**IN THE GENERAL DIVISION OF**
**THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2024] SGHC 71**

Originating Application No 882 of 2022 (Summons No 2625 of 2023)

Between

DFL

… *Applicant*

And

DFM

… *Respondent*

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# GROUNDS OF DECISION

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[Arbitration — Arbitral tribunal — Jurisdiction]
[Arbitration — Conduct of arbitration — Rules]
[Arbitration — Award — Interim award]
[Arbitration — Enforcement — Foreign award]

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**[2024] SGHC 71**

General Division of the High Court — Originating Application 882 of 2022 (Summons No 2625 of 2023)
Chua Lee Ming J
29 January, 6 February 2024

15 March 2024

**Chua Lee Ming J:**

## Introduction

1 This was the respondent's application to set aside an order made by the High Court (the "Enforcement Order") granting the applicant permission to enforce a Provisional Award on Interim Relief (the "Provisional Award") issued in an arbitration conducted under the Dubai International Arbitration Centre Rules 2022 ("DIAC Rules").

2 The arbitration agreement provided for arbitration under the Dubai International Financial Centre –London Court of International Arbitration Rules (the "DIFC-LCIA Rules"). In 2021, the Dubai International Financial Centre Arbitration Institute (the "Institute") was abolished and the DIFC-LCIA Rules ceased to be operative. The applicant filed his request for arbitration with the newly established Dubai International Arbitration Centre ("DIAC") under the

DIAC Rules. The main issue in this case was whether the respondent had submitted to the arbitration that was commenced and conducted under the DIAC Rules.

**Facts**

3 On 17 August 2018, the applicant and respondent entered into an agreement (the "Settlement Agreement"), under which the respondent agreed to purchase the applicant's shares in a company (the "Company").[1] The price of the shares was to be paid in three instalments. The acquisition of the applicant's shareholding would give the respondent full control of the Company. It was contemplated that the respondent would conclude a merger transaction involving (among others) the Company and another company, [E] Limited.

4 Clause 17 of the Settlement Agreement contained an arbitration agreement which was governed by English law (the "arbitration agreement").[2] It provided that disputes were to be referred to and finally resolved by arbitration under the DIFC-LCIA Rules, and that the seat of arbitration was to be London, United Kingdom.

5 The DIFC-LCIA Rules was administered by the DIFC-LCIA Arbitration Centre. Prior to its abolition, the Institute operated the DIFC-LCIA Arbitration Centre in a joint venture arrangement with the LCIA. On 14 September 2021, the Dubai government issued Decree No 34 of 2021 (the "Decree"). The Decree abolished the Institute and transferred its assets to DIAC. The Decree came into

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1 Reply affidavit of applicant's counsel filed on 5 December 2023 ("[F's] Reply Affidavit"), at pp 21–32.

2 [F's] Reply Affidavit, at p 28.

force on 20 September 2021. Questions arose as to the status of arbitration agreements referring to, and pending arbitrations under, the DIFC-LCIA Rules

6 On 7 October 2021, the DIFC issued a press release stipulating that:

(a) existing cases would continue to be administered by the DIFC-LCIA team and the LCIA; and

(b) arbitrations arising out of agreements referencing the DIFC-LCIA and referred to arbitration after the date of enactment of the Decree, would be administered by the DIAC in accordance with the DIAC Rules, unless parties agreed otherwise.

7 On the same day, the LCIA issued its own press release, stating that it had not been consulted or given notice of the Decree, and that it was in discussion with the Dubai authorities regarding the transition.[3]

8 On 21 March 2022, the new DIAC Rules came into effect.

9 On 29 March 2022, the DIAC and LCIA issued a joint press release, stating (among other things) that:[4]

(a) they had agreed terms by which the LCIA would administer all existing cases commenced and registered by the DIFC-LCIA on or before 20 March 2022, and

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3 [F's] Reply Affidavit, at p 57.

4 [F's] Reply Affidavit, at p 57.

(b) all arbitrations referring to the respective rules of the DIFC-LCIA, commenced on or after 21 March 2022 "shall be registered by [the] DIAC and administered directly by its administrative body in accordance with the respective rules of procedure of [the] DIAC …"

10 On 2 April 2022, the applicant commenced DIAC Arbitration No [xx] of [xxxx] against the respondent and [E] Limited under the DIAC Rules. The applicant sought payment of an amount outstanding under the Settlement Agreement. The applicant alleged that [E] Limited was a party to the Settlement Agreement based on his interpretation of a definition in the Settlement Agreement. This present application does not concern [E] Limited although reference will have to be made to [E] Limited for proper context.

