THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

ISAI

Claimant

and

ISABELLE

Defendant

AMENDED ORDERS WITH REASONS OF H.E. JUSTICE OMAR AL MUHAIRI

UPON considering the Defendant's Application of 4 September 2017 seeking to set aside the Claimant's Claim for the recognition and enforcement of a DIFC-LCIA arbitral award in the DIFC-LCIA Case No. 22 (the "Defendant's Application)

AND UPON considering the submissions received from both parties

AND UPON hearing Counsel for both parties at a hearing held on 12 February 2018

AND UPON reading the relevant material filed in support of both Application Notices

IT IS HEREBY ORDERED THAT:

1. The Defendant's Application of 4 September 2017 is dismissed.

2. The Defendant shall pay the Claimant's costs for the Defendant's Application.

Issued by:

Ayesha Bin Kalban

Assistant Registrar

Date: 28 February 2018

At: 4pm

SCHEDULE OF REASONS

BACKGROUND

1. The underlying arbitration, DIFC-LCIA Case No. 22, arose out of a dispute between the parties concerning shares in a restaurant located in Dubai. The Claimant, Isai, filed a request for Arbitration on 12 July 2015. The resulting Arbitration, administered by a sole arbitrator appointed by the DIFC-LCIA, resulted in an Award dated 21 March 2017 requiring the Defendant, Isabelle, to pay certain sums to the Claimant.

2. The Claimant filed a Part 8 Application to Recognise and Enforce the Final Award in the DIFC Courts on 17 July 2017. Thereafter, on 4 September 2017, the Defendant filed a Part 23 Application, the subject of this decision, seeking to dismiss the Part 8 claim on multiple grounds.

3. While the Claimant initially filed this Claim as a litigant-in-person, she obtained Counsel and petitioned to be represented by Counsel at the Hearing of 24 January 2018. Although such request was made with limited time, it was accommodated provided her requested Counsel, Isao & Co. properly registered with the DIFC Courts in the allotted time period.

4. After reviewing the subsequent submissions of the parties and after hearing oral submissions of both parties on 24 January 2018, I release the below decision regarding the Defendant's Part 23 Application of 4 September 2017.

SUBMISSIONS

5. The Defendant is seeking dismissal of the Part 8 Claim on the following grounds:

a. The seat of arbitration is in Dubai, not in the DIFC, and thus the curial courts are the Dubai Courts. The Defendant alleges that her primary position is that the DIFC Courts lack jurisdiction to recognise and enforce an award made in an arbitration in Dubai before that same award has been ratified by the Dubai Courts. While the Defendant acknowledges that this is a matter for legal argument, the Defendant and her Counsel only articulate this argument by claiming that Articles 42 and 44 of the DIFC Arbitration Law are not intended to apply to arbitral awards from Dubai, outside the DIFC. The Defendant failed to expand on this allegedly legal argument in its pre-hearing submissions.

For this reason, the parties were allowed to provide further submissions on the jurisdiction of the DIFC Courts to proceed with this Claim. The Defendant provided these further submissions on 4 February 2017, arguing first that the DIFC Courts do not have jurisdiction over the current Claim and that if the Court finds otherwise, the DIFC Courts should refrain from exercising jurisdiction due to the extraordinary circumstances of this case.

The Defendant argues that the Terms of Reference and the underlying Award both state that "Dubai be the seat of arbitration." The parties also chose the laws of the UAE to govern the dispute and the Defendant contends that this means the Federal laws of the UAE. The underlying Award only applies UAE Federal Law and states that the laws of the DIFC are not applicable to the case. For these reasons, the Defendant's two critical challenges to the underlying Award must be addressed by the Dubai Courts, not the DIFC Courts.

In the event that the DIFC Courts determine that they do have jurisdiction, the Defendant argues that such jurisdiction should not be exercised. This is because the two critical challenges made to the Award by the Defendant must be addressed by the curial court and thus the DIFC Courts should refer the case to the Dubai Courts. Recognising the Award in its current form would be against the Public Policy of the UAE.

b. The Award violates public policy of the UAE as the underlying "Partnership Agreement" is in violation of Article 10 of Federal Law No. 2 of 2015 on Commercial Companies (UAE Companies Law). Article 10 of the UAE Companies Law requires that only UAE nationals can form valid partnerships. Since the Claimant and Defendant are not UAE nationals, any Partnership Agreement between the two would be invalid. The Defendant argues that the Claimant acknowledged this in the Arbitration by claiming that the Partnership Agreement was in fact a non-binding Memorandum of Understanding, however the Arbitrator did not properly follow procedure to accept this amended cause of action. The Arbitrator never addressed whether the arbitration clause contained within the Agreement would remain binding while the remainder of the agreement was non-binding.

