

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Civil Original No.25854 of 2023

SpaceCom International, LLC

Versus

Wateen Telecom Limited

JUDGMENT

Date of Hearing.	06-11-2024
APPLICANT BY:	M/s Sameer Khosa, Momal Malik, and Hammad Hussain, Advocates.
RESPONDENT BY:	M/s Salman Akram Raja, Muhammad Umer Akram Chaudhry, Muhammad Ali Talib and Muhammad Hammad Amin and Waheed Ahmad, Advocates

Shahid Karim, J:-. This judgment will decide an Application under Section 6 of the Recognition and Enforcement (Arbitral Agreement & Foreign Arbitral Award) Act, 2011 (“**the 2011 Act**”). It has been brought by SpaceCom International LLC (**SpaceCom**) a private company incorporated under the laws of Virginia in the United States of America and seeks enforcement of the award against the respondent-Wateen Telecom Limited (**Wateen**).

Facts and Background:

2. SpaceCom is a global information and communications technology systems integrator or global satellite service provider. It engages in the design, provisioning, integration, and operation of satellite communication networks. The networks are used, *inter alia*, for mobile backhaul, telephony, and data services for remote locations and enterprise communication networks. As part of its service offering, SpaceCom leases satellite transponder capacity and

provides network engineering and monitoring services.

Wateen is a Pakistani public limited company and is involved in the provision of communications services, including voice, internet and multimedia, through satellite and fixed line networks to corporate customers and to the general public in Pakistan.

3. On 15 August 2014 SpaceCom entered into a Master Service Agreement with Wateen (SpaceCom Service Agreement No.: 30-07014) (**the “2014 MSA”**). The 2014 MSA related to the provision of leased transponder capacities on the ABS-7 (Asia Broadcast Satellite) and IS-904 (Intelsat) Satellites, and network management and monitoring services (**the “Satellite Services”**) to Wateen. SpaceCom provided Satellite Services to Wateen, which used the Satellite Services to provide mobile backhaul (i.e. connectivity from remote mobile phone antenna towers, which have no fibre optic or copper wire connection, to its mobile switches and the rest of its network).

4. The 2014 MSA acted as an overarching contract between the parties, pursuant to which the parties entered into various service orders. Two service orders were issued and signed by SpaceCom and Wateen under the 2014 MSA, i.e. Service ID No.2001 (“**SO 2001**”) and Service ID No.2002 (“**SO 2002**”) (together the “**Service Orders**”). The Service Orders stated that they were issued on 31 July 2014. They were signed by SpaceCom on 15 August 2014, the same day as the 2014 MSA. Pursuant to the Service Orders, SpaceCom was to provide transponder capacity on the IS-904 satellite for a period of 26 months and on the ABS-7

satellite for a period of 24 months commencing 01 May 2014.

5. By way of background, it may be mentioned that the 2014 MSA was not the first agreement between the parties. The parties had previously entered into Master Service Agreement in 2007 effective from 25 September 2007 (the “**2007 MSA**”) as well as revised Master Service Agreement No.67007-B in 2013 (the “**2013 MSA**”) along with related service orders (Service ID Nos. 1007A and 1012B). Disputes under the 2013 MSA were resolved through a settlement agreement between the parties executed on or around 30 April 2014 (the “Settlement Agreement”) which involved the payment of certain sums by Wateen to the Applicant as well as the parties entering into the 2014 MSA. The parties entered into the 2014 MSA, however, it is alleged by SpaceCom that Wateen failed to pay the full settlement sums on time in breach of its terms.

6. It may be noted that the detailed facts and history of events between the parties including their dispute formed the subject matter of the Award on the Merits along with Appendix I (Partial Award on Jurisdiction and Procedural Objection) mentioned below and are narrated in detail therein.

7. For the purposes of the instant Application, the relevant fact is that the parties agreed upon, executed, and entered into the 2014 MSA, which finally and upto till its termination governed the relationship between the parties superseding any previous MSA. SpaceCom submits that the parties not

only accepted the obligations contained in the 2014 MSA but also acted upon the agreement.

8. SpaceCom states that differences arose between the parties during the subsistence of the 2014 MSA arising out of the fact that while Wateen profited from the Satellite Services provided by SpaceCom, it repeatedly failed to pay for them remaining consistently in default of its various contractual obligations to pay sums due to SpaceCom.

