

A FIRST FOR THE DIFC: COURT OF APPEAL SETS ASIDE PARTS OF A DIAC ARBITRAL AWARD

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By: Jennifer Paterson, Jonathan H. Sutcliffe

INTRODUCTION

In a recent judgment in the case of *Oheo Bank v Parker [2025] DIFC CA 006*, the Dubai International Financial Centre (DIFC) Court of Appeal upheld an appeal against the Court of First Instance's refusal to set aside a DIFC-seated DIAC arbitral award on the basis that the respondent, Oheo Bank (Bank), was not afforded an opportunity to present its case. In reaching its decision, the Court of Appeal held that it was persuaded, on a very narrow, fact-specific basis, that the high threshold for intervention had been met.

BACKGROUND

Parker, the claimant in the arbitration, was a customer of the Bank. Parker sought assistance from the Bank to obtain finance to complete the purchase of a ship (Vessel). Parker's relationship manager advised Parker that the Vessel could be financed through a series of transactions, one of which was a bond (Bond). Parker alleged that it had acted in reliance on the Bank's advice, but the Bond could not be used to secure finance for the purchase of the Vessel and so was worthless. Parker sought damages in the amount of €1 million, which it had paid for the Bond.

Parker asserted several claims against the Bank, such as deceit, misrepresentation, breach of regulatory duties, and negligence. All of the claims were dismissed by the arbitral tribunal except for a claim founded on alleged breaches of regulatory rules that required the Bank to ensure that its communications with Parker were clear, fair, and not misleading. This claim was upheld by a majority of the tribunal (Successful Claim).

Although Parker was ultimately successful in its claim for breach of regulatory duty, it did so on a basis that was never pleaded by Parker and that was articulated by Parker for the first time in its post-hearing brief.

The Bank, in its post-hearing brief, stated that (i) it had not engaged substantively with the unpleaded allegations regarding breaches of regulatory rules raised by the Claimant; and (ii) to the extent that the tribunal considered that the Bank had proper notice of any of the unpleaded points and wished to be addressed on them, the appropriate course would be to direct the Bank to file a supplemental post-hearing brief dealing substantively with any such points.

The tribunal unanimously accepted that the Successful Claim had not been pleaded prior to Parker's post-hearing brief. However, the majority of the tribunal took the view that the Respondent had a fair opportunity to address the unpleaded claim.

The dissenting arbitrator differed from the majority both regarding the decision to permit Parker to advance the Successful Claim and on the merits of the Successful Claim. His concerns were twofold. First, the Bank had not considered that the Successful Claim formed part of Parker's pleaded claims based on regulatory breaches and had not responded to it. Second, Parker's claim for regulatory breaches had been recast in its post-hearing brief as a claim advanced on the basis of negligence. Had the Bank appreciated that Parker's claim was framed in negligence, the Bank would likely have relied on the defences of contributory negligence and voluntary assumption of risk, which he considered would have been "well arguable."

The Bank challenged the arbitral award under Article 41(2)(a)(ii) of Law No. 1 of 2008, which provides that an arbitral award may be set aside by the DIFC Court if the party making the application furnishes proof that it was "unable to present his case." The Court of First Instance dismissed the challenge, and the Bank filed an appeal to the Court of Appeal.

JUDGMENT OF THE COURT OF APPEAL

In its decision to overturn the ruling of the Court of First Instance, the Court of Appeal noted that the arbitrators unanimously accepted that the Successful Claim had not been pleaded prior to Parker's post-hearing brief. The Court of Appeal stated that, given the significant number of unpleaded claims contained in Parker's post-hearing brief, the Bank had clearly conveyed that it was not engaging substantively with them, but, if the tribunal wished to be addressed on them, the appropriate course would be for the tribunal to direct the Bank to file a supplemental post-hearing brief. The Court of Appeal accepted this was a reasonable stance for the Bank to take. The Court of Appeal described the Successful Claim as a "dramatic departure" from the claim previously advanced by Parker and found that its essential elements had not previously been put to the Bank. It was therefore unsurprising that the Bank had not considered or responded to it.

The Court of Appeal agreed that the practical solution, to achieve fairness to both parties, would have been for the unpleaded claim to be put to the Bank and for the Bank to respond to it by way of a supplemental post-hearing brief (as the Bank had requested). Had the Bank been granted this opportunity, it would likely have raised certain defences that could realistically have made a difference to the outcome of the claim.

The Court of Appeal therefore decided to set aside parts of the arbitral award containing the majority's reasoning and decision on the Successful Claim.

ANALYSIS

This is the first time that the DIFC Courts have intervened and set aside part of an award on the basis that a party was not afforded the opportunity to present its case. This intervention demonstrates that the DIFC Courts will, in appropriate circumstances, intervene where there has been a real failure on the part of the tribunal to ensure procedural fairness between the parties. However, it is important to note that, in reaching its decision, the Court of Appeal drew a distinction between the Bank having not been given an opportunity to present its response to the Successful Claim and the Bank not recognising or taking an opportunity to do so, which would not have justified intervention.

ABOUT THE FIRM

Our Litigation and Dispute Resolution practice has a long history of acting as counsel on high-stakes international arbitration and litigation mandates. Our lawyers in Dubai have extensive experience advising on litigation and arbitration with respect to complex, high-value disputes in the United Arab Emirates and wider Middle East region.

KEY CONTACTS



JENNIFER PATERSON
PARTNER

DUBAI
+971.4.427.2728
JENNIFER.PATERSON@KLGATES.COM



JONATHAN H. SUTCLIFFE
PARTNER

DUBAI
+971.4.427.2747
JONATHAN.SUTCLIFFE@KLGATES.COM

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