DIFC COURTS SET ASIDE A DIAC ARBITRAL AWARD

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UAE Litigation and Dispute Resolution Alert

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In July, we reported on a recent judgment in the case of *Oheo Bank v Parker [2025] DIFC CA 006*, in which 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 Dubai International Arbitration Centre (DIAC) arbitral award on the basis that the respondent, Oheo Bank, was not afforded an opportunity to present its case. Our previous alert can be reviewed here.

The DIFC Court of First Instance has since applied *Oheo Bank v Parker* in *Princeton v Persephone ARB 015/2026 ARB 027/2026*, setting aside a final award in its entirety on the basis that the arbitral tribunal decided the case by reference to issues that had not been pleaded.

BACKGROUND

The dispute concerned the sale by Princeton to Persephone of 65,000 metric tonnes of ultra-low sulphur diesel. Persephone commenced a DIAC arbitration, claiming damages for Princeton's wrongful withholding of delivery and repudiation of the contract. Princeton's position was that Persephone had breached the contract by failing to pay in full by the due date, that title had not passed so no delivery obligation arose, and that Persephone's own conduct showed it did not intend to pay in accordance with the contract, entitling Princeton to accept the repudiation and mitigate its losses by reselling the cargo. It was common ground that Persephone had paid only 85% of the contract price, in breach of its payment obligation. The issue for the tribunal was whether that underpayment was a breach of condition or a repudiatory breach entitling termination, or merely a breach remediable by late-payment interest.

The majority of the arbitral tribunal found that the balance of the contract price was due by 17 January 2024, but held that the deadline had become moot in light of the parties' conduct (Princeton's acceptance without objection of certain late payments in February 2024), that there was no agreed date for payment, and ultimately that Persephone had not committed a repudiatory breach or breach of condition. The dissenting arbitrator considered that the majority had decided the case on issues that had not been pleaded, thereby improving Persephone's pleaded case.

Princeton applied under Articles 41(2)(a)(ii) and (iii) of Law No. 1 of 2008 to set aside the final award, arguing the majority decided the case by reference to issues that had never been pleaded or argued, denying Princeton's right to be heard on them.

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JUDGMENT OF THE COURT OF FIRST INSTANCE

The Court of First Instance found that a number of the tribunal's findings had not been pleaded by the parties. For example, Persephone had never argued that there was no agreed payment date, nor advanced a case that the conduct of the parties varied or waived the terms of the contract or gave rise to any form of estoppel that precluded Princeton for relying on those terms—ideas which first appeared in the final award. The Court of First Instance further held that the tribunal reached conclusions in respect of previous dealings between the parties—which were unparticularised in the final award—that had not formed part of Persephone's case and which, in consequence, Princeton had no opportunity to address. Had Princeton been given the opportunity, there were a number of defences which it would have been bound to argue.

Applying the DIFC Court of Appeal's approach in *Oheo Bank v Parker*, the Court of First Instance held that a party seeking to set aside an award need only show that the submissions it would have made were reasonably arguable and could reasonably (not fancifully) have made a difference—a threshold that was amply met, since the unpleaded issues went to the very heart of the majority's reasoning.

The Court of First Instance emphasised that it is fundamental to a DIFC-seated arbitration that the parties should have a reasonable opportunity to submit evidence and make submissions on the issues in dispute. Where a tribunal considers that the answer to any particular dispute is to be arrived at by reference to issues other than those raised by the parties, it must give the parties an opportunity to address those issues.

The Court of First Instance considered whether the offending parts of the award could be severed, but it concluded this was not possible because the procedurally unfair findings formed the foundation of the tribunal's conclusions. It therefore set aside the whole award.

ANALYSIS

This is the first time that the DIFC Court of First Instance has set aside an award in its entirety on the basis that a party was not afforded the opportunity to present its case. This case confirms 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, there remains a high threshold for interference. The DIFC Courts will only act to protect a party from injustice where it did not have an opportunity to present its case—as distinct from a party that simply failed to take an opportunity that existed.

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.

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