



DISPUTE RESOLUTION IN THE MIDDLE EAST

Costs



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COSTS

GENERAL OVERVIEW

A key element of any dispute is understanding the costs involved. It is not only important to budget for the potential spend, but also to understand:

- the constituent parts comprising the total costs of the dispute;
- when they are likely to be incurred; and
- the extent to which such costs may be recoverable.

The costs of a dispute do not only include legal fees (whether in respect of lawyers, counsel and/or advocates), but also include costs incurred in relation to:

- court, arbitrator and/or arbitration centre fees;
- expert reports and evidence (technical, legal or otherwise); and
- various disbursements (such as translation, document management, travel and accommodation expenses).

Therefore, when planning the pursuit of any claim, a costs/benefit analysis will be necessary. It is of course difficult, due to the uncertain nature of disputes, to predict the likely costs exposure, but in principle the exercise is useful nonetheless, especially in circumstances where parties are unable to recover their costs.

If costs are potentially recoverable, it is important from an early stage to keep clear records of the costs incurred. A party will need to determine what its total spend is over a period of time and ensure it is able to:

- budget accordingly; and
- evidence those costs when required.

Claiming costs

One of the many considerations when drafting dispute resolution clauses is understanding whether the choice of jurisdiction for a dispute allows for parties to recover their costs incurred during a dispute.

In terms of recoverability, the short answer is that the costs of a dispute are not always recoverable and where they are recoverable, it may not be the case that all of them are. The recoverability of costs typically depends on a number of factors, including:

- the jurisdiction in which the dispute takes place;
- the degree of success of claims/defences; and/or
- the conduct of the parties in the dispute.

ONSHORE LITIGATION

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There is no procedure for the recovery of legal fees in the onshore courts of the UAE. Typically, the court will grant the successful party the court and expert fees (if one is appointed by the court) it has incurred but no more than a token sum in respect of its legal costs.

OFFSHORE LITIGATION

When it comes to the offshore courts, such as those in the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM), their respective procedural rules on costs provide procedures by which a party may recover its costs.

The Rules of the DIFC Courts (RDC) provide the Court with considerable discretion when it comes to making orders as to costs. However, the general rule is that the unsuccessful party will be responsible for settling the successful party's costs.

The RDC provide that the court is to have regard all the circumstances when making an order as to costs. This includes consideration of the degree of success of the cases of the parties, their conduct and any offers to settle. There is also potential for the DIFC Court to make no order as to costs – this is usually where it finds that the merits of each party's case are balanced.

The DIFC Court will assess the amount of costs due to the receiving party on either a standard or indemnity basis. Where costs are assessed on the standard basis, the court will:

- only allow costs which are proportionate to the matters in issue to be recovered; and
- resolve any doubt as to whether costs were reasonably incurred or reasonable and proportionate in amount in favor of the paying party.

On the other hand, where costs are assessed on an indemnity basis, any doubt as to whether costs had been reasonably incurred or reasonable and proportionate in amount is interpreted in favor of the receiving party. In other words, it is for the paying party to persuade the court that certain costs were not reasonably incurred.

Where the DIFC Court orders a party to pay costs, it may either make an immediate assessment (i.e., at the hearing itself) or order that a detailed assessment takes place. Detailed assessment proceedings involve a separate hearing, at which a party must present and defend a detailed bill of costs before the court and its opponent (who is entitled to raise points disputing the bill of costs). There are a number of things to consider before starting assessment proceedings, including the fact that assessment proceedings demand that a certain percentage of the costs are paid to the court as a fee. This fee is potentially recoverable from the paying party, along with any further costs (including legal and court costs) a party incurs in costs assessment proceedings.

It is also worth noting that the DIFC Court is empowered to issue an interim costs order in favor of a party. These costs orders will usually reflect 50 percent of the costs incurred by the party, or what the court believes is the minimum it will recover.

The ADGM Court procedure rules, although somewhat less extensive than the RDC on costs and their recovery, broadly follow the framework of the RDC.

ARBITRATION

In respect of arbitrations that are seated onshore in the UAE, Article 46 of the UAE Arbitration Law (Federal

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Law No. 6 of 2018) provides arbitrators with the power to assess their own fees and the costs of the arbitration (including the costs of any expert(s) appointed by them) and to order that all or part of such fees and costs are borne by the unsuccessful party in the arbitration. However, the UAE Arbitration Law is silent on an arbitrator's ability to award any party's legal fees or other costs.

The Dubai Court of Cassation has directly considered, albeit under the previous legislative regime prior to the coming into force of the UAE Arbitration Law, the ability of arbitrators to award legal costs and ruled that arbitrators are only empowered to do so with the agreement of the parties. Given that the UAE Arbitration Law remains silent on the issue, we do not anticipate that the approach of the onshore courts will change. This agreement can be reflected in:

- the arbitration rules the parties have agreed to apply;
- the arbitration clause agreed by the parties; and/or
- the Terms of Reference agreed by the parties.

The position differs in arbitrations seated in the DIFC and the ADGM, which have their own arbitration laws. The arbitration laws of both the DIFC and ADGM empower arbitral tribunals to fix the costs of the arbitration. A definition of "costs" is included in each of these laws and includes:

- the fees of the arbitral tribunal to be stated separately as to each arbitrator;
- the properly incurred travel and other expenses incurred by the arbitrators;
- the costs of expert advice and of other assistance reasonably required by the arbitral tribunal;
- the travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- such other costs as are necessary for the conduct of the arbitration, including those for meeting rooms, interpreters and transcription services;
- the costs of legal representation and assistance of the successful party if such costs were claimed during the arbitration, and only to the extent that the arbitral tribunal determines that the amount of such costs, or a part of them, is reasonable; and
- any fees and expenses of any arbitral institution or appointing authority.

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