

Dubai Court of Cassation  
Cassation No. 1132-2020  
24 February 2021

Background:

The Appellant brought Action No. 15-2020 [Annulment of Arbitral Award] against the Respondent, on 24.03.20, seeking: 1- A summary order staying enforcement of the arbitral award rendered in DIFC Arbitration Case No. DL17133, dated 25.02.20, pending a decision on the action at bar, 2- An order setting aside said arbitral award on the grounds set out in the statement of claim.

The Appellant submitted that they are a limited liability company that provides onshore and offshore oil and gas field and installation services while the Respondent is a limited liability company that provides dredging services. By Contract, dated 10.04.16, signed by both parties, the Respondent was enlisted as a subcontractor to undertake trench excavation and backfill works for underwater installations associated with a certain project. A dispute arose between the parties and the Respondent proceeded with DIFC arbitration under Clause 43 of the Contract, with the Arbitral Tribunal issuing a final award on 25.02.20 stating:

- 1- The Respondent shall pay, to the Claimant, €8,794,924.62, in connection with the Claimant's claims in the arbitration;
- 2- The Respondent shall pay, to the Claimant, interest on said amount from the dates and at the rates indicated in the schedule to paragraph 381. Interest shall continue to accrue at such rates until the principal amounts have been paid;
- 3- The Respondent shall pay, to the Claimant, AED 1,201,109.26 in connection with the arbitration costs, and €1,388,170.5 on account of legal fees; and
- 4- All such amounts are payable within 28 days from the date of this final award.

The Appellant challenged the arbitral award as invalid on the following grounds:

- 1- The award contravenes the general rules of procedure for arbitration proceedings. The Arbitral Tribunal allowed the arbitration to proceed against the wrong party. The Appellant is not a party to the Contract;
- 2- The Arbitral Tribunal allowed persons lacking the requisite authority to appear on the Appellant's behalf at the final (evidentiary) hearing in the arbitration;
- 3- The Arbitral Tribunal considered and relied upon a Settlement Agreement to which the Appellant is not a party;
- 4- The Arbitral Tribunal refused to entertain the Appellant's counterclaim and defense of set-off in the arbitration;

- 5- The Arbitral Tribunal heard and relied upon the wrong expert witness;
- 6- The Arbitral Tribunal applied interest in a manner contrary to law and Islamic Sharia; and
- 7- Since genuine grounds exist for setting aside and the enforcement of the arbitral award before a decision has been made in the action will cause substantial damage, the Appellant seeks a stay of enforcement pending a decision on the action at bar.

Court of Appeal:

On 07.10.20, the Court of Appeal declined jurisdiction over the action.

Court of Cassation:

The Appellant appealed in cassation, online, on 05.11.20, arguing that the Court of Appeal contradicted, misapplied, and misinterpreted the law, gave erroneous reasoning, made wrong findings, went against established facts of record, and prejudiced its defense rights. The Court of Appeal declined jurisdiction over the action on the basis of Clause 43 (Dispute Resolution/Arbitration) of the Contract in which the parties expressly agreed in writing that the DIFC shall have jurisdiction over any dispute that may arise out of their Contract when the second half of Clause 43 evinces the parties' express written agreement that the seat (or legal place) of arbitration shall be UAE onshore (Dubai), in accordance with DIFC-LCIA Arbitration Rules. Article 16 of the LCIA Rules (the seat of arbitration and place of hearings) states that: "The parties may agree in writing the seat (or legal place) of their arbitration at any time before the formation of the Arbitral Tribunal and, after such formation, with the prior written consent of the Arbitral Tribunal. In default of any such agreement, the seat of the arbitration shall be DIFC (Dubai), unless and until the Arbitral Tribunal orders otherwise."

