DIFC Court of Appeal clarifies the threshold for setting aside arbitral awards

Simmons & Simmons Middle East LLP (Payam Beheshti and Stuart Storry), with barristers Yash Bheeroo and Ravi Jackson of 3VB, acted for the Appellant (a financial institution) in the first successful application to the DIFC Court of Appeal to set aside substantive parts of an arbitral award. The Court of Appeal also set aside the first-instance judgment and re-ordered costs in favour of the Bank at both first-instance and appellate level.

The ruling in *Oheo Bank v Parker* (CA 006/2025) (anonymised) is the first decision at an appellate level in the DIFC Courts to consider the principles underlying Articles 41(2)(a)(ii) and (iii) of the DIFC Arbitration Law (DIFC Law No. 1 of 2008). It marks a significant development in the approach to setting aside arbitral awards in DIFC-seated arbitration proceedings, providing authoritative guidance for parties, counsel, and tribunals operating in the region and beyond.

Background

The case arose from a DIFC-seated arbitration conducted pursuant to the DIAC Rules 2022, before a three-member tribunal. The claimant ("Parker") brought a 'misselling' claim against our client (the "Bank") arising from a series of transactions involving the purchase of bonds and the execution of an indemnity in connection with a proposed vessel purchase.

Parker advanced five heads of claim: deceit, misrepresentation, breach of the Quincecare duty, breach of regulatory duties, and negligence. The Arbitral Tribunal unanimously dismissed all of Parker's claims except one. By a majority, the Tribunal upheld a single claim for breach of regulatory duties – namely, that the Bank had breached a Crestsign-type duty (see below) when procuring Parker's execution of the indemnity and thereby failed to communicate with Parker in a way that was clear, fair and not misleading under DFSA COB 3.2.1 and GEN 4.2.6 (the "Successful Claim").

The dissenting Tribunal member considered that permitting Parker to advance this claim gave rise to serious procedural unfairness, as the claim had not been pleaded and had only emerged in Parker's post-hearing submissions, depriving the Bank of the opportunity to respond with defences of contributory negligence and voluntary assumption of risk.

The Bank challenged the Award under Article 41 of the DIFC Arbitration Law (DIFC Law No. 1 of 2008), seeking to set aside parts of the Award.

The application was dismissed at first instance. The Bank's appeal was heard before the DIFC Court of Appeal (H.E. Chief Justice Wayne Martin, H.E. Justice Sir Peter Gross, and H.E. Justice Patrick Keane).

Articles 41(2)(a)(ii) and (iii) of the Arbitration Law are derived from Articles 34(2)(a)(ii) and (iii) of the UNCITRAL Model Law on International Commercial Arbitration 1985, as amended. In turn, the grounds for setting aside an award under Article 34 of the Model Law essentially match the grounds for refusing recognition and enforcement of an award under Article V.1 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention").

The Court of Appeal noted that, in interpreting the Arbitration Law, it is entitled to treat as persuasive authorities from other common law jurisdictions which have adopted the Model Law.

For this reason, this decision is likely to be relevant to other Model Law jurisdictions.

Key issues before the Court

The appeal turned on three core issues:

1. Procedural fairness (Article 41(2)(a)(ii)

Was the Bank unable to present its case because the successful claim emerged too late?

2. Scope of submission (Article 41(2)(a)(iii))

Did the Tribunal decide a dispute not properly before it?

3. Adequacy of reasons (setting aside the First Instance decision)

Were the DIFC Court of First Instance's reasons for dismissing the challenge sufficient?

Court of Appeal decision

The Court of Appeal allowed the Bank's appeal on Ground II (procedural fairness under Article 41(2)(a)(ii)) and Ground III (inadequacy of reasons), and dismissed the appeal on Ground I (scope of submission under Article 41(2)(a)(iii)), although the latter was academic in light of the decision on Ground II. As a result, the substantive paragraphs of the Award were set aside. The first instance judgment was also set aside, both as a whole on Ground III and in part because of the decision on Ground II.

Costs were ordered in favour of the Bank, both at first instance and on appeal.

Key findings

Article 41(2)(a)(ii) – inability to present one's case

The central issue was whether the Successful Claim had been raised prior to Parker's post-hearing submissions, such that the Bank had a reasonable opportunity to present its case in response. Significantly, the Tribunal itself had unanimously confirmed in its Consequentials Award that the Successful Claim was not pleaded and had only emerged in closing submissions, with Parker succeeding "*by the skin of its teeth after its arguments on breach of regulatory duty were recast in closing*" – a finding the Court of Appeal treated as effectively conclusive. The Bank had explicitly declined to engage substantively with the approximately 20 unpleaded claims and allegations contained in Parker's post-hearing brief (including the allegation that became the Successful Claim) but had invited the Tribunal to direct a supplemental brief if it wished the Bank to address any of those points.

