

The scope of the DIFC Courts' curial jurisdiction in support of arbitration: A step too far?

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In a ruling of earlier this month (see CFI 017/2015 – *Emirates NBD Bank PJSC v. Infospan Gulf Inc.*, ruling of the DIFC Court of First Instance of 3rd April 2016) H.E. Justice Ali Al Madhani, one of the UAE-national resident judges of the DIFC Courts, sitting in the DIFC Court of First Instance, found in favour of an expansive curial jurisdiction of the DIFC Courts on the basis of a dispute resolution clause that according to the Justice provided for the DIFC as the proper seat of the arbitration by implication. Despite the compelling nature of the Justice's reasoning, it is questionable as to whether the Justice's findings are compatible with prevailing case law precedent of the DIFC Courts and give sufficient (if any) credit to the doctrine of separability, which is enshrined both under the UAE Arbitration Chapter (see UAE Federal Law No. 11 of 1992 Concerning Civil Procedures) and the DIFC Arbitration Law (see Art. 23(1), DIFC Law No. 1 of 2008). In this commentator's view, a more cautious interpretation of the dispute resolution provisions underlying the disputed contractual framework would have been in order and would have concluded in favour of onshore Dubai, and not the DIFC, as the proper seat of the arbitration. This being said, the resoluteness of the Justice's approach is no doubt commendable albeit not entirely beyond reproach. Even though the Justice's approach demonstrates an inherently arbitration-friendly attitude of the DIFC Courts and will no doubt contribute to the ongoing consolidation of the UAE as an internationally recognised and respected seat of arbitration within the Middle East, it appears to call into question the DIFC Courts' previous *acquis* on the proper distinction between "Dubai" and the "DIFC" as a chosen seat of arbitration.

By way of background, in 2007, Emirates NBD Bank PJSC ("Emirates NBD") and Infospan Gulf Inc. ("Infospan") entered into an agreement whereby Infospan was to provide stored value card services to Emirates NBD for use by customers in the UAE (the "SVC Agreement"). The SVC Agreement contained a number of governing law and dispute resolution provisions that formed the focal point of the Parties' arguments before the DIFC Court of First Instance. More specifically, Clause 13.2 of the SVC Agreement stipulated that "[t]he validity, construction and interpretation of [the SVC Agreement] and the rights and duties of the [P]arties [there]to shall be governed by the internal laws of the UAE". Pursuant to Clause 13.3 of the SVC Agreement, the Parties were to "submit to the jurisdiction of the courts in Dubai, the UAE." Finally, in the terms of Clause 13.5 of the SVC Agreement, "[a]ny controversy arising out of, or relating to this Agreement, or the breach thereof [...] shall be submitted to arbitration per the law of the United Arab Emirates." On the basis of these provisions, Emirates NBD sought to convince the DIFC Courts that they were the proper forum for hearing an application for appointment of a DIFC-seated arbitration tribunal that would in turn hear the merits of the Parties'

dispute, or in the alternative to refer the application for appointment to the onshore Dubai Courts. Infospan objected to the DIFC Courts' proper competence in this matter on the basis that (i) the underlying arbitration agreement was invalid; (ii) the DIFC Courts' did not have proper subject-matter jurisdiction; and/or (iii) abuse of process. It bears mentioning in this context that an affiliated company of Infospan incorporated in the US, Infospan Inc., had, already prior to the application, initiated various court proceedings against Emirates NBD in relation to its claims under the SVC Agreement in California, which in turn prompted an order from the Californian courts to refer the Parties' dispute to arbitration in the US subject to a presently pending appeal.