It is patently clear from the above that the parties agreed that the seat of arbitration is Dubai, not the DIFC, though they did opt into the DIFC-LCIA Arbitration Rules. The parties further agreed at Clause 41 (Governing Law) of the Contract that: "This Subcontract shall be construed, governed by, and performed in accordance with UAE Law. Further, Clause 7-2 of the Terms of Reference mentions that the parties and the Court have expressly agreed that the seat shall be onshore (Dubai). In addition to the parties' clear and express agreement that the seat (place) of arbitration is Dubai, the arbitration hearings and meetings were held at the Four Points Sheraton (Dubai onshore), not the DIFC. Yet, the Court of Appeal confused the use of the arbitral institution whose rules govern the arbitration proceedings with DIFC Court proceedings and DIFC-LCIA arbitration proceedings. Each DIFC-LCIA case is prefixed by DL, as in this instance (DL17131), whereas cases before the DIFC Court of First Instance are prefixed by CFI. This confirms that the case in

question was conducted by an arbitral tribunal in Dubai as opposed to the DIFC. Therefore, the arbitral award's reference to various DIFC laws is misplaced and has no bearing on the subject matter of the instant case.

The Court of Appeal further erred in confusing DIFC-LCIA arbitral awards with judgments of the DIFC Court of First Instance. The parties had agreed that the seat shall be Dubai, where the final award was issued. Therefore, the only court having jurisdiction to take cognizance of a challenge against an arbitral award issued in Dubai are the Dubai Courts, which accordingly possess jurisdiction, not the DIFC Courts. Moreover, Article 5 of the DIFC Law provides that: "Parties may agree to submit to the jurisdiction of any other court in respect of the matters listed under paragraphs (a), (b) and (d) of this Article." Such an agreement, that the seat of arbitration shall be in Dubai, is set forth in the second half of Clause 43 of the Contract. Hence, the Dubai Courts have jurisdiction over the case, not the DIFC Courts, as explained above. Furthermore, DIFC Law does not expressly provide for an action to set aside an arbitral award and only expressly provides for confirming an arbitral award. Nor does DIFC Law list specific points on which an arbitral award may be challenged, as clearly set out in the Arbitration Law and the action to set aside an arbitral award.

The Appellant advanced the following grounds for setting aside the final award under Article 53 of the Arbitration Law:

- 1- The Appellant is not a party to the Subcontract between the contractor and subcontractor and so, the Appellant has no right to enter into contract with the Respondent who was aware of this fact. Accordingly, all rights acquired and obligations owed under the Subcontract are confined to subcontractor and the Respondent and the Appellant is a non-party to the Contract, both rights and obligations-wise. Indeed, a subcontractor may only be contractually engaged by a contractor who is contractually engaged by the employer which is not the case with the Appellant. The arbitral award is thus void for contravening the general rules of procedure for arbitration proceedings;
- 2- The Arbitral Tribunal allowed persons who were not legally authorized to represent the Appellant to appear at the final hearing;
- 3- The Arbitral Tribunal relied upon a Settlement Agreement to which the Appellant is not a party;
- 4- The Arbitral Tribunal refused to entertain the Appellant's counterclaim and defense;
- 5- The Arbitral Tribunal relied upon the report of an expert not approved by the Respondent. The Arbitral Tribunal relied on evidence of delay from the expert who had been appointed as quantum expert for the Respondent. The Arbitral Tribunal took decisions related to actions concerning delay in reliance on evidence from an expert who had not been duly appointed or approved to present such evidence.

The Arbitral Tribunal heard oral evidence from the Respondent's quantum expert on delay issues without an expert report when the Respondent should have instead put forward Mr. Adams as a delay expert who would accordingly be permitted to give evidence;

- 6- The Arbitral Tribunal calculated interest in a manner contrary to law and Islamic Sharia; and
- 7- The Appellant, adduced, in addition to all of the above, a further ground, pursuant to Article 41(5),(3) of the Arbitration Law, viz. the arbitrators did not sign all the pages of the arbitral award covering both the reasons and operative part but signed a separate sheet which does not contain the decision and a part of the reasoning. The signatures of the arbitrators do not appear on all the pages of the award, except for the signatures which appear on the last page which is completely removed from the reasoning and irrelevant to any part of the decision. The other pages of the award which contain the facts, reasoning, and the decision do not include the arbitrators' signatures. Moreover, the Arbitral Tribunal set out its award under what it termed a "table of contents," which begins with the preamble at p. 1 and ends with the decision at p. 105 whereas the signatures of the arbitrators appear on p. 106 to which no reference is made in the table of contents.

