

LIRIT V LIWANU [2021] DIFC ARB 011:

CHALLENGES TO THE ENFORCEMENT OF ARBITRAL AWARDS IN THE DIFC

A Case Note from the 2TG Commercial Dispute Resolution Team

Autumn 2021

Introduction

1. On 8th August 2021, H.E. Justice Shamlan Al Sawalehi, sitting in the Court of First Instance of the Dubai International Financial Centre, handed down judgment in *Lirit v Liwanu* [2021] DIFC Arb 011, concerning the Defendant's application (the "**Application**") to set aside an Order (made *ex parte*) ordering recognition and enforcement of a DIFC-LCIA arbitration award under Article 44(1)(a)(iv) of DIFC Law No. 1 of 2008 (the "**DIFC Arbitration Law**").
2. This Judgment provides useful insight into the approach of the DIFC Court to challenges to the enforcement of arbitral awards under Article 44(1) of the DIFC Arbitration Law.



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Article 44(1) of the DIFC Arbitration Law

3. Article 44(1) of the DIFC Arbitration Law sets out the grounds for refusing recognition or enforcement of arbitral awards. Article 44(1) mirrors Article V(1) of the New York Convention. Accordingly, in English Law, materially similar provisions are contained within section 103 of the Arbitration Act 1996.
4. The Application was brought under Article 44(1)(a)(iv), which provides as follows:

"Recognition or enforcement of an arbitral award, irrespective of the State or jurisdiction in which it was made, may be refused by the DIFC Court only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the DIFC Court proof that:

[...]

(iv) the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, in the absence of agreement, was not in accordance with the law of the State or jurisdiction where the arbitration took place."

The grounds of the Application

5. The Defendant argued that the arbitral award (the "**Award**") should be set aside under Article 44(1)(a)(iv) on the following grounds:
 - 5.1. That the Arbitration's procedure was not in accordance with the law of the jurisdiction where the arbitration took place, being "onshore" Dubai¹ ("**Ground 1**"); and/or
 - 5.2. That the Arbitration's procedure was not in accordance with the agreement of the parties, as certain steps in a tiered dispute resolution clause were said not to have been complied with ("**Ground 2**").

The Decision

Ground 1

6. The Court dealt with Ground 1, shortly. As envisaged by the terms of Article 44(1)(a)(iv) itself, a challenge on the basis of non-compliance with the law of the place of the Arbitration may only be made "*in the absence of agreement*" by the parties on arbitral procedure. As addressed further below (and as is evident by the fact of Ground 2 itself), such an agreement was in place (in that the parties agreed to conduct the arbitration pursuant to

the DIFC-LCIA Arbitration Rules) and the Court dismissed Ground 1 accordingly.²

Ground 2

7. The Court considered Ground 2 also to be "*conceptually fatally flawed*"³ as it did not relate to the parties' agreement on arbitration procedure:
 - 7.1. The relevant arbitration clause provided for a multi-tiered dispute resolution process requiring, amongst other things, the parties to attempt "*amicable resolution*" of the dispute within 21 days after "*receipt of written notice of impasse*" before referral to Arbitration may be made.⁴
 - 7.2. As the Defendant's complaint was in respect of alleged non-compliance with the mandatory tiered process "*prior to commencing arbitration*", the Court held that it did not relate to any failure in the procedure adopted in the Arbitration (i.e., "*after the commencement of arbitration*") and as such, Article 44(1)(a)(iv) was not engaged.⁵
8. The Court also held that Ground 2 could not succeed even if the alleged non-compliance could be considered to relate to the parties' agreement on the arbitration procedure as under Article 25 of the UAE Federal Law No. 6 of 2018 (the "**UAE Arbitration Law**"), a party who fails to object to any non-compliance with the relevant arbitration agreement and/or applicable law within the agreed time limit or, in the absence of agreement, within seven days of becoming aware of the non-compliance, "*shall be considered to have waived his [right] to object.*"

¹ Albeit not expressly set out in the Judgment, the basis for this submission was that no "Oath" had been administered by the Tribunal to some of the witnesses giving evidence, and that this was contrary to the UAE Arbitration Law.

