

# (1) Fiske (2) Firmin v Firuzeh [2014] DIFC ARB 001

Claim No: ARB 001/2014

## THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF FIRST INSTANCE

BEFORE H.E. JUSTICE ALI AL MADHANI

BETWEEN

**(1) FISKE  
(2) FIRMIN**

Claimants

and

**FIRUZEH**

Defendant

Hearing: **16 - 17 December 2014**

Counsel: Tom Montagu-Smith instructed by Fichte & Co for the Claimants  
Steven Thompson instructed by Clyde & Co LLP for the Defendant

Judgment: **13 July 2015**

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### JUDGMENT OF H.E. JUSTICE ALI AL MADHANI

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#### Summary of Judgment

The First and Second Claimants filed an Arbitration Claim seeking an order against the Defendant, a company incorporated and domiciled in Dubai, before the Dubai Courts for recognition and enforcement of two foreign Arbitral Awards made in their favour in London pursuant to 5(A)(1)(e) of the Judicial Authority Law and Articles 42 and 44 of the Arbitration Law.

The Defendant raises three grounds in response to the claim for recognition and enforcement of the Awards. First the Defendant argues that the composition of the Arbitration Tribunal was not in accordance with the agreement of the parties or the law of England. Second, the Defendant claims that to recognise and enforce the awards would be contrary to the public policy of the UAE and finally, the Defendant contends that there is no evidence that the Defendant has any assets in the DIFC and thus the Court should refuse to enforce the Awards even if it recognises them as a matter of discretion.

In response, the Claimants maintain their position that the DIFC Courts must recognise and enforce the Awards pursuant to Article 42 and 44 of the DIFC Arbitration Law. In response to the first argument, the Claimants cite Article 73 of the English Arbitration Act which mirrors Article 9 of the DIFC Arbitration Law which posits that a party who participates in arbitration proceedings without making a procedural objection may not take that objection later unless he shows that he did not know about the procedural defect and could not have discovered it. With regard to the public policy argument, the Claimants argue that the Defendant has failed to effectively engage the public policy defence and furthermore points out that there is a strong public policy argument in favour of enforcing arbitration awards. As for the last argument on discretion, the Claimants assert that the Court has no discretion to refuse enforcement unless a specified defence is made out and that the Awards must be recognised and enforced in accordance with Article 42 and 44 of the DIFC Arbitration Law.

Regarding the issues surrounding the composition of the Arbitration Tribunal, the Court rules that the Defendant has failed to establish that they raised the procedural composition issue before the appointed arbitration tribunal at any stage or time while taking place in that proceeding. Accordingly, the Defendant shall not be allowed to raise this issue as a matter of objection to the enforcement procedures before this Court. On the issue of public policy, this Court points out that the public policy argument raised by the Defendant is identical to the public policy argument raised in the previous application heard on 17 September 2014 and that the same analysis applies as was discussed in the previous application and accordingly, the Defendant's argument fails. As for the final argument, the Court rules that unless the Defendant can establish that their defence can be brought under one of the grounds exclusively listed under Article 44 of the DIFC Arbitration Law, this Court shall recognise or enforce the Award. Since the Defendant has failed to identify any further ground this Court can rely on in Article 44, the Defendant's request is without merit and dismissed. Accordingly, the Court ruled that the Claimants are entitled for the terms of the Award to be entered into the judgment.

## **JUDGMENT**

### **Introduction**

1. On 17 April 2014, the First Claimant and the Second Claimant, who have no connection with the DIFC, together filed an Arbitration Claim seeking an order against the Defendant, a company incorporated and domiciled in Dubai, before the DIFC Courts for recognition and enforcement of two foreign arbitral awards (the "Awards") made in their favour in London on 14 September 2012 and 12 April 2013, pursuant to the combined application of Article 5(A)(1)(e) of the Judicial Authority Law, Dubai Law No. 12 of 2004 as amended by Law No. 16 of 2011 (the "JAL") and Articles 42 and 43 of the DIFC Arbitration Law, DIFC Law No. 1 of 2008 as amended by DIFC Law No. 1 of 2013 (the "DIFC Arbitration Law").

2. The Awards were issued in an arbitration (the "Arbitration") commenced pursuant to an arbitration agreement in a charter-party in respect of a vessel known as "Fiske". The Claimants were awarded USD 38,943,986.14 plus interest.