11 On 18 May 2022, the respondent and [E] Limited filed their respective answers to the request for arbitration. In his answer,[5] the respondent reserved his rights in relation to the Decree and its impact on the arbitration and denied liability on the ground that he was obliged to pay the applicant only to the extent to which he first received payment pursuant to the merger transaction.[6]

12 In its answer to the request for arbitration, [E] Limited challenged the jurisdiction of any arbitral tribunal in the arbitration on the ground that it was not a party to the Settlement Agreement or its arbitration agreement. [E] Limited did not otherwise object to the conduct of the arbitration under the DIAC Rules.

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5 Respondent's 2nd affidavit filed on 4 September 2023 ("Respondent's 2nd Affidavit"), at pp 189–200.

6 Respondent's 2nd Affidavit, at p 193 (para 14) and p 199 (para 52).

13 The tribunal in the arbitration under the DIAC Rules (the "Tribunal") was constituted on 18 July 2022.

14 On 3 August 2022, the applicant made an application to the Tribunal for interim relief (the "Application"). He sought:

(a) a proprietary injunction against the respondent and [E] Limited over sums received by the respondent and [E] Limited under the merger transaction, and

(b) a freezing order against the respondent over his assets.

15 The respondent contested the merits of the Application and reserved his rights to raise jurisdictional objections but without raising any such objections. As stated earlier, [E] Limited did not object to the conduct of the arbitration under the DIAC Rules. However, it challenged the Tribunal's jurisdiction on the ground that it was not a party to the Settlement Agreement and supported the respondent's submissions on the merits of the Application. The respondent supported [E] Limited's submissions as to jurisdiction.

16 On 16 November 2022, the Tribunal issued the Provisional Award. The Tribunal granted a proprietary injunction against the respondent but not against [E] Limited.[7] The Tribunal also granted a freezing order against the respondent.

17 On 27 December 2022, the applicant applied for permission to enforce the Provisional Award in Singapore against the respondent. On 28 December 2022, the Assistant Registrar granted the Enforcement Order. The respondent

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7 Provisional Award, at para 94 ([F's] Reply Affidavit, at p 182).

was served on 18 July 2023. On 28 August 2023, the respondent was granted an extension of time to file the present application to set aside the Enforcement Order, and he filed the same on 29 August 2023.

## The parties' cases and the issues

18 Section 31(2)(*e*) of the International Arbitration Act 1994 ("IAA") provides as follows:

> **Refusal of enforcement**
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> 31.—…
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> …
>
> (2) A court so requested may refuse enforcement of a foreign award if the person against whom enforcement is sought proves to the satisfaction of the court that —
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> …
>
> (*e*) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> …

19 The respondent submitted that the Enforcement Order should be set aside because the arbitration conducted under the DIAC Rules was not in accordance with the agreement of the parties, which was for arbitration under the DIFC-LCIA Rules.

20 The respondent also submitted that the Award should be denied enforcement in Singapore as there was a pending jurisdictional objection in the main arbitration proceedings.

21 Before me, the applicant accepted that the agreement for arbitration under the DIFC-LCIA Rules was frustrated by the Decree. In my view, the applicant was correct to do so. Parties' submission to arbitration is purely contractual. They cannot be compelled to submit to arbitration under a set of rules that they did not agree to. The Decree could not force an arbitration under the DIAC Rules on the respondent without his agreement (see, also, *Baker Hughes Saudi Arabia Co. Ltd. V Dynamic Industries, Inc. and others* Civil Action No. 2:23-cv-1396 (E.D. La. Nov.6, 2023)).

22 However, the applicant submitted that cl 16(i) of the Settlement Agreement applied such that the provision for arbitration under the DIFC-LCIA Rules in the arbitration agreement could be severed and replaced with a provision for arbitration under the DIAC Rules. Clause 16(i) provided that provisions that were or became illegal, invalid or unenforceable could be severed and, if possible, replaced with a lawful provision that gave effect to the intention of the parties.

23 The applicant also submitted that in any event, the respondent had submitted to the jurisdiction of the arbitration under the DCIA Rules.

24 The parties' cases gave rise to the following issues:

(a) Whether the provision for arbitration under the DIFC-LCIA Rules in the arbitration agreement could be severed and replaced with a provision for arbitration under the DIAC Rules pursuant to cl 16(i) of the Settlement Agreement.

(b) Whether the respondent had submitted to the arbitration under the DIAC Rules.

(c) Whether the Provisional Award should be denied enforcement in Singapore because the jurisdictional issue was pending in the main arbitration proceedings.

