

Costly indecision

With an increase in dispute resolution in the region, it is time the UAE embraced a full-scale legal costs allocation system, argues Antonios Dimitracopoulos

As unfair as it may seem, losers in a UAE legal battle can walk away without being ordered to pay winners' lawyer's fees. It is a local trait that parties to a court action have to bear their own legal costs – a position shared among many civil law jurisdictions.

Nonetheless, the UAE Civil Procedure Law in article 133 allows for the country's courts to have the discretion to award to the successful litigant legal fees as part of the costs of the action. However, in practice the costs of legal representation are only awarded by UAE courts to a nominal degree, usually at the sum of AED1,000. This can be explained by the fact that there is a distinct absence of a reliable system in place for ascertaining the reasonableness of full-scale legal costs. As a result, the discretionary provision remains generally unutilised, leaving a theoretical – and in practice, unusable – relief option for the successful party.

Not having a judicial practice that regularly applies full-scale legal costs allocation is an unwelcome state of affairs. It could mean that, once one's own legal fees have been agreed, there is no financial deterrent for any litigant to commence proceedings that may have no obvious merit, nor to protract the defence of those cases that clearly do have merit.

But awarding legal costs is no mean feat. To be conducted fairly and efficiently, it requires far more than an agreement between the parties or a provision within chosen arbitration rules. This is because such agreements or rules are always subject to UAE court practice, law and public policy. In addition, arbitrators' powers cannot normally exceed those of the courts, even by agreement between the parties.

Looking into the substance of an order for legal costs, it is generally based on the concept that he who has erroneously pursued or defended a legal action should bear the costs of forcing the other litigant to defend or pursue it. This practice is, in general, aimed at discouraging speculative legal actions and abuse of the judicial system. In addition to orders for legal costs, in many common law jurisdictions penalties are imposed on lawyers that file writs or other applications that clearly have no obvious chance of success.

As with any initiative aimed at achieving equitable allocation of risks, a legal system that allows orders for legal costs must at the same time have in place a means of enforcing and monitoring the reasonableness of such costs. For example, costs draftsmen fulfil that role in the UK. They are regulated in the context of by-laws implemented by the Association of Law Costs Draftsmen and their reports are filed with the relevant court, generally as part of that court's judgment.

Law costs draftsmen have extensive experience and undergo specialised training in determining the reasonableness of legal bills in proportion to complexity, duration and degree of success of actions in question.

However, it is not uncommon – indeed it is regularly observed – that a departure from UAE court practice of allowing a nominal amount by way of advocate's fees takes place when it comes to local arbitration. Often arbitrators, particularly those stemming from common law systems, include a last-minute legal costs addendum to their awards, on the basis that either the rules of the arbitration or some ad hoc agreement between the parties empowers them to do so. This paves the way for potentially successful applications to the courts, at the award's enforcement stage, seeking nullification of part or possibly the entire arbitral award.

Such applications are usually requested on the basis that the arbitrators have exceeded their authority and have applied practices that are in breach of UAE public policy or at least court practice.

Vital ingredient

Allowing legal costs as part of a judgment or an arbitral award ideally requires an infrastructure that supports the relevant court order or arbitral award. A vital ingredient of such infrastructure is the analytical filtering of legal costs by qualified, specialised, regulated and independent professionals, the costs of which are also often included in a legal costs submission.

Without this ingredient, the inclusion of legal costs in a court order or an arbitral award could open an uncontrollable path to gross injustice and even undue enrichment. It could also form



fertile grounds for legal disputes as to the basis on which a judge or an arbitrator has made the relevant assessment.

This is particularly the case with regard to arbitral proceedings at the commencement of which legal costs amount to a quantum that is unknown. Such quantum is continuously (save for fixed-fee instances) rising throughout the proceedings.

Therefore, it is predictable that legal costs may be liable to extortionate inflation when produced at the end of arbitral proceedings in the hope that all, or at least part of them, may be awarded and after one of the parties is confirmed as the overall winner. This would be so at the expense of the losing party who would be at the mercy of the arbitrator's judgment on what constitutes reasonable legal fees.



Typically, arbitrators in international as well as local proceedings are unlikely to be either qualified or regulated as legal costs experts. Therefore, the part of their awards that relates to legal costs allocation could be challenged on a two-fold basis: either that the arbitrators should have consulted specialist experts to assess the reasonableness of the legal costs awarded and/or that, in any event, the amounts awarded could not exceed those included in a typical UAE court judgment.

Developing, implementing and refining an accurate system for assessing the reasonableness of legal costs may form a long-term goal for the improvement of the UAE judicial system. In the meantime, there is an increasing tendency of parties being hauled into defending or pursuing endless court

proceedings (and often lengthy arbitrations) without any substantial cost repercussions for the eventual losing party.

The abundance of court actions as well as arbitral proceedings, coupled with the intense promotion of various dispute resolution centres, necessitates a short-term and happy medium solution. Its aim would be to address this tendency as efficiently as possible limiting the potential exposure of the losing party to pay excessive legal costs, while at the same time compensating the winning party for a meaningful percentage of such costs.

Banding together

One option that could be adopted would be a band-based system. This could be achieved by capping the rate of the recoverable legal fees

“Establishing a solid and functional system for the fair distribution of legal costs is vital to the judicial system”

at differing bands, depending on the amounts awarded on merits, leaving at the discretion of the judges or arbitrators the determination of the exact amount of the legal costs awarded, but always within the particular band.

There may be counter arguments as to the efficacy and fairness of one system of legal costs distribution versus another. However, there can be little doubt that establishing a solid and functional system for the fair distribution of legal costs is vital to the judicial system of a burgeoning economy.

The benefits would be too many to enumerate but would include an awareness of the consequences of obviously unfounded court actions and even of ones that have some legal basis but could backfire on their merits.

This, in turn, could mean a reduction of legally weak claims and inevitably a more manageable workload for UAE court judges, most probably resulting in higher quality of judgments. This would then provide more solid guidelines for arbitrators to follow when issuing awards that include an allocation of legal costs.

At the same time, the losing party's vulnerability at the final stage of arbitration proceedings would be alleviated. Similarly, the winning party's recovery of a substantial part of its legal costs would not run the risk of being jeopardised at the award's enforcement stage by a losing party desperately (but at times successfully) seeking nullification of the legal cost aspect of the award.

Such a reform would also have an impact on us lawyers and the quality of the services we provide. Giving legal advice on the merits of a dispute and actually accepting representation of a given client before a dispute resolution authority would be a far more responsible task to undertake. The prospect of the opponent's legal costs being catapulted back on to the lawyer's client would almost certainly lift the degree of alertness with which pleadings are drafted and arguments are articulated. And that would ultimately benefit the parties seeking justice and a fair trial. ●

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