H.E. Justice Ali Al Madhani based his finding of the DIFC Courts' proper curial competence in the present circumstances on a combined reading of Arts 7 and 17(3)(b) of the DIFC Arbitration Law and the jurisdictional gateways of the DIFC Courts under Art. 5 of the Judicial Authority Law (see DIFC Law No. 12 of 2004 as amended by DIFC Law No. 16 of 2011). Pursuant to Art. 7 of the DIFC Arbitration Law, Art. 17(3)(b), i.e. the DIFC Courts' power to appoint a tribunal, was only to be engaged if the seat of the arbitration was the DIFC. In reliance on Art. 5(A)(1)(e) of the Judicial Authority Law, pursuant to which the DIFC Courts have jurisdiction *"in accordance with the DIFC Laws and DIFC Regulations as prescribed by the DIFC Arbitration Law"*, the Justice found that *"the Arbitration Clause (13.5) alone [did] not clearly nominate the DIFC to be the Seat of Arbitration and [that] nothing in the entire SVC Agreement refer[red] specifically to the DIFC"* and that *"[t]herefore the DIFC Arbitration Law [was] not sufficient to confer jurisdiction to the DIFC Courts in this case"* (see ruling, at para. 52). So far, so good. Clearly, to the extent that the underlying arbitration agreement fails to mention a seat of arbitration and that Clause 13.3 of the SVC Agreement makes only reference to the courts in *"Dubai, United Arab Emirates"* as the litigious forum of choice, the DIFC hardly appears to have been within the Parties' contemplation when drafting the mechanism for disputes under the SVC Agreement in 2007. Despite the apparent clarity with which the Parties stayed clear off the DIFC as a jurisdictional venue or indeed a seat of arbitration in drafting the terms of the SVC Agreement, Justice Al Madhani read a measure of ambiguity and uncertainty into the arbitration agreement that he thought justified him to look for the DIFC Courts' jurisdiction to appoint a tribunal in the present circumstances into the remaining jurisdictional gateways under Art. 5(A)(1) of the Judicial Authority Law, which deal with the substantive or subject-matter - as opposed to the curial - jurisdiction of the DIFC Courts. In doing so, the Justice completely ignored the statutory limits of the DIFC Courts' curial jurisdiction that are clearly defined by Art. 7 of the DIFC Arbitration Law and operate by reference to the choice of the DIFC as the seat of the arbitration: no DIFC seat, no curial jurisdiction for the DIFC Courts! This is in compliance with both domestic and international arbitration practice in most modern leading arbitration jurisdictions and supported by the wording of the DIFC Arbitration Law and, equally importantly, by the doctrine of separability, pursuant to which (i) the arbitration agreement is separate from the main contract, i.e. the SVC Agreement, and (ii) a court's curial competence in relation to it is commonly determined by the relevant provisions of the prevailing arbitration law and not a court's judicial competence over the contracting parties' substantive rights and obligations of the main contract. In complete disregard of these considerations, Justice Al Madhani held as follows:

"53. If the Claimant cannot rely on the DIFC Arbitration Law to confer jurisdiction to the DIFC Courts seeing as the Arbitration Clause in the SVC Agreement is ambiguous and uncertain, then reliance falls on the general rules of jurisdiction provided by Article 5(1) of the Judicial Authority Law. Importantly, it must be determined whether the parties intended to refer their disputes to the DIFC Courts or to the non-DIFC Dubai Courts. Thus, both Clauses (13.3) and (13.5) should be interpreted with this inquiry in mind.

54. That leaves the question of whether, under the provisions of Article 5(A)(1) of the Judicial Authority Law, as amended, this Court has jurisdiction over the substantive dispute in this case in the absence of an Arbitration Clause."

It is clear from the wording above that in his determination of the DIFC Courts' proper jurisdiction to appoint a tribunal in the present circumstances, the Justice failed to distinguish between the curial and substantive jurisdictions of the DIFC Courts. Taking account of the doctrine of separability and the clear wording of Art. 7 of the DIFC Arbitration Law, this goes a step too far and ultimately results in an inflation of the DIFC Courts' proper curial jurisdiction. In other words, it is the choice of the DIFC as the seat of the arbitration that triggers the curial competence of the DIFC Courts to exert supervisory and supportive functions in the arbitration, including the power to default-appoint arbitrators, not the DIFC Courts' (potential) substantive jurisdiction over the merits of a dispute under the main contract (read: the SVC Agreement).

Misguided on the proper application of Art. 7 of the DIFC Arbitration Law, Justice Al Madhani continued to test as to whether any of the remaining jurisdictional gateways conferred jurisdiction upon the DIFC Courts and ultimately concluded as follows:

"62. Next, I move to discuss the third jurisdiction gateway under the Judicial Authority Law, which requires an action arising out of or relating to any incident or transaction, wholly or partly performed within the DIFC and that the action is related to DIFC activities.

63. To support their argument, the Claimant provides the letter of 4 May 2009 with the subject line: 'Emirates NBD - InfoSpan Gulf Inc. Stored Value Card Program.' The letter discusses meeting arrangements in the DIFC to occur the next day. Additionally, in this letter, the Deputy CEO of InfoSpan Private Limited (Pakistan) was inquiring about the 2nd Addendum to the Emirates Bank - InfoSpan Gulf Inc Agreement, which was signed by him on 21 January 2009.