3. In an earlier application before this Court on 7 August 2014, the Defendant issued an application for a stay of this claim pending determination by the Union Supreme Court of the UAE of the constitutionality of the DIFC laws upon which the Claimants rely, which it alleged were against Federal law. On 17 September 2014, I heard and dismissed the Defendant's Constitutionality Application.

4. On 2 October 2014 the Defendant applied for permission to rely upon expert evidence of UAE law on public policy. The Defendant's application for permission to rely upon expert evidence of UAE law was dismissed, but the parties were informed that they may provide copies of relevant legislation, commentary, case law and written submissions for the Court's consideration at trial.

### **The Defendant's Submissions**

5. The Defendant raises three grounds in response to the claim for the recognition and enforcement of the Awards; (a) The composition of the Arbitration Tribunal was not in accordance with the agreement of the parties or the law of England, where the arbitration took place (relying upon Article 44(1)(a)(iv) of the DIFC Arbitration Law); (b) To do so in the circumstances of this case would be contrary to the public policy of the UAE (relying upon Article 44(1)(b)(vii) of the DIFC Arbitration Law); (c) On the facts of this case, and in particular because there is no evidence that the Defendant has any assets in the DIFC, the Court should refuse to enforce the awards (even if it recognises them) as a matter of discretion.

6. With regard to the first ground, the Defendant states that it previously appointed an arbitrator, Mr Mark Hamsher, who was appointed to the tribunal and whose appointment had never been effectively revoked. Subsequently, Mr Hamsher was not included in the present Arbitration and accordingly, the Defendant argues, Mr Hamsher's absence from the tribunal panel, whose appointment had never been effectively revoked under English law, rendered its composition defective.

7. The Defendant submits that the parties in the arbitration agreement in the charter-party have expressed the choice of English law, which means that any question as to the validity of the appointment would be governed by English law. The Defendant refers to Section 23 of the English Arbitration Act of 1996 which outlines the position that a party cannot unilaterally (or even with the consent of the arbitrator) revoke an appointment; the parties must act jointly to revoke it and they must do so in writing (unless they also terminate the arbitration agreement).

8. The Defendant accordingly invites the Court to refuse recognition and enforcement of the Awards since the parties conducted the Arbitration in violation of Article 44(1)(a)(iv) of the DIFC Arbitration Law as the parties did not terminate the arbitration agreement nor did they agree to terminate Mr Hamsher's appointment. Moreover, they did not act jointly in seeking to terminate Mr Hamsher's appointment; indeed they did not do anything in writing.

9. With regard to the second ground, the Defendant argues that the enforcement of the Awards would be contrary to UAE public policy.

10. The Defendant contends that the enforcement of awards against a person in Dubai outside the DIFC, with no connection to the DIFC, would be morally offensive and repugnant to the principles of the Islamic Shari'ah and, therefore, is contrary to UAE public policy pursuant to Article 44(1)(b)(vii) of the DIFC Arbitration Law.

11. Specifically, the Defendant argues that the enforcement of arbitral awards in the DIFC against a defendant domiciled in mainland Dubai would deprive individuals of: (i) protection of their ratification and enforcement rights under Article 215 of the UAE Civil Procedure Code, Federal Law No 11 of 1992 as amended by Federal Law No 30 of 2005 (the "CPC"); (ii) the right to be heard in the UAE Courts where the arbitration agreement could be construed in accordance with the principles of Islamic Shari'ah, principles which would not be taken into account in the DIFC Courts; and (iii) the legitimate expectation to plead in the Arabic language.

12. The Defendant argues that if the DIFC Courts proceed to deal with the claim and consequently recognise and enforce the Arbitral Awards, fundamental elements of the CPC will be bypassed, thereby depriving a person or company in the UAE with no connection whatsoever to the DIFC of the legitimate and expected rights to rely on UAE law, including the terms of the CPC, and in particular Article 215 thereof.

13. The Defendant further submits that in considering UAE public policy arguments, the UAE courts outside the DIFC would treat as material the fact that the DIFC was not created so as to constitute an alternative jurisdiction to the UAE courts. The purpose of the DIFC Courts is described in Article 6 of the DIFC Courts Law (Law No. 10 of 2004) as being:

“...to provide for the independent administration of justice in the DIFC in accordance with Dubai Law No. 9 of 2004 and the Judicial Authority Law.”