c. Furthermore, the Defendant argues that there was no legal relationship between the parties as the purported Partnership Agreement is invalid under UAE Law. The Defendant cites Article 12 of the DIFC Arbitration Law and Article 203(4) of the UAE Civil Procedure Code, Federal Law No. 11 of 1992, which both require a legal relationship between parties for those parties to validly agree to arbitrate. The Defendant also argues that the agreement was not valid within the meaning of Article 44(1)(a)(i) of the DIFC Arbitration Law and the circumstances remained a private arrangement between two parties. For this reason, the underlying arbitration was invalid from the start.

d. The Claimant has not made full and frank disclosure by claiming to be a litigant-in-person while also being represented by the law firm Isao & Co. The Defendant also mentions that there are some alleged procedural deficiencies in the Claimant's Part 8 filing, requiring the DIFC Courts to dismiss the Claim.

e. The Award is vitiated because it was rendered by a biased Arbitrator. The Defendant points to numerous communications relevant to the underlying Arbitration to support this claim that the Arbitrator was biased against the Defendant. The Defendant argues that the Arbitrator conflated the Defendant's request for her to recuse herself with a challenge of jurisdiction. Furthermore, the Arbitrator did not adequately address the Defendant's proper challenge to jurisdiction. The Defendant argues that the Arbitrator not only displayed bias towards the Claimant, she also improperly guided the Claimant on how to proceed in the Arbitration.

f. The Defendant intends to file nullification proceedings in the Dubai Courts and thus this claim should be dismissed pursuant to the Joint Judicial Tribunal, Case No. 88/2017. Although the Defendant has not claimed that it has filed any proceedings in the Dubai Courts as of yet, she argues that this Claim should be adjourned in favour of those intended proceedings. The Defendant informs that she intends to seek annulment of the Award before the Dubai Courts pursuant to Article 216(1) of the UAE Civil Procedure Code on the grounds that the underlying agreement between the parties was invalid.

6. Based on the above pleaded grounds, the Defendant seeks the following relief:

a. The Part 8 Claim for Recognition and Enforcement of the Award be set aside.

b. A declaration that the DIFC Courts have no jurisdiction to recognise and enforce the Award, as it is a Dubai-seated arbitration.

c. Alternatively, suspension of proceedings in the DIFC Courts pursuant to Rule 4.2(6) of the Rules of the DIFC Courts (RDC), until nullification proceedings have been commenced and concluded in the Dubai Courts.

d. A declaration that the Arbitrator should have recused herself for bias and failure to do so vitiates the Award.

e. An award of costs to the Defendant for wrongful initiation of proceedings in the DIFC Courts.

7. The Claimant provided a reply to the Defendant's Application on 18 September 2017. The Claimant argues that the Defendant's Application is "misconceived, unfounded and based on frivolous grounds with malafide purpose of delaying the ratification of the Award."

8. The Claimant contends that the Defendant should deposit in the Court the awarded amount together with legal costs pursuant to DIFC Courts'

Practice Direction No. 1 of 2017. However, the Claimant has not filed any such application requesting such security or indemnity costs and the Court is not presently minded to address this issue of its own initiative.

9. The Claimant goes on to contend that the ratification of the Award may only be refused on certain enumerated grounds, pursuant to Article 44 of the DIFC Arbitration Law. The Defendant has failed to provide grounds for dismissal in accordance with these enumerated grounds. Furthermore, the Defendant has failed to challenge the Award within the 3-month period required by Article 41(3) of the DIFC Arbitration Law. Finally, the Defendant cannot raise issues relevant to the merits of the underlying Arbitration at this time.

10. The Claimant goes on to address the Defendant's grounds for dismissal point by point:

a. As to the Defendant's argument that the Dubai Courts are the proper curial courts applicable to this case, the Claimant objects arguing that first, the Defendant has failed to provide a copy of JJC Case No. 88/2017 upon which it relies and second, the Defendant has failed to address JJC Case No. 102/2017 which states that the curial courts of matters adjudicated under the rules of the DIFC-LCIA Arbitration Centre are the DIFC Courts.

