**IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS**

**IN THE COURT OF FIRST INSTANCE**

BETWEEN

**MUHALLAM**

Claimant

and

**MUHAF**

Defendant

---

**ORDER WITH REASONS OF H.E. JUSTICE SHAMLAN AL SAWALEHI**

---

**UPON** the Claimant's ex parte application dated 29 December 2022 seeking the recognition and enforcement of the Provisional Award

**AND UPON** the Order of H.E. Justice Shamlan Al Sawalehi dated 20 January 2023 (the "Order" or "Enforcement Order")

**AND UPON** the Defendant's Application No. ARB-021-2022/2 dated 7 July 2023 disputing the DIFC Court's jurisdiction and seeking to set aside the Order (the "Defendant's Application")

**IT IS HEREBY ORDERED THAT:**

1. The Defendant's Application is dismissed.

2. The Defendant shall pay the Claimant's costs of the Defendant's Application on the standard basis, to be assessed if not agreed.

Issued By:
**Ayesha Bin Kalban**
Registrar
Date of issue: 19 September 2023
At: 2pm

**SCHEDULE OF REASONS**

1. A single question arises for determination in the Defendant's Application: does the DIFC Court have jurisdiction to enforce interim measures ordered by arbitral tribunals where the seat of the arbitration is not the DIFC? The Defendant says that it does not, and asks the Court to set aside its Enforcement Order dated 20 January 2023 by which the Court recognised and enforced such measures in the form of the Provisional Award on Interim Relief dated 16 November 2022 (the "Interim Measures"), made in the underlying arbitration. The Claimant says that the Court does have such jurisdiction and asks the Court to uphold the Enforcement Order. My view is explained in these reasons.

**The Claimant advances two propositions, one of which is not in issue**

2. The Interim Measures was recognised and enforced by the Court under Article 42 of the DIFC Arbitration Law, that is, as an arbitral award. The Claimant submits that the only way which was open to the Defendant to challenge the Enforcement Order was under Article 44-which the Defendant did not take-that is, as a challenge to recognition and enforcement of the Interim Measures as an arbitral award. The Claimant emphasises the opening words of Article 44- "(1) Recognition or enforcement of an arbitral award . may be refused by the DIFC Court *only. if."* (emphasis added)-and the exhaustive list of the circumstances in which refusal is permitted which follow them. The Claimant also cites authorities for this proposition that Article 44 provides for the exclusive recourse against the recognition and enforcement of arbitral awards. But that proposition is not in dispute. The Defendant's case is situated further upstream: he says that the Interim Measures is not a ruling recognisable and enforceable under Articles 42 and 43 of the DIFC Arbitration Law, or in other words that it is not an "arbitral award" for the purposes of those provisions.

3. While Article 44 provides for the exclusive recourse against the recognition and enforcement of arbitral awards, there must remain open recourse against an order of the Court purporting to recognise and enforce an arbitral award under Articles 42 and 43 where the case is that the document enforced is not in fact an arbitral award for the purposes of those provisions. For if the document is not an arbitral award for the purposes of Articles 42 and 43, it will not an arbitral award for the purposes of Article 44, with the result that the reliance of a party who asks for an Enforcement Order to be set aside on Article 44 would, on that party's case, be both misconceived and inconsistent with his ultimate position.

4. A comparable situation occurred in ARB-017-2019. The Claimant had sought and obtained an Order for the recognition and enforcement of an arbitral award. The Defendant opposed the Enforcement Order but advanced no case under Article 44. The Claimant contended, as the Claimant contends here, that the Defendant's challenge was impermissible in as much as it was outside of and therefore contrary to Article 44. However the Defendant did not oppose recognition and enforcement of the award; indeed, his position was that he had already complied with it. Instead, the Defendant contended that the terms of the Enforcement Order deviated from those of the award it purported to enforce. At [22] of his Judgment dated 7 July 2020, H.E. Deputy Chief Justice Omar Al Mheiri stated that "orders recognising arbitral awards must not exceed or otherwise deviate

from the terms of the awards they recognise" and that the Court should "ensure fidelity between the court order and the award." After comparing the award and the Court's Enforcement Order, which was based on a draft supplied by the Claimant, the Judge concluded that there were discrepancies between them (see [41]). He remedied the "defects" he identified, not by refusing to recognise and enforce under Article 44, but by amending the Enforcement Order using the Court's power in Article 20(1) of the DIFC Court Law (ibid). In other words, the Defendant's challenge against the Enforcement Order was heard and decided outside the confines of Article 44 insofar as the Enforcement Order did not in fact enforce an arbitral award. In my view, the same approach should be taken where it is said that a tribunal's decision was not amenable to recognition and enforcement. In both cases, the question is whether an "enforcement" order in fact enforces an "arbitral award" for the purposes of Articles 42 and 43, as it must, and to the extent it does not I do not think an application under Article 44 is the correct way to challenge it.