64. This letter is quite clear evidence that the transaction between the parties took place, at least in part, within the DIFC, which means that the parties transacted business in the geographical territory of the DIFC and therefore must be governed by DIFC Laws including being subject to the jurisdiction of the DIFC Courts pursuant to Article 5 of the Judicial Authority Law.

65. The only criticism the Defendant can provide against this evidence is that the letter was sent by an independent company, InfoSpan Pakistan. In my view this criticism lacks rationale. Although the letter was sent by InfoSpan Pakistan, the subject matter and the content of the letter indicate that the referenced meeting is about executing the SVC Agreement in the DIFC or that a transaction related to the same contract came through the DIFC. In my view, this is sufficient to link the transaction to the jurisdiction of this Court as required by Article 5(1)(b) and (c) of the Judicial Authority Law.

66. Thus, having said that this Court's interpretation of the wording 'the courts in Dubai, the UAE' of Article (13.3) of the SVC Agreement must mean the DIFC Courts and since the [P]arties executed their contract and transacted in this jurisdiction, the DIFC Courts are the Courts of natural jurisdiction in the absence of an Arbitration Clause.

67. Since this Court has found that the contract or the transaction has crossed the line and become subject to the jurisdiction of the DIFC Courts, any reference to UAE Law must be a reference to UAE Laws applicable within the DIFC. Accordingly the reference to UAE Laws in the Arbitration Clause (13.5) of the SVC Agreement must be the DIFC Arbitration Law and procedure and not the applicable law as to the merits or substance of the claim, considering that the applicable law was referred to in Clause (13.2) and would not likely be referred to twice."

The Justice's findings run counter to the DIFC Courts' previous distinction between the use of the terms "Dubai" and "DIFC" for the designation of the seat of an arbitration in dispute resolution provisions providing for UAE arbitration. In at least two cases to date (see DIFC Court of First Instance, Claim no. CFI 011/2009 - *Amarjeet Singh Dhir v Waterfront Property Investment Limited and Linarus FZE*, Grounds of Decision of 8 July 2009, at paras 80-107; and DIFC Court of First Instance, Claim no. CFI 012/2009 - *Five River Properties LLC and Renaissance Holdings and Developers FZE v Waterfront Property Investment Limited and Linarus FZE*, Grounds of Decision of 8 July 2009), the DIFC Courts found that a wish to resort to DIFC arbitration required express wording to that effect, a reference to "Dubai" only was to be understood as a reference to arbitration onshore, not arbitration seated in the DIFC. This distinction, no doubt, will find application by analogy to other wording in relation to the designation of law or dispute resolution fora between Dubai and the DIFC: a reference, as in the present contractual framework, to the Dubai Courts in combination with UAE internal laws as the governing laws of the dispute is, no doubt, to be taken literally, i.e. the Courts of Dubai (and not those of the DIFC) and the laws of the UAE (and not those of the DIFC). Had the parties wished to opt into the jurisdiction and into the substantive laws of the DIFC in one form or another, they should have stated so in as many words, i.e. expressly. The requirement of express reference is not in any way mitigated by DIFC law being a form of UAE law and the DIFC Courts forming part of the judicial system of Dubai and the UAE more generally.

As regards the validity of the arbitration agreement, there can be little doubt - as indeed confirmed by the Justice (see para. 73) - that it is *prima facie* valid: The absence of an express choice of seat does not render an arbitration agreement invalid (whether under UAE or DIFC law for that matter). Last but not least, the Justice confirmed that in the light of the potentially conflicting outcomes between the arbitration process in California (provided it were to go ahead) and the arbitration proceedings in the UAE, "*it seem[ed] that the correct decision [was] to dismiss the Claimant's [application] based on abuse of process.*" (see para. 80) However, in the light of pending appeal before the Californian courts, the Justice decided in favour of an order to stay.

Should the Californian courts confirm the proper reference to arbitration in the US, the practical implications of the DIFC Courts' findings will remain limited for now. This being said, the DIFC Courts set a dangerous precedent, which - if followed - blurs the clear-cut boundary between arbitration offshore (i.e. seated in the DIFC) and arbitration onshore (i.e. seated in Dubai and the wider UAE). In a sense, the DIFC Courts' ruling in Emirates NBD Bank is the step too far that takes us two steps back!