² At [4]

³ At [8]

⁴ At [7]

⁵ At [9]

9. The Defendant alleged that its previous legal advisors had not alerted it to the alleged non-compliance and it only became aware of the same after the Award was published, after having fully participated in the arbitral proceedings.⁶

10. The Court considered that the Defendant had not shown “*why its previous advisors’ knowledge... should be considered distinct from its own*” and that in any event, it was implausible that the Defendant was not aware of the terms of the arbitration agreement itself, it having signed the contract which contained the agreement. Accordingly, the Defendant was held to have waived his right to object to any non-compliance with the arbitration procedure.⁷

Discussion

11. By this judgment, the DIFC Court underscored the narrow construction given to Article 44(1) of the DIFC Arbitration Law in line with the restrictive approach generally taken by contracting states to the New York Convention.⁸

12. Similarly, it is pertinent that in dismissing Ground 1, the DIFC Court paid heed to the guidance given by UNCITRAL as to the scope of Article V(d) of the New York Convention (being the materially equivalent provision to Article 44(1)(a)(iv)),⁹ confirming its willingness to consider international guidance while developing its own jurisprudence.

13. The judgment is also interesting in that, contrary to the approach which has been taken in the Joint Judicial Committee (the “JJC”)¹⁰ the DIFC Court, in holding that it was the UAE Arbitration Law which was the law of the seat¹¹, appears to have accepted that, properly construed, the Arbitration was conducted as a DIFC-LCIA Arbitration but with an (onshore) UAE seat. Such an approach is, it is suggested, in keeping with a more orthodox approach to the construction of arbitration agreements than that which has previously been taken by the JJC which has¹² appeared to consider all DIFC-LCIA arbitrations to be subject to the supervision of the DIFC Courts (and presumably subject to the DIFC Arbitration Law), regardless of their seat within the UAE.¹³

Conclusion

14. This Judgment serves as a reminder of the difficulty faced by parties seeking to challenge the enforcement of arbitral awards in the DIFC Court. In line with the approach generally taken by the international community, the DIFC construes the limited grounds of challenge set out in Article 44(1) narrowly and is, in this sense, clearly a “pro-arbitration” jurisdiction.

*Timothy Killen appeared on behalf of the successful enforcing party instructed by **Damian Crosse and Sammy Nanneh** of Pinsent Masons Dubai LLP.*

For further information on Timothy's practice, including his work in the UAE, please click [here](#)

⁶ At [12]

⁷ At [13]

⁸ See *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 2016 Ed., page 125 at [4]

⁹ At [5]

¹⁰ See, e.g. the JJC Decision in *Sinbad Marine v Al Tamimi* (Cassation 1 of 2018)

¹¹ At [11] and [12]

¹² See *Sinbad Marine*, *ibid.*

¹³ It should be noted that Decree no. 34 of 2021, signed on 14 September 2021, makes provision, amongst other things, in respect of arbitration seats and the applicable law. This Decree has yet to be published in English and the extent to which, if any, it would have altered the outcome of this case remains to be seen.

makes specific provision as to the correct supervisory courts and applicable law. This Decree has yet to be published in English and it remains to be seen the extent to which it would have altered the DIFC Courts approach in this case.

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James has a diverse commercial practice and has gained particular experience in cases concerning contract interpretation and shareholder disputes. He has worked on a number of cases before the DIFC Courts, including:

- Acting (led by Patrick Dillon-Malone SC and Timothy Killen) in a multi-million dollar DIFC Court cross-border fraud claim concerning alleged breach of fiduciary duties, trust and contract.
- Assisting in a high value DIFC Court claim, concerning the proper shareholding of a Dubai company.

Other commercial cases of note include:

- *Al Jaber & Ors v Salfiti & Ors* [2021] – acting (led by Olivier Kalfon and Zac Sammour) for the first, third and fifth Defendants in a multi-million pound cross-border fraud claim involving alleged breaches of directors' duties, knowing receipt, dishonest assistance, breaches of trust and conspiracy.
- *O'Toole v Demarca Gaming Limited* [2020] – acting as sole counsel for the defendant in a successful jurisdiction challenge to a breach of contract claim against a Maltese casino.
- *Liberty Partnership Ltd v Tancred* [2020] – acting as sole counsel for the defendant in a longstanding dispute concerning alleged breaches of a share purchase agreement.
- *Riddel v Laffey* [2020] – acting as sole counsel in a restitution and breach of trust claim against a waste processing company.

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