14. It is worth mentioning that in its application of 7 August 2014 for a stay of this claim pending determination by the Union Supreme Court of the UAE of the constitutionality of the DIFC laws, the Defendant pursued the argument that the DIFC Courts, by accepting to recognise and ratify foreign arbitral awards where no link with its jurisdiction has been established, is contravening the UAE public policy in that regard and reference was also made to the UAE Federal CPC.

15. Lastly, and on an alternative basis, the Defendant contends that if the main two arguments are rejected, and the Court sees it fit to recognise the Awards, the DIFC Courts as a matter of discretion should nevertheless refuse to enforce the Awards, as it would be wrong to make any order enforcing the awards in the DIFC where the Defendant has no assets in the DIFC.

### **The Claimants' Response and Submissions**

16. The Claimants maintain their position that the DIFC Courts must recognise and enforce the Awards pursuant to Articles 42 and 44 of the DIFC Arbitration Law.

17. In response to the Defendant's first argument that the appointment of the arbitrators was not in accordance with the agreement of the parties or English law, the Claimants assert that Mr Hamsher was appointed by the Defendant in respect of a different arbitration altogether and that arbitration was subsequently brought to an end when the Defendant withdrew the proceedings.

18. The Claimants argue that the Arbitration resulting in the Awards in the present case was a separate matter that was commenced long after Mr Hamsher's appointment and that Mr Hamsher could not have been appointed to the present-case Arbitration in December 2010 because the Arbitration had not yet been commenced at that time. Additionally, the Claimants assert that Mr Hamsher's appointment was in fact properly terminated by agreement in writing as the parties only communicated in writing through emails.

19. Notwithstanding the above, the Claimants cite Article 73 of the English Arbitration Act 1996, which is similar to Article 9 of the DIFC Arbitration Law, which posits that a party who participates in arbitration proceedings without making a procedural objection may not make that objection later unless he shows that he

did not know about the procedural defect and could not have discovered it. In effect, the argument put forward is that the Defendant cannot participate in arbitration without objection and then subsequently raise an objection at the enforcement stage.

20. With regard to the Defendant's public policy argument, the Claimants point out that there is a strong public policy in favour of enforcing arbitration awards and cite a slew of cases and academic reports that finely tailor public policy arguments and their application into two categories; namely, substantive and procedural public policy.

21. The Claimants argue that the Defendant has failed to effectively engage the public policy defence as none of the claims elucidated by the Defendant relate to the substantive rights afforded by the Awards or to the procedures by which the Awards were produced. Rather, the public policy argument put forth by the Defendant, according to the Claimants, is about the manner in which the Claimants are going about enforcement - which is a matter for the laws and procedures of the DIFC and Dubai, not a matter of public policy.

22. As for the Defendant's last submission on discretion, the Claimants assert that the Court has no discretion to refuse enforcement unless a specified defence is made out and that the Awards must be recognised and enforced in accordance with Articles 42 and 44 of the DIFC Arbitration Law.

### **The issues surrounding the composition of the Arbitration Tribunal**

23. The arguments put forward by the parties in this regard have raised three technical questions:(a) Whether the arbitrator Mr Hamsher was appointed to the same tribunal that issued the Arbitral Awards (the subject of this case) or to different arbitration proceedings;(b) Whether the arbitrator Mr Hamsher's appointment (if said to be appointed to the same tribunal which issued the current Awards) was in fact properly terminated by agreement in writing in accordance with the governing rules;(c) Whether the Defendant has waived their right to object by failing to raise the objection related to the composition before the tribunal which issued the current Arbitral Awards.

24. Although determining any of the three questions mentioned above would bring the debate about the composition of the Arbitral Tribunal to an end, I will deal with the third question first for the reason that if the Defendant cannot satisfy the test in that question (c) it would not be open to them to argue the issues in the first two questions (a) and (b).

25. It is not disputed that the composition of arbitral tribunals in this specific case is governed by the rules of the English Arbitration Act of 1996 which dictates how arbitral tribunals are composed and how to revoke the appointment of an appointed arbitrator. The Act also provides for relief if parties are in breach of the said rules as we will see in the following paragraphs.

26. It is a matter of fact that it is usually open to the Defendant to object, before this Court, to the enforcement of an arbitration award in the case of irregularity related to the composition of the arbitral tribunal as stated in Article 44.1(a)(iv) of the DIFC Arbitration Law:

“(1) Recognition or enforcement of an arbitral award, irrespective of the State or jurisdiction in which it was made, may be refused by the DIFC Courts only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the DIFC Courts 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 such agreement, was not in accordance with the law of the State or jurisdiction where the arbitration took place.”