**Whether the arbitration agreement was saved by cl 16(i) of the Settlement Agreement**

25 Clauses 16(i) and 17(b) of the Settlement Agreement provided as follows:

> 16. Validity
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> i. Where any provision of this Agreement is or becomes illegal, invalid or unenforceable in any respect under the Laws of any jurisdiction then such provision shall be deemed to be severed from this Agreement and, if possible, replaced with a lawful provision which, gives effect to the intention of the parties under this Agreement.
>
> …
>
> 17. Governing law and Jurisdiction
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> …
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> b. Any dispute, claim, difference, question or controversy arising out of, relating to or having any connection with this Agreement, including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity and any dispute relating to any non-contractual obligations arising out of or in connection with it, shall be referred to and finally resolved by arbitration under the Dubai International Financial Centre–London Court of International Arbitration Rules (the *DIFC-LCIA*) (the Rules).
>
> …

26 The applicant submitted that the provision in cl 17(b) for arbitration under the DIFC-LCIA Rules could be severed and replaced with a provision for arbitration administered by the DIAC unless parties agreed otherwise.[8] The

[8] Applicant's Written Submissions, at para 80.

applicant submitted that this would be in accordance with the parties' intention, which was to resolve their disputes by arbitration administered by an institution in Dubai.

27 I disagreed with the applicant's submission. Express agreements on institutional rules "concern the basic architecture of the arbitration and typically have a substantial impact on the arbitral proceedings": Gary Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2021) at 3909. In my view, it was a stretch to say that the parties intended, at the time they signed the Settlement Agreement, to accept arbitration administered by any institute in Dubai (whether then existing or not) regardless of the rules under which the arbitration would be conducted. As the respondent submitted, there were significant differences between the DIFC-LCIA Rules and the DCIA Rules that rendered an arbitration under the DIAC Rules fundamentally at odds with the parties' intention:

(a) The DIAC Rules provided for timelines which were unnecessarily compressed in circumstances where the issues in dispute were complex and the value of the claim was high.

(b) The DIAC rules permitted an emergency arbitrator to hear applications on an *ex parte* basis; in contrast, under the DIFC-LCIA Rules, any emergency application had to be delivered and notified forthwith to the other parties.

(c) The arbitration costs in the DIAC were calculated on an *ad valorem* basis, whereas costs in a DIFC-LCIA arbitration were calculated on the basis of hourly rates and time spent.

28 Accordingly, I found that cl 16 of the Settlement Agreement could not apply and that the arbitration procedure under the DCIA Rules was not in accordance with the parties' agreement for arbitration under the DIFC-LCIA Rules.

**Whether the respondent submitted to the Tribunal's jurisdiction**

29 Although the arbitration was not conducted under the DIFC-LCIA Rules as provided in the arbitration agreement, the respondent's challenge under s 31(2)(*e*) of the IAA would still fail if he had submitted to the jurisdiction of the Tribunal.

30 The legal principles regarding submissions to jurisdiction were not in dispute. A defendant's conduct constitutes submission to jurisdiction if it demonstrates an unequivocal, clear and consistent intention to submit to the jurisdiction of the court. Put differently, a party's conduct will only amount to a submission to jurisdiction where said conduct is "only necessary or useful on the assumption that the defendant has waived, or has never entertained, any objection to such jurisdiction": *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 ("*Shanghai Turbo*") at [37].

31 Reservations as to jurisdiction or jurisdictional challenges may be relevant to the issue of submission. As the Court of Appeal held in *Shanghai Turbo* at [37],

> [w]here a party pursues a certain course of action that could possibly be construed as a submission to jurisdiction, that party may be able to show that his conduct should not be so construed by caveating that course of action with a reservation as to jurisdiction, or by simultaneously mounting a jurisdictional challenge or stay application …

32 In *Chong Long Hak Kee Construction Trading Co v IEC Global Pte Ltd* [2003] 4 SLR(R) 499 ("*Chong Long*"), a defence was filed with an express reservation of the defendant's right to apply for a stay the proceedings in favour of arbitration. The court was of the view that the reservation of the rights in the defence could have preserved the defendant's right to stay the proceedings.

33 *Chong Long* was cited with approval by the Court of Appeal in *Carona Holdings and others v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460, which added the caveat that "it is of course conceptually possible for an earlier reservation to be subsequently waived by clearly inconsistent conduct. A party should be careful not to approbate and reprobate simultaneously" (at [101]).

34 The applicant submitted that the respondent had submitted to the Tribunal's jurisdiction in the arbitration under the DIAC Rules, alternatively that the respondent had submitted to the Tribunal's jurisdiction with respect to the Application. I deal with the latter first.