5. In conclusion, I consider that the Claimant's arguments which focus on Article 44 being the only avenue to challenging the recognition and enforcement of arbitral awards fail to engage with the Defendant's case in the application and should therefore be disregarded.

**Arguments and analysis**

6. To proceed, the Defendant's case is that the only provision of the DIFC Arbitration Law which gives the Court jurisdiction to enforce a tribunal's interim measures is Article 24(2), which provides as follows:

> "With the written permission of the Arbitral Tribunal a party in whose favour an interim measure has been granted may request from the DIFC Court of First Instance an order enforcing the Arbitral Tribunal's order or any part of it. Any request for permission or enforcement made under this Article shall be simultaneously copied to all other parties. Unless the Arbitral Tribunal at any time directs otherwise, the party making a request to the DIFC Court of First Instance under this Article shall be entitled to recover in the Arbitration any legal costs and DIFC Court of First Instance fees reasonably incurred thereby."

It is common ground between the parties that Article 24(2) only applies where the seat of the arbitration is the DIFC. This is because of Article 7:

> **"Scope of application of Law**
>
> (1) Parts 1 to 4 and the Schedule of this Law shall all apply where the Seat of the Arbitration is the DIFC.
>
> (2) Articles 14, 15, Part 4 and the Schedule of this Law shall all apply where the Seat is one other than the DIFC."

Article 24(2) appears in Part 3 of the DIFC Arbitration Law and therefore falls within Article 7 paragraph (1) but not (2). Finally, Article 10 states, "In matters governed by this Law, no DIFC Court shall intervene except to the extent so provided in this Law." The consequence of these provisions, the Defendant contends, is that the Court's jurisdiction to enforce interim measures is unavailable where the seat of the arbitration is not the DIFC (Articles 24(2) and 7) and the Court is precluded from having recourse to any other DIFC Law as giving it jurisdiction to intervene in arbitration proceedings (Article 10).

7. In my view, however, if Article 24(2) is the only provision of the DIFC Arbitration Law which gives the Court jurisdiction to enforce interim measures, that will not be because of Article 24(2) read with Articles 7 and 10 alone have that effect. On my reading, the most one can conclude from these provisions taken in isolation is that Article 24(2) is a provision that gives the Court jurisdiction to enforce interim measures where the seat of the arbitration is the DIFC.

8. In my judgment, Article 24(2) must be read simultaneously with Article 7. If these provisions are read consecutively-that is, if Article 24(2) is read and then Article 7 is read afterwards-the impression given is that Article 24(2) provides for an indiscriminate power to enforce interim measures but that that power is reined in, as it were, by Article 7 to only apply where the seat is the DIFC, which gives the impression, in turn, that the question whether the DIFC Court has the jurisdiction to enforce all interim measures is expressly dealt with in the law and is answered in the negative.

9. That would not necessarily be a correct impression, however. The effect of Article 7, in my view, is that the words "where the seat of the arbitration is the DIFC" are implicit in each provision of the DIFC Arbitration Law other than Articles 14 and 15 and the provisions of Part 4. And when reading Article 24(2) with these words inserted, the following question imposes itself: is the Court's jurisdiction to enforce interim measures limited to circumstances where Article 24(2) applies (i.e. where the seat of the arbitration is the DIFC), or does Article 24(2) simply provide for an exceptional regime for the enforcement of interim measures where the seat of the arbitration is the DIFC? The existence of this question means, in my opinion, that nothing conclusive can be concluded by focusing on Articles 7, 10 and 24(2), and instead an inquiry which takes a broader look at the DIFC Arbitration Law is necessary in order to determine whether the Court can enforce non-DIFC seated interim measures.

10. One could begin by asking whether interim measures can be arbitral awards for the purposes of Articles 42 and 43. The Defendant's position on this question is that these provisions are concerned with the recognition and enforcement of *final* arbitration awards, that is, awards which finally determine the substantive issues between the parties to the arbitration. He relies on Mith and Mafe's chapter in *The GAR Guide to Challenging and Enforcing Arbitration Awards,* "Enforcement of Interim Measures," to demonstrate two trends. First, the view taken by most national courts which have considered the question is that tribunal-ordered interim measures are not enforceable under the New York Convention, even where styled as interim "awards," because they do not determine any of the matters referred to the tribunal for decision and are thus not "binding" on the parties (see pages 3 to 4). Second, the preponderance of academic commentary takes the same view, although there are dissenting voices (see pages 4 to 5).

