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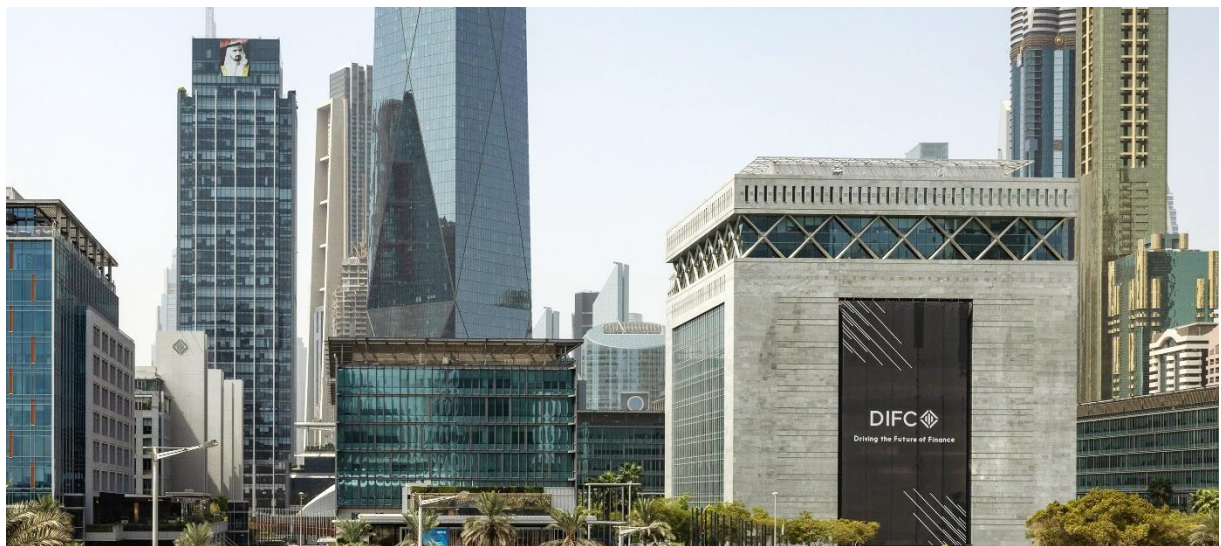
## ARBITRAL AUTONOMY AND PROCEDURAL FAIRNESS: WHEN WILL THE DIFC COURTS SET ASIDE AN AWARD AS THE SUPERVISING SEAT?

In two recent decisions, *Oheo Bank v Parker and Princeton v Persephone*, the DIFC Courts have drawn an increasingly clear line between arbitral autonomy and procedural fairness.

An arbitral tribunal is not required simply to choose between the competing cases presented to it. It may assess the evidence independently, develop its own reasoning and reach conclusions that neither party has articulated in precisely the same way. But there is a limit.

What happens where the argument that ultimately decides the case was never fairly put to the losing party at all?

Two recent DIFC Courts decisions provide important guidance. Together, they confirm that while the threshold for setting aside an arbitral award remains deliberately high, arbitral finality will not protect an award where the way in which the dispute was decided causes “*real unfairness or real practical injustice*”.



### THE STATUTORY FRAMEWORK

Article 41 of the DIFC Arbitration Law provides limited grounds on which an award made in a DIFC-seated arbitration may be set aside.

Two grounds were central to *Oheo*.

Article 41(2)(a)(ii) applies where a party was unable to present its case. Article 41(2)(a)(iii), by contrast, concerns an award which decides matters falling outside the scope of the submission to arbitration. The distinction matters.



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A tribunal may decide an issue which falls within the overall scope of the dispute but nevertheless do so through a procedure which did not afford one party a fair opportunity to address it. That was precisely the problem in *Oheo*.



### **OHEO BANK V PARKER: WHEN THE WINNING CASE EMERGES TOO LATE**

*Oheo* arose from a DIFC-seated DIAC arbitration in which Parker pursued several claims against a bank arising from transactions intended to finance the purchase of a vessel. Most of Parker's claims failed. However, the majority of the tribunal awarded Parker EUR 1 million for breach of regulatory duties.

The difficulty was that the particular case on which Parker ultimately succeeded had not been advanced in that form through the pleadings, evidence or hearing. The Court of Appeal found that it emerged only in Parker's post-hearing brief.

The Bank spotted the problem. In its own post-hearing brief, it identified approximately 20 allegedly unpleaded claims and expressly stated that, if the tribunal wished to consider them, it should allow the Bank to file a supplemental brief. No such opportunity was provided.