9. SpaceCom initiated arbitration with DIFC-LCIA (First RFA). DIFC-LCIA sought clarification on the applicability of the rules from both the parties by reference to the arbitration agreement which provided for arbitration "*In Dubai, UAE pursuant to rules of arbitration of the Dubai International Financial Center (DIFC)*" rather than expressly referring to the rules of DIFC-LCIA. It is pertinent to mention that DIFC has a separate court and a legal system which governs matters of arbitration and is the appointing authority in DIFC arbitration law. DIFC-LCIA, on the other hand, is an arbitral institution and differs from DIFC on that account. (These terms will be expanded in the later part.

10. In response to the Email by DIFC-LCIA, SpaceCom responded in the following terms:

"Regarding your inquiry below, the Claimant responds that the language at issue was drafted by the Respondent. It was and remains Claimant's understanding that when the parties referred to "the Rules of Arbitration of the Dubai International Financial Centre", they in fact meant the Rules of the DIFC-LCIA. That said, the Claimant is not aware of any evidence relevant to this question.

If the Respondent disagrees with the Claimant's understanding, the Claimant is willing to agree to proceed under the second scenario (arbitration under the DIFC

Arbitration Law, with the DIFC court as appointing authority for the third arbitrator)."

11. A reading of the response, set out above, would show that SpaceCom itself was not clear regarding precise sweep of the arbitration clause relating to rules of arbitration and whether the rules of DIFC court or DIFC-LCIA would apply. Rather it was willing to engage with Wateen to agree to proceed for arbitration under either of the laws. During this period Wateen did not formally take a position. Correspondence was exchanged on the issue between the parties but it is the case of SpaceCom that Wateen failed to take any position and in the meantime SpaceCom emailed Wateen for appointment of the Arbitral Tribunal to which there was no response. This was done on 02.02.2016 and 04.03.2016. SpaceCom thereafter issued a second RFA due to Wateen's refusal to clarify. On 25.07.2016 Wateen claimed arbitration in Dubai UAE while refusing *ad hoc* arbitration. The contents of Wateen's refusal dated 25.07.2016 are set out below:

"We are in receipt of your document entitled "Request for Arbitration", in respect of which, we have the following observations and reservations.

Pursuant to Clause 14 of the MSA, any arbitration between the Parties is to be conducted in Dubai UAE, whereas you have erroneously and arbitrarily determined DIFC as the venue. We understand that the Dubai International Financial Centre is a special economic free zone forming an "offshore" jurisdiction separate from mainland" Dubai. The reality is that the contract was not executed in the Dubai International Financial Centre, neither party is based in the Dubai International Financial Centre, the contract was not performed in the Dubai International Financial Centre, there is no connection whatsoever with the Dubai International Finance Centre, and we do not consent to it and any such attempt is clearly in contravention of the arbitration process envisaged in the MSA.

Additionally you have asserted that the arbitration shall be subject to the "DIFC Arbitration Law". We see nothing in

the arbitration clause to that effect and since your understanding of the seat/venue is also misconceived, we do not provide our consent to it.”

12. The above position clarifies the stance of Wateen that the seat of arbitration is to be Dubai UAE which is mainland Dubai as distinguished from an offshore jurisdiction vesting in DIFC. Thus, for the first time on 25.07.2016 Wateen comes forth on its stated position with regard to the seat of arbitration and denies jurisdiction to vest in DIFC-LCIA. In the meantime SpaceCom filed arbitration claim form in DIFC court of first instance for declaration of DIFC seat and appointment of Arbitral Tribunal. To counter this, Wateen filed a suit in August 2016 in Lahore and obtained injunction in the Lahore suit. SpaceCom also sought an anti-suit injunction in DIFC court which was granted on 25.02.2017. The final anti-suit injunction was granted by DIFC court on 09.03.2017. While doing so, the court also confirmed DIFC as the seat of arbitration. On 14.03.2017 Wateen withdrew proceedings in the Lahore suit and made an application to the DIFC court on 09.04.2017 whereupon DIFC court issued a clarificatory ruling on 23.5.2017 reiterating its earlier ruling regarding seat of arbitration and the rules applicable thereto. On 09.08.2017 SpaceCom filed an amended request for arbitration and proceedings commenced through third RFA.

Arbitrators:

13. As adumbrated, clause 14 contains the dispute resolution clause and provides that:

“14. Dispute resolution. This agreement and any disputes arising hereunder shall be governed by the law of the Commonwealth of Virginia, without regard to the conflicts of laws provisions thereof. In the event of any dispute

leading to arbitration or litigation hereunder, the prevailing Party shall be entitled to an award of attorney's fees and costs. Any dispute arising out of or in connection with this Agreement, or the breach, termination, or validity hereof, shall be resolved through arbitration in Dubai U.A.E pursuant to the Rules of Arbitration of the Dubai International Financial Centre (DIFC) by a panel consisting of three arbitrators. One arbitrator shall be appointed by each party, and the parties shall agree on the third, who shall be the chairman of the arbitration panel, provided that if the parties cannot agree on the third arbitrator, then the two selected arbitrators shall jointly appoint the third (failing which the third arbitrator shall be selected by DIFC). The decision of the arbitration panel shall be binding and judgment on the decision may be entered in any court empowered to enforce it.”