#### Court of Cassation's Response:

The first part of this contention is without merit. The essence of Articles 2, 8, 10 of Law No. 9 of 2004, as amended by Law No. 7 of 2011 in respect of the Dubai International Financial Centre, Articles 1, 2, 3, 5 of Law No. 12 of 2004 in respect of the Judicial Authority at Dubai International Financial Centre, as amended by Law No. 16 of 2011 and Law No. 5 of 2017 in respect of the DIFC Courts, as held by the Court of Cassation, is that the law recognizes the DIFC Courts as a standalone judicial authority with independent functions, as prescribed by law. The DIFC Court of First Instance has, by law, exclusive jurisdiction to hear and determine any civil, commercial, or labor claim or dispute to which the DIFC or any DIFC Body or DIFC Establishment is a party; civil, commercial, and labor claims and disputes arising out of or relating to a contract or promised contract, whether partly or wholly concluded, finalized or performed within the DIFC or that will be performed or is supposed to be performed within the DIFC pursuant to express or implied terms stipulated in the contract; civil, commercial, and labor claims and disputes arising out of or relating to any incident or transaction which has been wholly or partly performed within the DIFC and is related to DIFC activities; appeals against decisions or procedures made by the DIFC Bodies where DIFC Laws and DIFC Regulations permit such appeals; and any claim or action over which the DIFC Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations. The DIFC Court of Appeal has exclusive jurisdiction to determine appeals against judgments and decisions made by the Court of First Instance. Judgments rendered by the Court of Appeal shall be final and conclusive, and shall not be subject to appeal by any means of appeal. From its base in the DIFC, the DIFC-LCIA Arbitration Centre, a JV, operates as a DIFC Establishment under Article 2 of Law No. 12 of 2004, as superseded by the

mentioned Law No. 16 of 2011. The DIFC Courts, then, are exclusively competent to hear appeals against their judgments and decisions.

The Court of Appeal based its decision on the following reasoning: “As per the record, the dispute between the parties relates to the Contract dated 10.04.16. Law No. 16 of 2011 was already operative, having entered into force on the date it was issued, 31.10.11. Under Clause 43 (Disputes/Arbitration) of the Contract, the parties agreed that: “During the term of this Contract or at any time hereafter, any dispute, difference, or question arising between the Contractor and Subcontractor in connection with the Subcontract or its interpretation or the rights or obligations of the Contractor or Subcontractor shall be settled through negotiation and mutual agreement between the parties hereunder. If no agreement is reached, either party may then refer the dispute to and for final resolution through arbitration under the Arbitration Rules of the DIFC - LCIA Arbitration Centre, which Rules are deemed to be incorporated by reference into this clause.”

“In other words, the parties had expressly agreed in writing that the DIFC shall have jurisdiction over any dispute that may arise out of their Contract. The Respondent had, pursuant to this arbitration clause, filed their DIFC arbitration case which ran its course before the competent Arbitral Tribunal until the award to be set aside was issued. This is not disputed by the Appellant. It is the DIFC, then, that has jurisdiction over the Appellant’s request, in the instant action, to set aside the arbitral award, for it is the DIFC that has original jurisdiction over the dispute under the Contract’s arbitration clause. This Court accordingly lacks jurisdiction, which jurisdiction belongs to the DIFC Courts. We thus decline jurisdiction to hear the action.” The Court of Appeal’s conclusion is based on established facts of record and is not inconsistent with the law. The exception taken to its decision under this head is accordingly baseless.

The second part of the contention is inadmissible since the Court of Appeal’s ruling is limited to declining jurisdiction over the action and no error can be assigned to it based on grounds for setting aside the arbitral award which the Court of Appeal did not even address.

Based on the foregoing, the cassation petition is hereby dismissed.