The Court of Appeal, drawing on a comprehensive survey of international authorities, presented to it in submissions, emphasised the distinction between a party having no opportunity to present its case and a party failing to recognise or take an existing opportunity to do so. Whether a party was unable to present its case is a question of fact and degree, dependent on the circumstances. Importantly, the Court of Appeal confirmed that an applicant need not show that the outcome would have been different – only that the submissions it would have made were reasonably arguable and could realistically have made a difference.

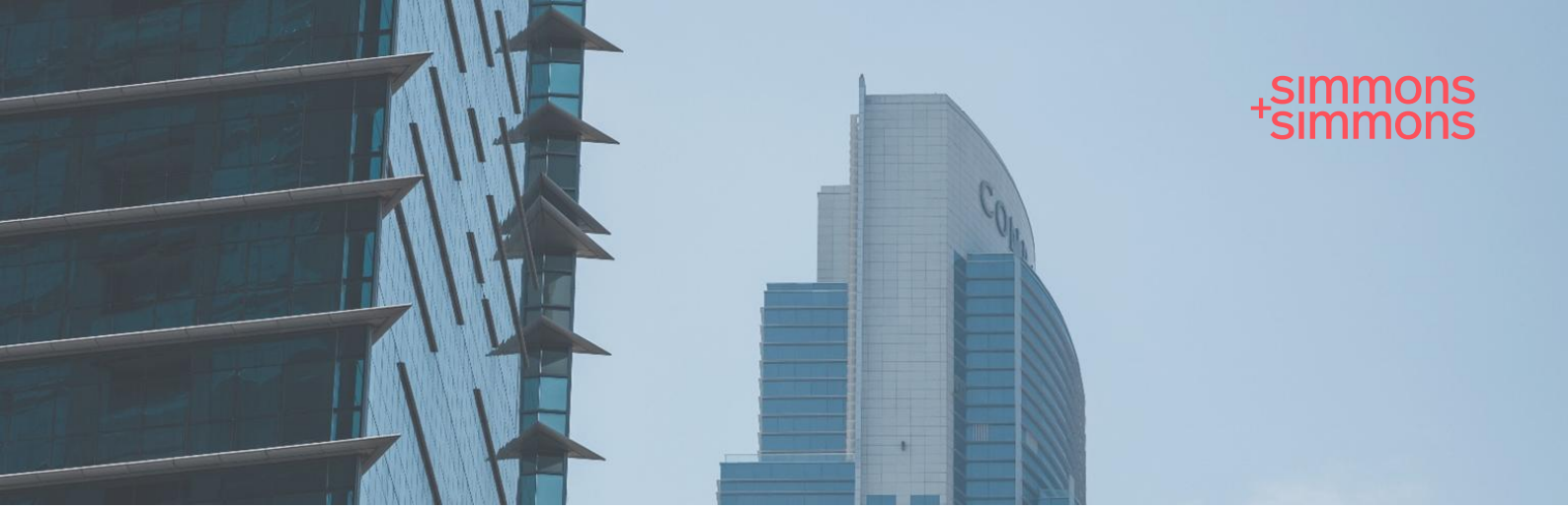
On the facts, the Court of Appeal found, on a narrow, fact-specific basis, that the high threshold for intervention was met. The Successful Claim represented a "*dramatic*" departure from the case previously advanced, having emerged from a single paragraph in Parker's post-hearing brief and relying on building blocks (including the duty established in *Crestsign Ltd v National Westminster Bank* [2014] EWHC 3043 (Ch) to explain fully and accurately the nature of products in respect of which an explanation is volunteered that had not previously been put to the Bank. The Bank's decision not to engage substantively with the unpleaded claim was held to be a reasonable stance in the circumstances. The Court of Appeal found that the practical solution would have been for the tribunal, if impressed by the unpleaded claim, to put it to the Bank for response by way of a supplemental brief, as the Bank had expressly requested.

The Court of Appeal further found that, had the Bank been given the opportunity to respond, its submissions on contributory negligence and voluntary assumption of risk were reasonably arguable and could realistically have made a difference – a conclusion reinforced by the majority's own observation that it would likely have been sympathetic to such a plea.