14. It is clarified that the parties nominated their arbitrators and the third arbitrator was nominated by the two arbitrators appointed by the parties. Thus, neither DIFC court nor DIFC-LCIA nominated the arbitrators. The arbitration proceedings were registered as DIFC-LCIA arbitration No.DL 17109 and commenced on 9 August 2017. The seat of arbitration proceedings was the Dubai International Financial Centre (DIFC) which is a financial free zone within Dubai UAE. UAE is a contracting state to the 1958 *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention)*. The following awards were rendered by the Arbitral Tribunal:

- (i) “Award on the Merits dated 15 April 2020 in DIFC-LCIA Arbitration No.DL 17109 between SpaceCom International, LLC (“SpaceCom”) and Wateen Telecom Limited (“Wateen”) including Appendix 1 i.e. Partial Award on Jurisdiction and Procedural Objection dated 22 November 2018 between the same parties and Appendix II Interest Calculation; and
- (ii) Award on Costs dated 08 November 2020 in the same arbitration between the same parties.
(The Awards above are hereinafter collectively referred to as the “Awards”)”

15. The Application is accompanied by certified copy of Award on merits dated 15 April 2020 along with appendix I

and II and certified copy of the Award on costs dated 8 November 2020.

16. Prior to this on 29 March 2018, the Arbitral Tribunal notified the parties that it had decided that the arbitration proceedings would be bifurcated so as to deal with the respondents' jurisdictional and procedural objections first. Following a hearing on jurisdictional and procedural objections on 27 September 2018, the Tribunal issued its Partial Award on jurisdictional and procedural objection dated 22 November 2018 (**the Partial Award**). The Arbitral Tribunal held that:

"267. The Tribunal awards, declares and orders as follows:

- (1) *The DIFC Court's ruling and order in Claim No.ARB-010-2016 dated 09 March 2017 and 23 May 2017 are res judicata as between the Claimant and the Respondent and have preclusive effect in this arbitration;*
- (2) *Accordingly, the seat of this arbitration in the Dubai International Financial Centre and the arbitration rules applicable in this arbitration are the Arbitration Rules of the DIFC-LCIA Arbitration Centre;*
- (3) *The Claimant has not waived the right to pursue, and is not estopped from pursuing, arbitration against the Respondent pursuant to the Arbitration Rules of the DIFC-LCIA Arbitration Centre under the Master Service Agreement executed between the parties on 15 August 2014 (Spacecom Service Agreement No.30-07014);*
- (4) *The Tribunal declines to stay these arbitration proceedings;*
- (5) *The Respondent's challenge to the jurisdiction of this Tribunal relating to the applicable arbitration rules and the Respondent's procedural objection relating to the seat of the arbitration are dismissed; and*
- (6) *The issues of the parties' legal and other costs incurred is deferred to the merits stage of this arbitration."*

17. According to the Arbitral Tribunal, DIFC court's ruling and orders in claim ARB-010-2016 dated 9 March 2017 and 23 May 2017 are *res judicata* as between the claimant and Wateen and have preclusive effect in the arbitration proceedings. Accordingly, it was held that the seat of

arbitration was DIFC and the applicable rules would be the arbitration rules of DIFC-LCIA arbitral centre.

Wateen's Defence and its rebuttal:

18. Wateen's defence under the 2011 Act is premised on Articles V (1)(d) and V(2)(b) of the Schedule to the 2011 Act which provides that:

"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought. Proof that:-

(d) 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;"

"V(2)(b) The recognition and enforcement of the award would be contrary to the public policy of that country.

