

# Cost Reallocation in Arbitration

Natasha Kohne and Eugene Delgado provide practical considerations for practitioners regarding the reallocation of 'arbitration costs' in the UAE.

**A**s arbitration practitioners in the United Arab Emirates (UAE) are well aware, it is best practice to execute an arbitration deed (i.e., terms of reference) setting out key relevant procedural issues in relation to an arbitration. In this regard, it is important to carefully consider the reallocation of arbitration costs before executing an arbitration deed. Many arbitration practitioners believe that international arbitration standards permit all arbitration costs (e.g., legal fees, administrative fees, expert fees, and witness fees, etc.) to be reallocated in the final award and attempt to apply these same standards in the UAE. However, practitioners in the UAE would be remiss not to consider that:

1. The definition of arbitration costs is a complex and sometimes contested issue that requires an in-depth analysis of the UAE laws, rules, and arbitration agreements; and
2. The UAE may not blindly follow international arbitration standards, but rather considers the UAE laws, rules, and arbitration agreements for guidance in determining the types of costs included in arbitration costs.

The UAE Federal Civil Procedures Law No. (11) of 1992, Article 218, states as follows:

*"The arbitrators shall estimate their fees and the arbitration costs and may decide that such amount, in whole or in part, be borne by the party against whom the award was issued. The court may, at the request of one of the parties, amend the said estimation taking into account the efforts of the arbitrators and the nature of the dispute."*

Given the lack of specificity regarding arbitration costs under UAE law, a practitioner may assume that arbitration costs include all of the costs associated with the arbitration as per international arbitration standards. However, it is important to note that despite the law providing an arbitrator the discretion to reallocate arbitration costs, the courts do not simply include all of the costs involved in the arbitration, but rather analyse a multitude of factors, including the rules of the arbitral institution to determine which costs the arbitrator is allowed to allocate in the award.

For example, the Dubai Court of Cassation (Case No. 282/2012, Real Estate Cassation, judgment of February 3, 2013) analysed the rules of the specific



arbitral institution to determine if the arbitrator was allowed to allocate legal fees. Specifically, the Court reviewed the Dubai International Arbitration Centre (DIAC) rules and found that legal fees are not recoverable from the opposing party as the rules did not expressly provide for reallocation of legal fees. Although Article 4.2<sup>1</sup> of the DIAC rules provides for reallocation of the “costs of the arbitration”, Article 2.1 of the DIAC rules defines the costs of arbitration 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.”*

In the view of the Court of Cassation (and strict interpretation), the DIAC rules did not make an express reference to the recovery of legal fees. As such, it decided that unless a specific power to award such costs had been granted to the arbitrator either in the original arbitration clause or subsequent arbitration deed, legal fees may not be allocated and recovered.

The Court specifically stated:

*“... the costs, expenses and legal fees are imposed or obligated on either party to arbitration only by law provision, legislative provision, general rules or if provided for expressly and clearly in a submission agreement given that an arbitration award is a contractual decision in relation to which the arbitrator’s jurisdiction is based on an arbitration clause contained in the agreement concluded between both parties ...” [Emphasis Added]*

In light of the preceding language, it appears that in order for the allocation of legal fees to fall into the arbitrator’s discretion, it should be expressly agreed to in an arbitration deed entered into between the parties.

Given the foregoing, practitioners should be aware that similar arguments may be made under other arbitral institutional rules when considering the types of costs an arbitrator can allocate in an award. For example, the Abu Dhabi Commercial Conciliation Arbitration Centre (ADCCAC) rules provide a few Articles regarding costs (e.g., Articles 28<sup>2</sup>, 37<sup>3</sup>, 38<sup>4</sup>, and 39). However, only Article 39 expressly authorises and defines which costs the arbitrator is allowed to reallocate. The costs are arbitrator’s fees and ADCCAC fees. Article 39 states that:

*“The fees of the Arbitration Panel in addition to the proportional fee referred to in Article 38 [Centre fees] shall be deposited by the parties equally with the Centre prior to the commencement of arbitration proceedings until the final award is issued which shall determine which of the parties should be obliged to*



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***with the arbitration [and] adjudicate upon the case and determine which of the parties should bear these fees and in what proportion or decline the arbitration assignment.” [Emphasis Added]***

***bear the fees and in what proportion.***

*If one of the parties abstains from paying its share of the fees, the party that has interest in the arbitration shall deposit the defaulting party’s share with the Centre by way of a loan to that party. Should all parties refrain from making the payment, the Arbitration Panel may either proceed*

Hence, similar to the DIAC rules, it appears that the ADCCAC rules do not expressly provide the arbitrator with the discretion to reallocate legal fees, but rather confines the reallocation discretion to arbitrator’s fees and ADCCAC fees only. As such, when executing an arbitration deed, it is important for practitioners in the UAE to specifically define which arbitrations costs it wants the arbitrator to reallocate as the arbitrator’s discretion may be confined to the strict wording of the arbitral institutional rules rather than allowing a reallocation of all costs associated with an arbitration. 📌

1. DIAC Rules Article 4.2 (Decision as to the Costs of the Arbitration): “... the final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties ...”
2. ADCCAC Rules Article 28 (Issuing of Arbitration Awards): “... the Centre shall undertake the notification of the Arbitration award to the parties and submit an original copy to each party after ensuring that the arbitration costs have been completely paid by the parties or by one of them to the Centre.”
3. ADCCAC Rules Article 37 (Determining Arbitration Fees): “The fees of the Arbitration Panel shall be determined by reference to the amount in dispute, in accordance with the two tables of fees referred to in Articles 43 and 44 of the Rules, as applicable ...”
4. ADCCAC Rules Article 38 (Proportional Fee for the Centre): “The Centre shall, in return for services rendered by it, collect a proportional fee of 15% calculated on the fees of the Arbitration Panel’s specified in Article 43 or Article 44 as applicable.”



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