27. As regards the question whether the Defendant has waived their right to object to the enforcement process before this Court by failing to raise the objection related to the composition before the tribunal which

issued the current Arbitral Awards, this Court shall refer to the English Arbitration Act, the law of the seat governing the issue related to the composition of the arbitration tribunal in that jurisdiction and then to the DIFC Arbitration Law which gives parties the right to object to the enforcement proceedings based on a breach of the English provisions.

28. Article 73 of the English Arbitration Act 1996 provides the following:

“Loss of right to object.

(a) If party to arbitral proceeding takes part, or continues to take part, in the proceeding without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this part, any objection-

(b) that the tribunal lack substantive jurisdiction,

(c) that the proceeding have been improperly concluded,

(d) That there has been a failure to comply with the arbitration agreement or with any provision of this part, or

(e) that there has been any other irregularity affecting the tribunal or the proceeding,

He may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part, or continued to take part in the proceeding, he did not know and could not with reasonable diligence have discovered the ground for the objection.”

29. The DIFC Arbitration Law contains a provision for the waiver of the right to object:

“A party who knows that any provision of this Law, including one from which the parties may derogate, or any requirement under the Arbitration Agreement has not been complied with and yet proceeds with the Arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.”

30. I am only relying on the DIFC Arbitration Law, but referring to the English law just because the situation is identical in both countries. However, the principle in both the DIFC and English rules governs the conduct of the current arbitration (English Arbitration Act 1996) and the rules govern the right to object to the enforcement of arbitral awards(DIFC Arbitration Law) – in that a party who participates in arbitration proceedings without making a procedural objection may not make that objection later unless he shows that he did not know about the procedural defect and could not have discovered it earlier.

31. In the current case although the Defendant claims that there was irregularity in relation to the composition of the arbitration tribunal, revoking Mr Hamsher’s appointment, despite the fact that the Defendant has the right to claim that before this Court at this stage, the Defendant has failed to establish that they have raised that issue before the appointed arbitration tribunal at any stage or time while taking part in those proceedings, accordingly, they shall not be allowed to raise this issue as a matter of objection to the enforcement procedures before this Court.

32. Having found that, the Court sees no need to investigate the first two questions (a & b) set out in paragraph 23 above.

### **The issue of public policy**

33. As it has been summarised above, the Defendant in this part argues that the enforcement of the Awards would be contrary to UAE public policy.

34. The Defendant contends that the enforcement of awards against a person in Dubai outside the DIFC, with no connection to the DIFC would be morally offensive, repugnant to the principles of the Islamic Shari’ah and therefore, contrary to UAE Public Policy pursuant to Article 44(1)(b)(vii) of the DIFC Arbitration Law which provides:

“(1) Recognition or enforcement of an arbitral award, irrespective of the State or jurisdiction in which it

was made, may be refused by the DIFC Courts only:

...

(b) if the DIFC Courts finds that:

...

(vii) the enforcement of the award would be contrary to the public policy of the UAE.”

36. The Defendant referred mainly to UAE public policy and only to some Articles in the UAE Federal CPC, arguing that enforcement by the DIFC Courts would be contrary to the CPC, which forms part of the UAE public policy, along with other sources of public policy.

37. I appreciate the fact that the Defendant prepared their submission in this regard before the reasons in response to the Union Supreme Court application heard in 17 September 2014 were handed down. However, the public policy issues were discussed in that application and in my view the issues in the current case, that the enforcement of the awards would be contrary to the public policy of the UAE, are identical to the ones in the previous application brought by the Defendant arguing direct conflict between the CPC, the JAL and the DIFC Arbitration Law.

38. In that previous application it was held on 15 December 2014 that:

“49. The question in the current application is whether there is a constitutional conflict between Article 5(A)(1)(e) of the JAL and Articles 42 and 43 of the Arbitration Law on the one hand, and the rules of the CPC on the other hand in relation to the ratification and enforcement of foreign awards before this Court.

39. In the current application the Defendant is raising a challenge of conflict between Dubai and DIFC laws applicable in the DIFC and before this Court on the one hand, and between CPC rules which are not applicable in the DIFC or before this Court on the other.