11. I think Mruk chapter demonstrates other equally important trends, however. On page 5, they note that perhaps the leading scholar of the New York Convention, Mufik, rejected the notion that there was a "prevailing view" on the question whether interim measures are enforceable under the New York Convention *qua* awards; it should be noted, however, that this remark was made over twenty years ago, in 2000. Mufik himself preferred the "pragmatic view," namely that "no major obstacles to the enforcement of a `temporary' award seem to exist" (ibid.). On page 3, Castello and Chahine's observe that "neither is there any textual (or other) reason to suppose that the drafters deliberately excluded arbitral interim measures from the NY Convention's ambit-a point acknowledged by most of the scholars who interpret the Convention's scope in either way

regarding such enforceability." Indeed, the UNCITRAL's Secretariat itself, Castello and Chahine note, acknowledged the possibility of interpreting "award" within the New York Convention as encompassing interim measures (pages 5 to 6). And Castello and Chahine demonstrate a trend towards broader recognition and enforcement of interim measures in both national legislation (pages 6 to 9) and case law (pages 9 to 12).

12. In the final analysis, I think Castello and Chahine's chapter is useful for acquiring an understanding of international trends on the interpretation of the term "award" in the New York Convention, implemented in the DIFC by the DIFC Arbitration Law, which is based on the UNCITRAL Model Law, but it does not aid this Court beyond that in relation to the interpretative exercise that the Court must undertake. Indeed, in my judgment the main takeaway from "Enforcement of Interim Measures" is precisely that there is nothing in the New York Convention and the Model Law which would prevent courts from deciding that interim measures are or can be awards for the purposes of the enforcement provisions. Instead, it is a matter for this Court to interpret what "arbitral award" means in these provisions.

13. As the Claimant has correctly pointed out, Article 24 of the DIFC Arbitration Law itself establishes that an interim measure for the purposes of Article 24 can be an award. Article 24(1)(b) states that an interim measure may be *"in the form of an award* or in another form" (emphasis added). Is the type of "award" referred to in Article 24(1)(b) different from the type of "award" referred to in Articles 42, 43, and 44? (Articles 42, 43 and 44 give more prominence to the term "arbitral award," but inasmuch as this term is used interchangeably in those provisions with the term "award," it is clear, in my judgment, that nothing terns on the difference in expressions.) The Court has not been shown anything internal to the DIFC Arbitration Law which suggests that a measure in the form of an award within the meaning of Article 24 would not be an award for the purposes of Articles 42, 43 and 44. In the absence of a good reason to conclude that a single term, "award," has multiple meanings within a single legislation, I think it is sensible to conclude that the term has a single meaning.

14. The foregoing is sufficient to conclude that Article 24(2) is not the only provision of the DIFC Arbitration Law which gives the Court jurisdiction to enforce interim measures. So long as an interim measure is an award, it may be recognised and enforced, in my judgment, under Articles 42 and 43 of the DIFC Arbitration Law.

15. I will, however, add a further observation which I think supports my conclusion. Articles 24(2) and 42, in my view, perform different functions-not drastically different, but different nonetheless-such that I do not see a reason to even go so far as concluding that Article 24(2) is the source of an exclusive jurisdiction to enforce interim measures where the seat is the DIFC. On my reading, Article 24(2) provides for a summary procedure for the enforcement of interim measures where the seat is the DIFC. It will be noted, for example, that unlike with Article 42, with Article 24(2) there is no requirement that the tribunal's decision be recognised: it is directly enforced. And more importantly perhaps, while an application for the recognition and enforcement of an award under Article 42 triggers a Defendant's right to apply for recognition and enforcement to be refused under Article 44, there does not appear to be any such right or procedure triggered when an application is made under Article 24(2). The Court merely gives force to the tribunal's decision without considering whether enforcement is appropriate according to its own policy.

16. If the term "award" in Articles 42, 43 and 44 encompasses interim measures in the form of awards such that the Court would be obliged to recognise and enforce a non-DIFC seated interim award, I think it must be the case that the beneficiary of a DIFC-seated interim award can also take advantage of Articles 42 and 43 if he so chooses. This may occur where, for any reason, the tribunal which made the interim award has not given written permission for the Court to enforce the interim award, a requirement under Article 24(2). If I am correct in this conclusion, it would follow that, not only is Article 24(2) not the only provision of the DIFC Arbitration Law which gives the Court jurisdiction to enforce a tribunal's interim measures, as the Defendant has argued, but it would not even constitute an exclusive source of jurisdiction where the seat is the DIFC, and instead merely provides an additional and more summary procedure for enforcement where the decision is an interim measure and the seat is the DIFC.

**Conclusion**

17. For the foregoing reasons, the Defendant's Application is dismissed.

18. The Defendant shall pay the Claimant his costs of the Defendant's Application on the standard basis, to be assessed if not agreed.