Article 41(2)(a)(iii) – scope of submission to arbitration

In providing the first authoritative appellate guidance on Article 41(2)(a)(iii), the Court of Appeal articulated the following principles:

- Curial courts should not lightly intervene when faced with a challenge based on an arbitral tribunal having exceeded its jurisdiction regarding the scope of submission to arbitration. The autonomy of the parties and the arbitral process is a matter of first importance;
- There is an important distinction between the erroneous exercise of a power by a tribunal and the purported exercise of a power it does not have. Mere errors of law or fact do not of themselves justify setting aside an award for excess of jurisdiction;
- Should a tribunal give undue indulgence to a party regarding the scope of submissions, this can readily result in unfairness to the other party/parties;



- In deciding what is within the scope of a submission to arbitration, DIFC law should look at matters "*in the round*", having regard to the "*five sources*" (pleadings, lists of issues, opening statements, evidence adduced, and closing submissions) to determine what issues or disputes are "*in play*". While pleadings are the starting point, they are not necessarily the finishing point; and
- In reaching this formulation, the Court of Appeal expressly preferred the more flexible approach adopted in Hong Kong (*C1 v IBS* [2025] HKCFI 227) over the approach in certain Singapore decisions (for example, *CAJ v CAI* [2021] SGCA 102) which had suggested that a matter not initially pleaded could only be brought into play by amendment to the pleadings. This endorses the view that international arbitration should not be tied to local rules of civil procedure in determining whether an issue was properly before a tribunal.

Applying this approach, the Court of Appeal was not persuaded that the Successful Claim fell outside the scope of the submission to arbitration. However, it emphasised that the real vice concerning the Successful Claim was not that it fell outside the scope of the submission, but rather that the Bank was not given the opportunity to deal with it.

Adequacy of reasons

The Court of Appeal also allowed the Bank's appeal on Ground III, setting aside the first instance judgment. The first instance Judge's analysis comprised only two pages for a complex case where the hearing had occupied more than a normal day of court time, the hearing bundle ran to over 2,500 pages, and the parties had filed detailed skeleton arguments.

The Court of Appeal found that the Judge's reasons consisted of a series of conclusions without any attempt to explain the reasoning behind them, failing to address the reasons given by the dissenting arbitrator for his dissent – a significant component of the Bank's submissions. It emphasised that adequate reasons are a function of due process, must leave the parties in no doubt as to why they have won or lost, and must enable the appellate court to assess whether the Judge addressed all determinative issues. The Court also observed that the Judge's failure to follow the "*building blocks of the reasoned judicial process*" may explain the difference between his conclusions and those of the Court of Appeal.

Commentary

This decision does not signal a departure from the arbitration-friendly stance of the DIFC Courts, nor from the light-touch supervisory approach to international commercial arbitration. The Court of Appeal expressly reaffirmed that curial intervention requires a high threshold, adopting the touchstone of "real unfairness or real practical injustice" and that the starting principle is to minimise court interference, furthering the interests of arbitral autonomy and finality. However, the judgment demonstrates that where a party is deprived of a genuine opportunity to address a dispositive claim, the DIFC Courts will intervene.

The judgment is of significant importance for several reasons.

Firstly, it represents the first authoritative appellate guidance in the DIFC on the approach to setting aside arbitral awards under the Arbitration Law. The articulation of the curial approach, drawn from a comprehensive survey of authorities across leading common law jurisdictions, including Australia, Canada, England and Wales, Hong Kong, and Singapore, will serve as the definitive framework for future challenges to DIFC-seated arbitral awards.

Secondly, because the Arbitration Law is based on the UNCITRAL Model Law, and the grounds for setting aside an award essentially mirror those under the New York Convention, the reasoning is likely to be treated as persuasive in other Model Law jurisdictions, extending the decision's significance well beyond the DIFC.

Thirdly, the Court of Appeal's express adoption of looking at matters "in the round" provides important practical guidance on how DIFC Courts will assess whether a dispute fell within the scope of submission to arbitration. While pleadings remain the starting point, courts will consider the totality of what was before the tribunal.

Fourthly, the judgment reinforces the principle that where a tribunal is impressed by a point that has not been raised, it is obliged, as a matter of fairness, to draw the point to the parties' attention so that they have an opportunity to deal with it. This has immediate practical implications for arbitral tribunals considering unpleaded or late-emerging claims.

Finally, the Court of Appeal's analysis on Ground III sets a clear standard for judges hearing challenges to arbitral awards in the DIFC, reinforcing that the "building blocks of the reasoned judicial process" must be applied to ensure that the review contemplated by Article 41(2) is meaningful.

If you're interested in discussing any details of this case or related matters in more detail, please reach out to our team of experts who would be delighted to assist you.

Key takeaways

There are a number of practical takeaways, each for different participants in an arbitration.

- For arbitral tribunals: Even in a flexible procedure, any reformulation of a claim at a late stage may need to be put back to the parties for response, including by inviting supplemental submissions if appropriate;
- For claimants: The formulation and pursuit of a claim must be done whilst mindful of whether this exposes any successful award to challenge; and
- For respondents: Consider how to engage with new claims whilst preserving the right to challenge if necessary.

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