40. The rules of the CPC are not applicable in the DIFC or before this Court by Federal legislation (Federal Law 8 of 2004 3(2)) and that means there cannot (practically) be a conflict between an applicable rule and an inapplicable one.

41. It is very well known that public policy can be generally defined as a system of laws, regulations, regulatory measures, or courses of action concerning a public matter and that the source of that public policy is usually laws.

42. Thus, it can be said that it is public policy in the whole of the UAE not to apply the CPC within the DIFC and that leads us to conclude that there are no conflicts as long as the said Dubai and DIFC laws apply within the Centre (DIFC).

43. The Defendant then argues that the application of Article 5(A)(1)(e) of the JAL and Articles 42 and 43 of the Arbitration Law- which are Dubai and DIFC laws - would extend to take effect outside the jurisdiction of the DIFC in Dubai mainland where the conflict with the CPC would be clearer.

44. The answer to the previous argument is that the DIFC Courts should deal with matters before it according to the given laws, regulations, public policy or public order that are applicable to it within its capacity and jurisdiction. So that if the outcome of the DIFC Courts proceedings would result in conflict with the law or public policy of other or foreign courts' jurisdiction (or is expected to in any way) then it is for that Court according to its rules to decide whether to enforce the decision of the DIFC Courts or not for legitimate reason.

45. The DIFC Courts cannot and should not decide on behalf of other or foreign courts as to public policy or the right legal or judicial practice in that jurisdiction.”

46. The answer to the question in the current application must be the same; that the CPC rules are exempted from being applied in the DIFC, and accordingly it is the UAE policy that the DIFC Courts must not give regard to them. Furthermore, the Defendant's argument that accepting to recognise and enforce the Awards in hand would be against UAE public policy, with reference to Article 44(1)(b)(vii) of the DIFC Arbitration Law, must fail.

## **The Court's discretion not to enforce**

47. The Defendant's alternative defence is that the DIFC Courts, as a matter of discretion, should refuse to enforce the Awards as it would be wrong to make any order enforcing the awards in the DIFC where the Defendant has no assets in the DIFC. However, the Defendant gave no further explanation as to where the discretion can be found.

48. The Claimants on the other hand insist that unless a specified defence is made out, the Court has no discretion to refuse enforcement and that the awards must be recognised and enforced in accordance with Articles 42 and 44 of the DIFC Arbitration Law.

49. In my view, Article 44 of the DIFC Arbitration Law is the only provision that cites grounds for refusing recognition or enforcement. The article reads: "*(1) Recognition or enforcement of an arbitral award, irrespective of the State or jurisdiction in which it was made, may be refused by the DIFC Courts only...*" and proceeds to state grounds which allow the Court to set the Award aside.

50. That position is further supported by Rules 43.70 to 43.73 of the Rules of the DIFC Courts which require the party intending to challenge the arbitration award to make an application to set it aside; these rules state that the party must set out the grounds under Article 44(1) of the DIFC Arbitration Law upon which the applicant alleges that the Order should be set aside, as follows:

"43.70

Within 14 days after service of an Order made without notice or, if the Order is to be served outside Dubai, within such other period as the Court may set:

- (1) the defendant may apply to set aside the Order; and
- (2) the award must not be enforced until after:

(a) the end of that period; or

(b) any application made by the defendant within that period has been finally disposed of.

43.71

An Order made without notice must contain a statement of

- (1) the right to make an application to set the Order aside; and
- (2) the restrictions on enforcement under Rule 43.70(2).

43.72

An application under Rule 43.70(1) must:

(1) be made in accordance with RDC Part 23;

(2) set out the grounds under Article 44(1) of the Arbitration Law on which the applicant alleges that the Order should be set aside;

..."

51. Accordingly, the principle in such a case is that unless the Defendant can establish that their defence can be brought under one of the grounds exclusively listed under Article 44 of the DIFC Arbitration Law, the Court shall recognise or enforce the Award. The Defendant has failed to identify any further ground that this Court can rely on in order not to recognise or enforce, and therefore the Defendant's request is without merit and shall be dismissed.

52. As a result of the above, the Claimants are entitled for the terms of the award to be entered into the judgment.

53. The Claimants shall also be awarded their costs of this case, to be assessed by the Registrar on the standard basis if not agreed.

Issued by:

**Natasha Bakirci**

Assistant Registrar  
Date of Issue: 13 July 2015  
At: 3pm