19. Article V (2)(b) provides the grounds on which recognition and enforcement of award may be refused at the request of the party against whom it is invoked. Two of the grounds invoked by Wateen are contained in the clauses set out above. Wateen alleges that the composition of arbitral authority for the arbitral proceedings was not in accordance with the agreement of the parties. Learned counsel for Wateen has elaborated upon this argument by reference to the arbitration clause and in particular the reference to the seat of arbitration contained in clause 14 which clearly states that any dispute arising out of the agreement shall be resolved through arbitration in Dubai, UAE pursuant to the rules of arbitration of Dubai International Financial Centre by a panel consisting of three arbitrators. Learned counsel laid much emphasis on the intention of the parties to establish Dubai UAE as the seat of arbitration and no other

seat. According to the learned counsel, Dubai refers to the on-shore juridical seat of Dubai, subject to the federal arbitration laws of UAE, as distinguished from an off-shore jurisdiction, that is, Dubai International Financial Centre which has been established as a special economic free zone. Learned counsel for SpaceCom did not rebut the proposition that these were two different jurisdictions and were governed by separate streams of law. Indeed DIFC is a special economic free zone and has been separated from Mainland Dubai in the applicability of laws and in particular laws relating to arbitration. The rules of DIFC-LCIA which have been formulated by the arbitral institution set up in DIFC would be rules of arbitration in cases coming before DIFC courts in which arbitration is held under the auspices of DIFC courts. Therefore, the question is clearly one of jurisdiction and goes to the competence of DIFC-LCIA to embark upon arbitration in this matter where the parties had clearly mentioned Dubai UAE as the seat of arbitration. It is clear that the defence raised by Wateen is covered by Article V (1)(d) of the 2011 Act for this Court to determine whether the defence is sustainable and on that basis the recognition and enforcement of the Awards may be refused.

Determination:

20. Learned counsel for Wateen while expanding his defence reiterated that the seat of arbitration is pivotal in any arbitration proceedings and cannot be brushed under the carpet. It constitutes a vital defence envisaged by the 2011 Act and is analogous to an exclusive jurisdiction clause. This Court ought to refuse the recognition and enforcement

of the award on this basis. The seat of arbitration in this case was Dubai UAE and not DIFC which are different jurisdictions and have separate application of laws. Dubai is one of the seven emirates of the United Arab Emirates. Following Article 104 of the United Arab Emirates Constitution, 1971 (“**UAE Constitution**”), Dubai has its own judicial hierarchy comprising of the Court of First Instance (which hear all claims related to civil and commercial matters), the Court of Appeal, and the Court of Cessation, established since 1970. In relation to arbitration proceedings, as codes of procedures is a federal subject under Article 121 of the UAE Convention, the law applicable in Dubai was set out in UAE civil Procedure Code, enacted through the Federal Law No.11 of 1992. The Federal Law No.11 of 1992, in other words, sets out the procedural law applicable to arbitrations seated in Dubai. In 2018, UAE enacted Federal Law No.6 of 2018 (on arbitration), which amended the Federal Law No.11 of 1992.

Learned counsel referred to the constitutional amendment No.1 of 2004 which *inter alia* provides that;

“...the order and the manner of establishing Financial Free Zones and the boundaries within which they are exempted from having to apply rules and regulations of the Union.”

21. It is clear in terms of the Constitution of UAE that the Union has the authority to establish financial free zones and the boundaries within which they are exempted from having to apply rules and regulations of the Union. By the federal decree No.35 for the year 2004, Dubai International

Financial Centre was established as a financial free zone in the Emirates of Dubai which was followed by law No.9 of 2004 in respect of DIFC. Law No.9 of 20004 established a Centre, that is, DIFC which was meant to have financial and administrative independence and *inter alia* had dispute resolution authority as one of its attached bodies. It was envisaged that an Arbitration Institute would be established under the Centre to perform its functions independently in accordance with the Centre's laws and the constitution of the Arbitration Institute which will be promulgated by a resolution of the President. It was clearly provided by Article X that Centre establishments shall carry out their activities in accordance with the Centre's laws, Centre's Regulations and the licenses issued to them. By Article 13 it was unambiguously provided that the Centre's bodies and Centre establishments shall carry on their commercial activities in accordance with the Centre's laws and Regulations. By clause 2 of Article 13 it was specifically clarified that the Centre, Centre's Bodies, Centre establishment and their employees and their delegates **shall not be governed in relation to matters within the jurisdiction of the Centre by the laws of the Emirates and the rules and regulations of any local government body.**

22. A reference to the provisions of law No.9 of 2004 leaves it in no manner of doubt that DIFC established by the law would have an independent and separate existence and would be governed by its own laws as distinct from the laws of Emirates. DIFC Law No.10 of 2004 is, in essence, the

