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## **COST AWARD OR NOT, THAT IS THE QUESTION:**

**Review of Judgment by Dubai Court of Cassation on the Recovery of Legal Fees in an ICC Arbitration**

### **IN THIS CASE:**

- Peter & Kim obtained a successful award with costs in an ICC arbitration between a Korean subcontractor and a Chinese state-affiliated company seated in Dubai, in which Peter & Kim represented the Korean company as claimant.
- The respondent sought to challenge the award in the local Dubai courts on various grounds, including that an arbitral tribunal has no power to award legal fees.
- The Court of Appeal (first instance court in this case) agreed with the respondent. However, the Dubai Court of Cassation held, for the first time and going against precedents, that the ICC Rules empower a tribunal to award legal costs, including the costs of a party's legal representatives.

Can a cost award bestow legal fees upon the successful party? Of course – one might think so. After all, that's one of the key reasons in seeking a cost award.

This seemingly obvious issue, however, was recently put in issue before the Dubai Court of Cassation in Commercial Case No. 756/2024.

In a judgment in late 2024 considering a request to set aside an ICC arbitral award, the Dubai Court of Cassation overturned the Court of Appeal's decision that an arbitral tribunal has no power to award legal fees, and confirmed that arbitral tribunals are authorized to award parties their legal costs.

### **THE UNDERLYING ICC ARBITRATION**

In the underlying ICC arbitration seated in Dubai, the Claimant, a Korean sub-contractor specializing in near-shore construction works represented by Peter & Kim, brought diverse claims against a main contractor in relation to the construction of a desalination plant in the UAE.



During the arbitral proceedings, neither the Claimant nor the Respondent challenged the Tribunal's power to award costs, including legal fees. In fact, both parties made submissions on costs – the Claimant having submitted a cost schedule and the Respondent having submitted both a cost schedule and lengthy cost submissions.

In its cost submission, the Respondent (i.e., the main contractor) expressly accepted the Tribunal's power and jurisdiction to award costs according to applicable procedural rules, the UAE Federal Arbitration Law, and the ICC rules. It emphasized that costs should be allocated reasonably and proportionally based on the parties' success in their claims and their conduct during arbitration and requested an award of its attorney and legal consulting expenses. In short, during the arbitration, the Respondent never took issue with the Tribunal's power to award costs under the ICC Rules.

In early 2024, the final award held that the Claimant is entitled to recover costs from the Respondent, including legal fees.

## **THE COURT OF APPEAL'S DECISION**

Following the issuance of the final award, the Respondent applied to the Dubai Court of Appeal, as the court of first instance for onshore arbitration recognition and set-aside applications in Dubai, to nullify the Tribunal's cost order. It claimed, amongst others, that it did not consent to the recovery of legal expenses and consulting fees in the arbitration.

At issue was the scope of Article 46(1) of the UAE Arbitration Law, which provides that "[u]nless 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". It is noteworthy that Article 46(1) does not expressly refer to the fees of counsel.

Also relevant is Article 38(1) of the ICC Rules 2021, which provides that the "costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court [...] and the reasonable legal and other costs incurred by the parties for the arbitration".

In the circumstances, on 27 May 2024, the Dubai Court of Appeal found that the award of legal costs by the Tribunal had no legal basis because (i) the arbitration agreement between the Parties lacked a clause authorising the Tribunal to adjudicate legal fees and expenses and (ii) Article 38 of the ICC Rules 2021 also did not expressly grant a tribunal the authority to award legal costs.



In its ruling, the court strictly interpreted Article 46(1) of the UAE Arbitration Law. This ruling was in line with certain previous cases that had affirmed that tribunals seated in the UAE have no jurisdiction to deal with awarding recovery of legal fees to the successful party in circumstances where parties did not expressly agree on the recovery of legal fees.

## **COURT OF CASSATION'S DECISION**

On 19 November 2024, the Court of Cassation reversed the Court of Appeal's ruling in a surprising decision departing from prior decisions and concluded that the ICC Rules empower a tribunal to award legal costs, including the costs of a party's legal representatives.