In the Claimant's subsequent submissions on jurisdiction, provided on 8 February 2017, the Claimant argues that the Defendant incorrectly implies that the Dubai Courts are the only courts that can ratify the underlying Award. Instead, as made clear in JCC Case No. 86/2017, the DIFC Courts shall ratify an award made under the DIFC-LCIA Rules, even where the seat of arbitration was Dubai and the applicable law was not specifically DIFC law. The JJC in Case No. 86/2017 ruled that the DIFC Courts, not the Dubai Courts, were the proper courts for ratification in circumstances very similar to the present case.

Furthermore, contrary to the Defendant's statements that it is irrelevant, it is significant that the Defendant has not filed any proceedings before the Dubai Courts relevant to the Award. Both parties acknowledge that there are no parallel proceedings at this time.

The Award's statement that the laws of the DIFC are not applicable only applies to the dispute between the parties, not to the question of ratification. Instead, under Article 42 of the DIFC Arbitration Law, the DIFC Courts are empowered to ratify an Award regardless of the applicable State or jurisdiction. The Defendant is misguided when stating that Article 42 would only apply to international awards.

b. In response to the Defendant's arguments surrounding Article 10 of the UAE Companies Law, the Claimant argues this issue was fully pleaded in the underlying Arbitration and is not appropriate for re-adjudication at this time. Furthermore, the Award does not violate Public Policy of the UAE as the underlying Award contains a ruling that no violation of Article 10 of the UAE Companies Law occurred after full opportunity for defence was allowed. The Claimant also contends that it made no admission in the underlying Arbitration as to the nature of the agreement being non-binding nor did a new cause of action arise in the Arbitration.

c. As to any procedural deficiencies alleged, and not admitted, against the Claimant, the Claimant argues that the proper remedy would be to allow the Claimant to address these deficiencies rather than dismissing the Claim. An admitted error relevant to the Claim amount has already been addressed by the Claimant with the DIFC Courts' Registry. Furthermore, the Claimant contends that there has been no misrepresentation as to the Claimant's role as a litigant-in-person.

d. As to the argument that the Arbitrator was biased, the Claimant argues that the Defendant never initiated procedures pursuant to Article 19(3) of the DIFC Arbitration Law to seek removal of the Arbitrator. Thus, raising this argument is inappropriate at this time. Furthermore, the underlying Arbitration proceeded in a fair and justified manner.

e. The Claimant points out that, to her knowledge, there are no pending proceedings relevant to this Award in the Dubai Courts and thus there is no reason to entertain the argument to dismiss this Claim in favour of such non-existent proceedings.

11. The Claimant reiterated that the present Application is designed to delay the current proceedings. Thus, the Application should be rejected outright on all grounds and the Defendant should be required to pay the costs associated with its Application, including exemplary and punitive costs.

DISCUSSION

12. In spite of the lengthy submissions of the parties, the sole issue upon which I must rule is one of jurisdiction and whether the Claimant's Claim for recognition and enforcement should be continued in the DIFC Courts or should be dismissed on jurisdictional grounds.

13. Article 5(A)(1)(e) of Dubai Law No. 12 of 2004, as amended (the judicial authority law) must be read with Article 8(2) of Dubai Law No. 9 of 2004, as amended by Dubai Law No. 7 of 2011, which provides that the jurisdiction of the DIFC Courts is to be determined by "the Centre's Laws". Article 5(A)(1)(e) of the Judicial Authority Law, which states that the DIFC Courts shall have exclusive jurisdiction to hear and determine "Any claim or action over which the Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulation," reflects that provision.

14. Article 42(1) of the DIFC Arbitration Law provides that an arbitral award, irrespective of the State or jurisdiction in which it was made, "shall be recognised as binding within the DIFC"; subject to the provisions of Articles 43 and 44. Article 44(1) describes the limited and exclusive circumstances under which recognition may be refused by the DIFC Courts.

15. It is important to appreciate that the jurisdiction, in relation to recognition, conferred on the DIFC Courts by Article 42(1) of the DIFC Arbitration Law is jurisdiction to recognise that the arbitral award is binding within the DIFC.

16. In the present case, it is quite clear that Article 5(A)(1)(e) of the Judicial Authority Law and Article 8(2) of Dubai Law No. 9 of 2004, as amended by Dubai Law No. 7 of 2011, act as the "gateway" by which Articles 42, 43 and 44 of the DIFC Arbitration Law confer jurisdiction on the DIFC Courts to recognise that the arbitral award in question is binding within the DIFC. The Judicial Authority Law and the DIFC Arbitration Law contain no requirement that there be a connection with the DIFC to hear an application for recognition of an Award.