civil procedure code applicable in DIFC. Article 30 of the DIFC Court Law 2004 allows the DIFC courts to not only apply the laws applicable in DIFC or such law as is agreed between the parties but not the laws applicable in the rest of UAE. DIFC Law No.1 of 2008, enacted in 2008 by the Ruler of Dubai was legislated as the arbitration law applicable in DIFC. Thus, it cannot be argued with any degree of certainty that DIFC and Dubai UAE could be referred to interchangeably as one and the same entity for clearly they have separate sets of laws. The intention to place them in different compartments has a palpable purpose and must be given effect as this would assume significance in the context of the defence set up by Wateen. To substantiate this argument, learned counsel for Wateen referred to a decision made by DIFC court in claim No.CFI 011/2009 decided in the judicial authority of the Dubai International Financial Centre by the court of first instance. In that case, the question squarely was whether the seat was DIFC or Dubai UAE. It was stated in the decision that different laws applied in DIFC as distinguished from Dubai UAE and the two terms were clearly not synonymous or interchangeable. Further if the parties want DIFC law to apply and DIFC courts to have jurisdiction over an arbitration, they should expressly select DIFC as the seat of their arbitration agreement.

Tribunal's decision regarding jurisdiction:

23. It will be recalled that Wateen filed a suit before the Civil Courts at Lahore in August 2016. To counter that SpaceCom filed an anti-injunction suit in DIFC court. The

DIFC court not only decided the plea of injunction brought by SpaceCom but also went on to decide the question regarding seat of arbitration. The suit was titled ‘SpaceCom International LLP and Wateen Telecom (Pvt.) Ltd etc. and was fixed before the court of first instance DIFC courts. In the ruling rendered by Justice Sir Jeremy Cook it was held that:

“...The law which governs the agreement is that of the Commonwealth of Virginia in the USA but no evidence has been put before me as to that law, so for current purposes it is to be treated as the same as the law in DIFC. That is the only law which can fall to be applied at present. If the position is that the DIFC is the seat of the arbitration, then the DIFC court is the supervisory court and its jurisdiction and power to grant the interim injunction is undoubtedly...”

24. In the final ruling rendered on 09.03.2017 the issue relating to injunction as well as the seat of arbitration was decided but was more specifically elaborated in a ruling issued at later stage as a clarificatory ruling made pursuant to the request of the lawyers representing both parties in relation to orders and judgments given earlier and in particular the judgment of 25 February and the order of 9 March 2017. In the clarificatory ruling the following determination with regard to the seat of arbitration was rendered:

“This and the judgment of the same date made it plain beyond doubt, that the Court had decided that the seat of the arbitration was the DIFC and that the parties were bound by an agreement to arbitrate in the DIFC under DIFC/LCIA Rules and could not arbitrate elsewhere. The ad hoc arbitration, commenced in case the Court should find that there was no binding agreement to arbitrate under DIFC/LCIA Rules, was therefore the subject of the injunction also.”

25. Thus, DIFC court decided that the seat of arbitration was DIFC and the parties were bound to arbitrate in the

DIFC under DIFC-LCIA rules and could not arbitrate elsewhere.

26. Wateen joined issue before the Arbitral Tribunal and once again raised the question of jurisdiction reiterating its earlier stance regarding lack of competence in DIFC courts to enter upon arbitration proceedings asserting instead that the seat of arbitration had to be Dubai UAE as consented to by the parties in the arbitration agreement. The Arbitral Tribunal determined the said issue which is stated in the Award in paragraphs 184 to 196. The Tribunal laid much emphasis on the decision of 9 March, 2017 by DIFC court while making the final anti-suit injunction and holding that the seat of arbitration was DIFC. The entire discussion of the Tribunal hinged upon the decision of DIFC court. In paragraph 196 it was stated that:

“196. The Tribunal thus decides that the DIFC Court had jurisdiction to issue the interim anti suit injunction pursuant to the DIFC Arbitration Law and the JAL and that it had jurisdiction to make that injunction final, and to interpret the arbitration clause in doing so, by virtue of the Respondent’s failure to invoke the arbitration clause pursuant to Articles 13(1) of the DFIC Arbitration Law and Article 11(3) of the New York Convention.”

27. By a strange set of reasoning the Tribunal handed a decision regarding the competence of DIFC court to issue interim anti-suit injunction. The Tribunal thus perched itself in a dominant position over and above the DIFC court and endorsed the act of DIFC court in assuming jurisdiction to issue anti-suit injunction as well as a decision on the seat of arbitration. There is further discussion regarding this aspect in paragraphs 203 to 208 of the award. Finally it was concluded that:

“210. The Tribunal thus decides that the DIFC Court’s decision of 9 March 2017 on the final injunction, its Order with reasons of 23 May 2017 and its clarificatory ruling of 23 May 2017 all became final and binding on the parties.

216. The Tribunal thus decides that the DIFC Court’s decision of 9 March 2017 on the final injunction and its clarificatory ruling of 23 May 2017 are each a res judicata as between the parties.