***Submission to the Tribunal's jurisdiction with respect to the Application***

35 In the present case, it was not disputed that the respondent contested the Application on its merits. Ordinarily, such conduct would amount to a submission to the jurisdiction of the Tribunal. The question was whether the respondent had sufficiently qualified his conduct in contesting the merits of the Application so that it may be said that such conduct did not amount to an unequivocal submission to the jurisdiction of the Tribunal.

36 As stated earlier, in his answer to the request for arbitration, the respondent had reserved his rights in relation to the impact of the Decree.[9] In addition, the respondent objected to the conduct of the arbitration under the DIAC Rules in his statement of defence,[10] which was filed before the hearing of the Application. Further, the respondent submitted his answer to the Application and his skeleton argument with respect to the Application ("Skeleton Argument"), both dated 29 August 2022, "without prejudice" to his objections to the Tribunal's jurisdiction.[11]

37 However, it was not disputed that the respondent did not specifically raise any jurisdictional objections in his submissions to the Tribunal with respect to the Application. The respondent did support [E] Limited's jurisdictional objection but [E] Limited's jurisdictional objection (that [E] Limited was not a party to the Settlement Agreement or the arbitration agreement) was irrelevant to the Application against the respondent.

38 In so far as the respondent was concerned, the Tribunal noted his reservation in his answer to the request for arbitration and his objection in his statement of defence but did not deal with them. The Tribunal acknowledged however that there were jurisdictional objections that it would subsequently have to decide.[12]

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9 Respondent's 2nd Affidavit, at p 193 (para 14).

10 Respondent's 2nd Affidavit, at p 208 (paras 19–20 and fn 10).

11 Respondent's 4th affidavit filed on 5 February 2024 ("Respondent's 4th Affidavit"), at p 8 (para 4), p 31 (para 90) and p 35 (para 4).

12 Provisional Award, at para 11 ([F's] Reply Affidavit, at p 161).

39 What was critical was the fact that the respondent did not raise any jurisdictional objections in its submissions with respect to the Application. In my view, the respondent had demonstrated an unequivocal, clear and consistent intention to submit to the tribunal's jurisdiction with respect to the Application. Indeed, as the Tribunal noted, the respondent had accepted that the test under the DIAC Rules applied to the Application.[13] This was consistent with the fact that he did not raise any jurisdictional objection with respect to the Application. The respondent's conduct in choosing to contest the Application on its merits without raising any jurisdictional objection was clearly and objectively inconsistent with his present objection to the Tribunal's jurisdiction with respect to the Application. The respondent had demonstrated a willingness for the Tribunal to deal with the Application on its merits. This was diametrically opposed to his present objection to the Tribunal's jurisdiction to deal with the Application.

40 The respondent's reservation in his answer to the request for arbitration was relevant to the question whether the filing of the answer amounted to a submission to jurisdiction. However, in the present case, it was *not* the filing of the answer but the respondent's conduct in contesting the Application on its merits that amounted to a submission to jurisdiction. The respondent may have reserved his rights to raise jurisdictional objections in the future but the fact remained that he did not raise any such objection with respect to the Arbitration.

41 In this regard, the respondent's reliance on *Chong Long* was misplaced. *Chong Long* stands for the proposition that the filing of a defence with a reservation of the defendant's right to apply for a stay pending arbitration could

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[13] Provisional Award, at para 77 ([F's] Reply Affidavit, at p 178).

have preserved the defendant's right to stay the proceedings. In other words, the filing of such a defence would not amount to a submission to the court's jurisdiction in respect of the claim. The relevance of *Chong Long* in the context of the present case was that it showed that the *filing of the answer to the request for arbitration* (with the reservation of rights) was not a submission to the Tribunal's jurisdiction. However, as stated earlier, the filing of the answer was not the act upon which the submission to jurisdiction was based in the present case.

42 In his statement of defence, the respondent did object to the arbitration under the DIAC Rules. Before me, the respondent submitted that the Tribunal knew that his objections applied to the hearing of the Application as well. I disagreed with the respondent's submission. As the applicant submitted, the respondent did not raise any jurisdictional objection in his answer to the Application or in his Skeleton Argument. It was incumbent on the respondent to specifically raise such objections if he intended to rely on them with respect to the Application. In particular, the respondent clearly had the opportunity to raise these objections in his answer to the Application and his Skeleton Argument. Instead, the respondent did not do so and chose to merely reserve his right to raise jurisdictional objections.

43 In my view, the fact that the respondent chose to contest the Application on its merits without raising such objections could only mean that in so far as the Application was concerned, he was not relying on or was waiving the jurisdictional objections stated in his statement of defence. Just as a reservation of rights can be subsequently waived (see [33] above), so too could the respondent's jurisdictional objections in his statement of defence be waived for the purposes of the Application.

