's reliance on a principle established by the Court of Cassation regarding the delegation of powers to the arbitral tribunal to decide on costs is not applicable in this case. Although the principle permits the Respondent to challenge the tribunal's authority over costs before the court, it pertains to a distinct situation where the party failed to raise an objection to the legal costs before the arbitral tribunal. In contrast, in the present case, the Respondent explicitly consented to granting the arbitral tribunal the authority to decide on these costs. Furthermore, the certification of the arbitral award by the Assistant Secretary General of the ICC serves as evidence that the arbitral tribunal's determination of these costs is consistent with the parties' intentions and in accordance with the ICC Arbitration Rules.

Additionally, the Court of Appeal dismissed the parties' subsequent agreement, made after the original arbitration agreement, which granted the arbitral tribunal the authority to decide on these costs, despite acknowledging their later agreement to designate the seat of arbitration.

Court of Cassation's response:

Granted. It is firmly established in the case law of the Court of Cassation that if the parties agree to apply the procedural rules of the ICC in Paris to their arbitration, such an agreement effectively excludes the application of the Arbitration Law, except for provisions concerning public policy. The prevailing principle is that when the law's language is clear and unambiguous, it should be regarded as an accurate reflection of the legislator's intent. Any departure from this, whether by literal or broader interpretation, is prohibited. The law's clear and unequivocal text must be upheld as the definitive expression of its intended meaning.

The relevant provision broadly encompasses various legal costs, such as the fees and expenses of the arbitrators, the ICC's administrative expenses, and the fees and expenses of any experts appointed by the arbitral tribunal, and also includes 'other reasonable costs incurred by the parties for the arbitration.' As such, it cannot be argued that the arbitration costs outlined in this article are exhaustive. The language is broad and unqualified, covering all reasonable costs incurred by the parties throughout the arbitration process, without restriction.

In contrast, Article 46(1) of Federal Arbitration Law No. 6 of 2018, which is excluded under the ICC rules chosen by the parties to govern the proceedings, stipulates: 'Unless otherwise agreed by the parties, the arbitral tribunal shall determine the costs of arbitration, which shall include the fees and expenses incurred by any member of the arbitral tribunal in the performance of his duties and the costs of appointing any experts.' This provision explicitly limits the types of arbitration costs that the arbitral tribunal can determine and allocate.

Legal costs, such as fees paid to the parties' legal counsel for the arbitration, are considered reasonable costs incurred during the arbitration process. As such, these legal costs are part of the arbitration costs that the arbitral tribunal is empowered to determine and allocate under Article 38(1) of the ICC Arbitration Rules.

The Appellant’s argument—that the absence of an explicit reference to legal fees in the ICC Arbitration Rules, as compared to the specific mention in Article 36(1) of the 2022 DIAC Arbitration Rules, excludes them from arbitration costs—is unpersuasive. The omission of such a reference does not imply that the drafters of the ICC Arbitration Rules intended to exclude legal fees from the scope of arbitration costs. The phrase “and other reasonable costs incurred by the parties for the arbitration” encompasses all reasonable costs incurred by the parties, including legal costs such as attorney’s fees.

This interpretation aligns with the ICC's established practice, as reflected in Article 37(1) of the 2012 version of the ICC Arbitration Rules, which specifically includes 'reasonable legal and other costs incurred by the parties for the arbitration.' The Handbook of ICC Arbitration, which provides detailed commentary on the 2021 ICC Arbitration Rules, affirms in Clause 1490(3) that the arbitral tribunal considers the following costs as recoverable: (a) the fees and costs of party counsel. This language is consistent with the provisions in Article 38(1) of the ICC Rules, which have been in force since 2017.

International arbitration practices, including those under the ICC rules, consistently recognize attorney’s fees as part of the reasonable costs incurred by the parties during arbitration. These costs fall under the arbitral tribunal’s authority to determine and allocate.

In this case, however, the Court of Appeal departed from this established position, setting aside the arbitral award concerning the Appellant’s counsel’s legal fees. The Court of Appeal justified its decision on the grounds that legal fees fell outside the scope of arbitration expenses that the arbitral tribunal could determine and allocate, contrary to the established practice. Additionally, the Court of Appeal relied on the fact that there was no explicit agreement granting the arbitral tribunal the authority to rule on the legal fees of the parties’ counsel.

However, on 10.11.23 and 11.12.23, the Respondent submitted requests to the arbitral tribunal for the recovery of their arbitration costs, including legal fees, as confirmed in the arbitral award (and its translation provided by the Respondent) in paragraphs 185 and 188. This request was reiterated in the same terms in the arbitral award, starting from paragraph 1107 onward. By making this request, the Respondent implicitly acknowledged the arbitral tribunal's jurisdiction and authority to rule on these costs. Since the Appellant did not challenge this before the arbitral tribunal, the Court of Appeal's decision is flawed and must be reversed on this point

For the above reasons, Court has ruled as follows:

1- Cassation No. 760-2024 [Commercial], the appeal is dismissed, and the Appellant is ordered to pay the costs, along with AED 2,000 for attorney's fees. The deposit is forfeited.

2- The Court of Appeal's decision is partially reversed with respect to the partial set-aside of the arbitral award concerning the legal fees of the Appellant's legal counsel. The Respondent is ordered to pay the costs and AED 2,000 for attorney's fees, in addition to returning the deposit. On the merits, the action is dismissed in relation to the reversed portion, specifically the Respondent's request to set aside the arbitral award's ruling against them for US$1,542,376, covering the Appellant's legal costs and consultant and counsel fees. Furthermore, the Respondent is ordered to pay the costs and AED 1,000 for attorney's fees.