28. In a nub, the Tribunal’s conclusion was based on the findings of DIFC court regarding the seat of arbitration and it was held by the Tribunal that the decision of DIFC court operated as an issue preclusion regarding jurisdiction and therefore could not be reagitated before the Tribunal. This was clearly a fallacy on the part of the Tribunal. In the first instance, the DIFC court should not have gone beyond the case before it in seeking an interim injunction filed by SpaceCom to decide on the question of seat of arbitration as well. Secondly, there was no warrant to hold that this aspect of the decision operated as *res judicata* between the parties and the Tribunal was precluded from entering on this controversy afresh. While doing so, the Tribunal abdicated its power which is vouched by respectable authority to decide the question of jurisdiction and has a purpose stated in a large number of authorities on the subject.

29. It is well established that the arbitrators are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties but for the purpose of satisfying themselves as a preliminary matter whether they ought to go on with the arbitration or not. This was explained in an English case reported as *Christopher*

Brown Ltd. v Genossenschaft Osterreichischer [1954] 1 QB 8, 12-13 contained in the following passage:

"It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally. Nor it is the law that they are bound to go on without investigating the merits of the challenge and to determine the matter in dispute, leaving the question of their jurisdiction to be held over until it is determined by some court which had power to determine it. They might then be merely wasting their time and everybody else's. They are not obliged to take either of those courses. They are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties - because that they cannot do - but for the purpose of satisfying themselves as a preliminary matter whether they ought to go on with the arbitration or not. It has become abundantly clear to them, on looking into the matter, that they obviously had no jurisdiction as, for example, it would be if the submission which was produced was not signed, or not properly executed or something of that sort, then they might well take the review that they were not going to go on with the hearing at all. They are entitled, in short, to make their own inquiries in order to determine their own course of action, and the result of that inquiry has no effect whatsoever upon the rights of the parties."

30. Courts have recognized the autonomy of forum

selection clause in international trade. "Agreeing in advance

on a forum acceptable to both parties is an indispensable

element in international trade, commerce and contracting"

(*Bremen v. Zapata Off-Shore Co.* 407 U.S. 1, 13-14 and that

a choice of forum is "an almost indispensable precondition

to achieving the orderliness and predictability essential to

any international business transaction". (*Scherk v. Alberto*

Culver Co. 417 U.S. 506-519). It has also been recognized

that the New York Convention was enacted to promote the

enforcement of international arbitration agreements and

favours enforcement of arbitration clauses according to the

intent of the contracting parties Louis Dreyfus Commodities

Suisse S.A. v. Acro Textile Mills Limited (PLD 2018 Lahore

597). It was held in Zaver Petroleum Cop. Ltd. v. Saif Energy Ltd. (C.S No.1 of 2019) (IHC) that “*party autonomy is considered as the cornerstone of arbitration. There is indeed no prohibition on two Pakistani parties from opting for a foreign seat of arbitration.*” The Tribunal must follow the procedure that is agreed upon by the parties. In *Encyclopaedia Universalis SA v Encyclopaedia Britannica Inc.* (2nd Cir. 2005), a U.S Court emphasized the importance of upholding the parties’ agreement and held:

“*While we acknowledge that there is a strong public policy in favour of arbitration, we have never held that courts must overlook agreed-upon arbitral procedure in deference to that policy. The federal policy is simply to ensure the enforceability according to their terms, of private agreements to arbitrate.*”

31. Learned counsel for Wateen relied upon a judgment of the United States Court of Appeals Ninth Circuit “*POLIMASTER LTD. v. RAE SYSTEMS, INC.*, 623 F.3d 832” for the proposition that this Court as the Enforcing Court may review *de novo* the question whether a party established its defence to enforcement of arbitral award under the New York Convention. No doubt, the party raising the defence has the burden of showing the existence of a New York Convention defence which burden is substantially high and the public policy in favour of international arbitration is strong. It is also axiomatic that in any such inquiry we must begin with the language of the parties arbitration agreement (the case law in this regard has been cited with approval in *Polimaster*). It was further held on the basis of a plethora of judgments that the choice of forum was presumptively enforceable. Finally, on the basis

of facts in that case, it was held that the enforcing court may refuse an enforcement of award if it is the result of procedures that are contrary to the parties' agreement. The issue that arbitration was not conducted at the seat of arbitration agreed by the parties or the forums so selected, would constitute a defence under the New York Convention and on this basis the enforcement of an award may be refused.