44 Having chosen not to raise any jurisdictional objection in so far as the Application was concerned, it was not open to the respondent to raise such objections in connection with the enforcement of the Provisional Award. The respondent cannot be allowed to blow hot and cold. In my judgment, the respondent had submitted to the Tribunal's jurisdiction in so far as the Application was concerned.

***Submission to jurisdiction in the main proceedings***

45 The applicant first submitted that the filing of the respondent's answer to the request for arbitration was a submission to the jurisdiction of the Tribunal. I disagreed. In his answer, the respondent had expressly reserved his rights "in relation to the Decree and its impact on this arbitration",[14] Further, as the respondent submitted, Art 6.3 of the DIAC Rules only required him to raise his objections to the Tribunals' jurisdiction "no later than in the statement of defence". In my view, the mere filing of the respondent's answer to the request for arbitration could not be said to be an unequivocal submission to the jurisdiction of the Tribunal.

46 Next, the applicant pointed out that:

(a) in July 2023, the respondent made an application to amend his defence and to raise a counterclaim;

(b) the defence in the proposed amended defence was that a compromise had been reached; the original defences (including the jurisdictional objections) were only alternatives;

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[14] Respondent's 2nd Affidavit, at p 193 (para 14).

(c) the Tribunal raised the question as to whether the respondent's jurisdictional objections could withstand his application to plead a counterclaim; and

(d) in response, the respondent then withdrew his application to submit a counterclaim but confirmed that his application to amend his defence remained.

47 The applicant submitted that the respondent's attempt to amend his defence and to advance a counterclaim (notwithstanding his subsequent withdrawal of the latter) was inconsistent with his jurisdictional objections and amounted to a submission to the Tribunals' jurisdiction in the main arbitration proceedings under the DIAC Rules.

48 The respondent argued that his amended defence did not constitute a submission to jurisdiction. He submitted that under his amended defence, his primary position was that the tribunal had no jurisdiction, his alternative position was that of the defence of compromise, and his further alternative position was to rely on the defences pleaded in the original defence.

49 It seemed to me that the jurisdictional objection was not the foremost issue in the amended defence. Instead, the defence of compromise seemed intended to be the primary defence. However, as I had concluded that the respondent had submitted to the jurisdiction of the Tribunal with respect to the Application, it was unnecessary for me to decide whether the respondent's application to amend his defence and to raise a counterclaim (notwithstanding the subsequent withdrawal of the latter) amounted to a submission to the jurisdiction of the Tribunal in the main arbitration proceedings. The Tribunal had raised the issue regarding the application to introduce a counterclaim to the

parties[15] and I was informed that a decision was pending from the Tribunal on the respondent's objection to the Tribunals' jurisdiction in the main arbitration proceedings. In my view, it was more appropriate to leave it to the Tribunal to deal with this issue.

**Whether enforcement should be refused because the jurisdiction issue was pending in the main arbitration proceedings**

50 The respondent submitted that as the Tribunal had yet to rule on the question of its own jurisdiction, it was inappropriate for this Court to prematurely make a determination on this issue by allowing enforcement of the Provisional Award.[16]

51 I rejected the respondent's submission. First, my conclusion that the respondent had submitted to the Tribunal's jurisdiction in so far as the Application was concerned was consistent with the Tribunal's assumption of jurisdiction with respect to the Application. Second, my conclusion was separate and distinct from the question of the Tribunal's jurisdiction in the main arbitration proceedings. As the Tribunal noted, the Application concerned only provisional and interlocutory decisions.[17] If the respondent subsequently succeeds on his jurisdictional objections in the main arbitration proceedings, the interim relief orders under the Provisional Award would necessarily be discharged. In that event, it would be open to the respondent to enforce the applicant's undertaking to abide by any order or award as to costs or damages that the respondent may have sustained by reason of the Provisional Award.

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15 [F's] Reply Affidavit, at p 226.

16 Respondent's Written Submissions, at para 69.

17 Provisional Award, at para 62 ([F's] Reply Affidavit, at p 174).

**Conclusion**

52 For the reasons set out above, I dismissed the respondent's application to set aside the Enforcement Order. I also ordered the respondent to pay the applicant costs, fixed at $50,500 (inclusive of disbursements amounting to $32,500).

Chua Lee Ming
Judge of the High Court

Zhuo Jiaxiang, Lau Hui Ming Kenny, and Kyle Chong Kee Cheng (Providence Law Asia LLC) for the applicant;
Mahesh Rai s/o Vedprakash Rai and Soon Ser Jia Clarissa (Drew & Napier LLC) for the respondent;