17. Instead, Article 7 of the Judicial Authority Law regarding Execution, states that:

> " (2) Where the subject matter of execution is situated outside the DIFC, the judgments, decisions and orders rendered by the Courts and the Arbitral Awards ratified by the Courts shall be executed by the competent entity having jurisdiction outside DIFC in accordance with the procedure and rules adopted by such entities in this regard, as well as with any agreements or memoranda of understanding between the Courts and these entities. Such execution shall be subject to the following conditions:
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> a. The judgment, decision, order or ratified Arbitral Award to be executed is final and executory;
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> b. The judgment, decision, order or ratified Arbitral Award is translated into the official language of the entity through which execution is carried out;
>
> c. The Courts affix the executory formula on the judgment, decision order or ratified Arbitral Award.
>
> (3) In addition to Paragraphs (a), (b) and (c) of Clause (2) of this Article, when executing the judgments, decisions and orders issued by the [DIFC] Courts or Arbitral Awards ratified by the [DIFC] Courts through Dubai Courts, the following must be observed:
>
> a. the [DIFC] Courts shall issue an execution letter to the Chief Justice of the Court of First Instance of Dubai Courts stating the procedure to be carried out;
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> b. the person requesting execution shall submit to the execution judge of Dubai Courts an application accompanied by a copy of the judgment, decision or order, legal translation of the same, and the execution letter;
>
> c. the execution judge of Dubai Courts shall apply the execution procedure and rules stipulated in the aforementioned Federal Civil Procedure Code, including any objections to the execution; the execution judge may not reconsider the merits of the judgment, decision or order;
>
> d. Dubai Courts shall collect the execution fees for each execution request submitted to them in accordance with the aforementioned Dubai Courts Fees Law."

18. It is clear that the DIFC Courts and Dubai Courts cooperate to facilitate the recognition and enforcement of arbitral awards and it is customary, as evidenced by the legislation above, that both the DIFC Courts and Dubai Courts may recognise and/or enforce the same arbitral award.

19. Additionally, the jurisdiction of the DIFC Courts does not deprive the Dubai Courts of any jurisdiction which they may have in respect of the recognition and enforcement of arbitral awards pursuant to Articles 31 and 236 of the UAE Civil Procedure Code.

20. Not only are the jurisdiction of the DIFC Courts and the jurisdiction of the Dubai Courts in relation to the recognition and enforcement of an arbitral award mutually exclusive, they are also complementary. In enacting Article 7 of the Dubai Judicial Authority Law, the legislators contemplated that both the DIFC Courts and the Dubai Courts would have power (in appropriate cases) to ratify (or recognise) arbitral awards. There is no conflict between the jurisdiction of the two courts, as is reflected in the complementary relationship highlighted by Article 7 of the Judicial Authority Law.

21. This position (consistent with the New York Convention) is governed by Article 44 of the DIFC Arbitration Law. One of the grounds for refusing recognition or enforcement in the DIFC, pursuant to Article 44(1)(a)(v), is that the award "has been set aside or suspended" by the court of the seat. No such decision has yet been issued by the Dubai Courts and although the award was issued 10 months ago, the Defendant has not yet filed an application before the Dubai Courts seeking to set aside the Award. The Defendant has had plenty of time to file this application. Therefore, there is no basis for the suggestion that this Court should exercise its power under Article 44(2) of the DIFC Arbitration Law to "if it considers it proper, adjourn its decision" or "on the application of the party seeking recognition or enforcement of the award, order the other party to provide appropriate security."

22. It is accepted by the JJC Tribunal in Case No. 42/2016 that even where the courts of the arbitral seat are the Dubai Courts, the DIFC Courts equally have jurisdiction to entertain an application for recognition and enforcement. If an application for setting aside or suspension of an award has been made to the court of the seat, the DIFC Courts may adjourn its decision, pursuant to Article 44(2). In short, the Dubai Courts and the DIFC Courts have concurrent but separate jurisdiction in this regard.

CONCLUSION

23. As discussed above, there is no doubt that this Court has jurisdiction under Article 5(A)(e) of the Judicial Authority Law as amended and pursuant to Articles 42, 43 and 44 of the DIFC Arbitration Law to hear the recognition claim of this DIFC-LCIA Award.

24. Accordingly, the Defendant's Application is hereby dismissed in full.

25. In view of this conclusion, it is necessary to continue with the Claim in order to decide whether the DIFC-LCIA Award should be recognised as binding within the DIFC according to Article 42(1) of the DIFC Arbitration Law.

26. The Defendant must pay the costs of this Application, having caused delay and additional costs in submitting this unsuccessful application.