32. The courts in the United Kingdom have thoroughly explored the principle of *de novo* review in relation to Article V of the Convention in the landmark judgments in litigation between Dallah Real Estate and Tourism Holding Company and the Ministry of religious Affairs, Government of Pakistan:

(a) In Dallah v Pakistan [2008] EWHC 1901, Aikens J in Queen's Bench Division held at Para 82 to 83.

"...so far as English law is concerned, the matters set out in paras (a)-(f), including issues of foreign law, are all matters of fact.

Thus a party must be entitled to adduce all evidence necessary to satisfy the burden of proof on it to establish the existence of one of the grounds set out in s 103(2). I accept, of course, that questions of issue estoppel may arise (as in this case), which would prevent one or other party re-fighting issues of fact that have already been specifically argued and decided, as between those parties, on the merits by a competent tribunal. But, subject to that constraint, it seems to me that the statutory wording of s 103(2) requires that the party wishing to challenge the recognition and enforcement of a Convention award must be entitled to ask the court to reconsider all relevant evidence on the facts (including foreign law), as well as apply relevant English Law."

Aiken J held, at Para 149, the arbitral tribunal's determinations on the validity of the arbitration agreement did not create an issue estoppel.

The Court found that there was no valid arbitration agreement between Dallah and Pakistan and refused to recognise and enforce the foreign award made in Paris, France against Pakistan.

(b). Dallah's appeal against the judgment of the Queen's Bench Division was dismissed. The Court of Appeal endorsed the views of Aikens J. Dallah filed a further appeal before the Supreme Court of United Kingdom.

(c) The Supreme Court of the United Kingdom dismissed Dallah's appeal in *Dallah v Pakistan [2010] UKSC 46*.

In reaching this decision,

(i). Lord Mance, at Para 30, concluded that the arbitral tribunal's own view of its jurisdiction has no legal or evidential value:

*"The nature of the present exercise, is, in my opinion, also unaffected where an arbitral tribunal has either assumed or, after full deliberation, concluded that it had jurisdiction there is in law no distinction between these situations. The tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all. This is so however full was the evidence before it and however carefully deliberated was its conclusion. It is also so whatever the composition of the tribunal – a comment made in view of Dallah's repeated (but no more attractive for that) submission that weight should be given to the tribunal's "eminence" "high standing and great experience". The scheme of the New York Convention, reflected in ss. 101-103 of the 1996 Act may give limited *pirma facie* credit to apparently valid arbitration award based on apparently valid and applicable arbitration agreements, by throwing on the person resisting enforcement the onus of proving one of the matters set out in Article V(1) and s. 103. But that is as far as it goes in law. Dallah starts with advantage of service, it does not also start fifteen of thirty love up."""*

(ii) Lord Collins, after framing the issue of whether an English court can refuse to recognise and enforce an arbitral award issued by "a former Law Lord and a doyen of international arbitration, a former Chief Justice of

Pakistan and an eminent Lebanese Lawyer" (at Para 99,) concluded that enforcement courts are bound to revisit the issues that relate to serious and fundamental structural integrity of arbitration proceedings (at Para 102 to 104)

"But article V safeguards fundamental rights including the right of a party which has not agreed to arbitration to object to the jurisdiction of the tribunal. As van den Berg, the New York Arbitration Convention of 1958 (1981) puts it, at p 265: "In fact, the grounds for refusal of enforcement are restricted to causes which may be considered as serious defects in the arbitration and award... In Kanoria v Guinness [2006] 1 Lloyd's Rep 701, 706, May LJ said that section 103(2) concerns matters that go to the "fundamental structural integrity of the arbitration proceedings."

Nor is there anything to support Dallah's theory that the New York Convention accords primacy to the courts of the arbitral seat, in the sense that the supervisory court should be the only court entitled to carry out a re-hearing of the issue of the existence of a valid arbitration agreement; and that the exclusivity of the supervisory court in this regard ensures uniformity of application of the Convention. There is nothing in the Convention which impose an obligation on a party seeking to resist an award on the ground of the non-existence of an arbitration agreement to challenge the award before the courts of the seat.

It follows that the English court is entitled (and indeed bound) to revisit the question of the tribunal's decision on jurisdiction if the party resisting enforcement seeks to prove that there was no arbitration agreement binding upon it under the law of the country where the award was made"

(iii) Lord Saville held that the arbitral tribunal's ruling on its jurisdiction cannot even be the starting point of the analysis of the arbitration agreement. Lord Saville held at Paras 158 to 159:

"In the present case the arbitrators have made a ruling, as they were doubles entitled to do under the doctrine of kompetenz kompetenz, that there was an arbitration agreement between the parties, so that they were able to hear and decide the merits of the case, which they then proceeded to do. However, under Section 103 of the Arbitration Act 1996 (as under the New York Convention itself) the person against whom the award was invoked has the right to seek to prove that there was no arbitration

agreement between the parties, so that in fact the arbitrators had no power to make an award. The question at issue before the court, therefore, power to make an award. The question at issue before the court, therefore, was whether the person challenging the enforcement of the award could prove there was no such agreement.