The tribunal nevertheless accepted the new theory and awarded Parker EUR 1 million on that basis.

The DIFC Court of Appeal set aside the relevant parts of the award.

Importantly, however, the Court did not hold that any departure from the pleadings will invalidate an award. Nor did it accept the Bank's separate argument that the successful claim necessarily fell outside the scope of the arbitration.

Instead, the problem was one of procedural fairness: the Bank had not been given a proper opportunity to meet the case on which it ultimately lost.



### WHAT WAS REALLY “IN PLAY”?

One of the most important aspects of *Oheo* is the Court's rejection of an overly rigid approach to pleadings in arbitration.

In deciding whether an issue falls within the scope of the submission to arbitration, the Court held that the proceedings should be considered “*in the round*”.

Pleadings are the starting point, but not necessarily the end of the inquiry. The court may also consider agreed lists of issues, opening submissions, evidence and closing submissions in determining which issues were genuinely “*in play*”.

That is an important reminder of the procedural flexibility of arbitration.

The question is ultimately whether the affected party had a fair opportunity to address the material issue before it was decided.

Indeed, the Court considered that the practical solution in *Oheo* was straightforward: if the tribunal was attracted to the new argument, it could simply have put the point to the Bank and invited supplemental submissions.



### PRINCETON V PERSEPHONE: TAKING OHEO ONE STEP FURTHER

Four months later, the DIFC Court applied *Oheo* in *Princeton v Persephone*. This time, however, the procedural surprise did not come from an opposing party raising a late argument. It came from the tribunal itself.

The underlying arbitration concerned a contractual dispute involving the sale of cargo. The parties had proceeded on the basis that payment was contractually due by a particular date, although they disputed the legal consequences of the failure to pay. The tribunal took a different route.



Its reasoning effectively treated the parties' subsequent conduct as having altered the payment position through concepts resembling waiver, variation or estoppel. The difficulty was that neither party had advanced that case. It first materially surfaced in the Final Award.

The Court held that if a tribunal considers that the real answer to a dispute lies in an issue not raised by the parties, it must first give them an opportunity to address that issue, including through evidence or submissions where necessary.

The Final Award was set aside in full because the relevant issues went to the foundation of the tribunal's reasoning and could not sensibly be severed from the remainder of the award.

That takes *Oheo* an important step further. However, the common principle is procedural surprise.

#### **WHAT DO *OHEO* AND *PRINCETON* MEAN IN PRACTICE?**

For arbitration counsel, the decisions underline the importance of monitoring how the case evolves. Where an opponent introduces a genuinely new claim or theory late in proceedings, counsel should identify the issue clearly, explain the prejudice and expressly request an opportunity to respond. *Oheo* also shows why parties should preserve procedural objections contemporaneously rather than attempt to reconstruct them only after receiving an unfavorable award.

At the same time, counsel should not assume that an issue is unavailable merely because it does not appear neatly in the pleadings. The question is whether, viewed across the proceedings as a whole, it has become part of the dispute.

For tribunals, the message is equally practical. Arbitrators remain free to reach their own conclusions and are not confined to choosing between two competing scripts supplied by counsel. But where a tribunal identifies a new issue which may materially determine the dispute, the safer course is simple: put the issue to the parties before deciding it.

That may require no more than a targeted question or a short round of supplemental submissions. In other cases, limited additional evidence may be required.

#### **THE LINE EMERGING FROM THE DIFC COURTS**

The significance of *Oheo* and *Princeton* is therefore not that the DIFC Courts are becoming more interventionist. Quite the opposite: both decisions recognise the importance of limiting judicial interference with arbitration. What they do is identify the procedural floor beneath that principle of finality. Tribunals may manage proceedings flexibly. They may develop their own reasoning. They may reach conclusions different from those advocated by either party. But independent reasoning should not become procedural ambush.

Where a new issue may materially decide the dispute, the parties must first have a reasonable opportunity to address it.

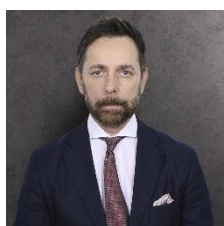


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If you are facing issues arising from a DIFC-seated arbitral award, or an arbitral award more generally, the International Arbitration team at BLK Partners is available to assist. Please feel free to contact us using the details below to discuss how we may assist.

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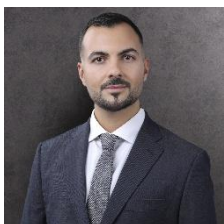
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