The Court of Cassation noted that the wording of a provision cannot be interpreted in a way that alters its meaning when it is clear and unambiguous. This principle is found in Article 265(1) of the UAE Civil Code, which is a cornerstone provision for contract interpretation.

The Court of Cassation found that when parties agree to conduct arbitration proceedings under the aegis of the procedural rules of the ICC, this agreement excludes the applicable provisions set out in the UAE federal law (except where related to public policy).

In this regard, the Court of Cassation confirmed that Article 46 of the UAE Arbitration Law is exhaustive and does not provide for the recovery of the parties' legal fees. However, the Court of Cassation also took into consideration the backdrop of the underlying arbitral award, including the wording of the ICC Rules 2021.

In the circumstances, the Court of Cassation found that Article 38(1) of the ICC Rules 2021 is clear and confirmed that the word "include" in Article 38(1) is not intended to restrict the list of recoverable costs in an arbitration and that "arbitration costs" merely refer to certain costs "by way of example".

In this regard, the Court of Cassation opined that legal costs are considered reasonable costs incurred by the parties in arbitration and should be deemed arbitration expenses that are estimated and awarded by the arbitral tribunal according to the text of the first paragraph of Article 38 of the ICC Rules 2021.

Notably, the Court of Cassation expressly rejected the argument that the absence of an explicit mention of legal representatives' fees would result in such costs not being considered arbitration expenses.



Indeed, the Court was satisfied that such an absence does not imply that the drafter of the ICC Rules intended to exclude the arbitral tribunal's jurisdiction to award lawyers' fees after including the phrase "reasonable legal and other costs incurred by the parties for the arbitration", which encompasses all reasonable costs incurred by the parties, including legal costs like lawyers' fees. In doing so, the Court held that the words "reasonable legal and other costs" demonstrate that tribunals may award any reasonable costs and that these may include the costs of legal representation.

The Court of Cassation also looked at the practice in international arbitration on the recovery of a party's legal fees and confirmed that the recovery of legal fees was in line with previous editions of the LCIA Rules, the ICC Rules and the Secretariat's Guide to ICC Arbitration 2012.

## **KEY TAKEAWAYS AND SUGGESTIONS**

This decision is a positive development within the UAE arbitration landscape as it brings Dubai closer in line with the international practice. In upholding the award, the Dubai Court of Cassation has demonstrated that a party to an arbitration seated in Dubai may be able to recover its legal costs, even in the absence of an agreement between the parties and despite the vague language of Article 46(1) of the UAE Arbitration Law.

While the decision has been well received by the arbitral community, the parties to an arbitration seated in Dubai should, however, be conscious of and manage this risk – given that the Dubai Court of Appeal has found that an arbitral tribunal has no power to award legal costs to a successful party in an ICC arbitration.

For instance, to minimise this possibility, parties could consider incorporating an express agreement in the arbitration clause or in a procedural order (or in the terms of reference in an ICC case) that the tribunal has the power and jurisdiction to determine and award legal costs.

From an arbitrator's point of view, this is welcome reassurance that awards of legal costs will likely stand scrutiny even if the parties to an arbitration have not agreed on the power of the arbitral tribunal to award them. However, tribunals may want to raise the issue during a case management conference and obtain written consent of the parties to mitigate any subsequent set-aside risk.



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## ABOUT PETER & KIM

Peter & Kim is a specialist arbitration firm with offices in Geneva, Zurich, Sydney, Seoul and Singapore. We support clients globally through a cohesive cross-border team structure offering a depth of common and civil law expertise that is grounded in decades of combined experience at partner level in international arbitration proceedings (including ISDS cases) and in advising and representing commercial and government clients in arbitration-related proceedings before State Courts.

Peter & Kim is recognised as a global leader devoted to the highest standard of legal expertise in international arbitration.