In these circumstances, I am of the view that to take as the starting point the ruling made by the arbitrators and to give that ruling some special status is to beg the question at issue, for this approach necessarily assumes that the parties have, to some extent at least, agreed that the arbitrators have power to make a binding ruling that affects their rights and obligations; for without some such agreement such a ruling cannot have any status at all.”

33. Wateen submits that Lord Saville’s views above merit particular attention. Lord Saville’ views signpost the circularity of the logic in which the Parties would fall if the tribunal’s own views as to its jurisdiction are taken as the starting point. I tend to agree that where the question is one of the Parties’ selection of the seat of arbitration, the judgment of the disputed seat’s court has no value or special status. The enforcement court needs to conduct a *de novo* review of the Parties’ evidence and submissions to determine the seat of arbitration.

34. This Court is not precluded in any sense whatsoever from conducting a *de novo* review of the Respondent’s evidence and submissions with reference to Article V(I)(d) of the convention. In *Dallah*, Lord Collins has suggested a step further and stated that the enforcement court is “indeed bound” to revisit the issues relating to Article V of the Convention. As such, this Court is required by the Article V of the Convention to conduct a fresh review of the Parties’ evidence to assess whether the grounds enumerated in Article V of the Convention are met or not.

Seat of Arbitration:

35. In the law of arbitration seat is a matter of crucial significance. It has a purpose and surely it is not a painting to be looked at without more. Learned counsel for the respondent has rightly relied upon the case of *ST Group Co. Ltd. & 2 others v Sanum Investments Ltd.* [2019] SGCA 65 decided by the Singapore Court of Appeal to set aside an arbitral award while relying upon Article V(1)(d) of the Convention. Two consequences, according to *ST Group Co.* follow the selection of seat of arbitration:

“(a). First, the selection of the seat of arbitration by the Parties contains in itself the choice of the procedural/curial law of arbitration. Law of seat of arbitration is the procedural law of arbitration proceedings. The Court explained at Para 96:

“The choice of an arbitral seat is one of the most important matters for parties to consider when negotiating an arbitration agreement because the choice of seat carries with it the national law under whose auspices the arbitration shall be conducted.”

(b). Second, the selection of the seat of arbitration by the Parties designates the system of courts that would have supervisory jurisdiction over the arbitration and would be the forum of remedies against the arbitral awards. The Court observed at Para 98:

“In addition to the external relationship with national courts, the law of the seat is also vital in governing significant issues relating to the conduct of an international arbitration and the validity and finality of the award resulting from the proceedings. The choice of the seat in and of itself represents a choice of forum for remedies.”

Following the principle, the Court observed at Para 101 that “the English courts have gone further [and] observed that “an agreement as to the seat of the arbitration” is “analogous to an exclusive jurisdiction clause”. Therefore, “any claim for a remedy going to the existence or scope of the arbitrator’s jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration.”

36. Reference may also be made to the case of *Enka v. Chubb* [2020] UKSC 38 which states that:

“1. Where an international commercial contract contains an agreement to resolve disputes by arbitration, at least three systems of national law are engaged when a dispute occurs. They are: the law governing the substance of the dispute; the law governing the agreement to arbitrate; and

the law governing the arbitration process. The law governing the substance of the dispute is generally the law applicable to the contract from which the dispute has arisen. The law governing the arbitration process (sometimes referred to as the “curial law”) is generally the law of the “seat” of the arbitration, which is usually the place chosen for the arbitration in the arbitration agreement. These two systems of law may differ from each other. Each may also differ from the law which governs the validity and scope of the arbitration agreement.”

37. The above statement of law regarding arbitration is premised on a plethora of judgments and derives support from the case law handed down by the courts across various jurisdictions. The seat of arbitration relates to the law governing the arbitration process and entails in itself a selection of curial / procedural law, that is, national law under whose supervision the arbitration shall be conducted. For the elaboration of these concepts one may allude to the Treaties, *Russell on Arbitration (21st Edition)* which have been updated in the subsequent editions of the same Treaties. The seat or place of arbitration has been explained in *Russell* as follows:

“2-097 The “seat” or place of arbitration. Like other jurisdictions, England regard it as essential for an arbitration to have a “seat”, a geographical location to which the arbitration is ultimately tied and which prescribes the procedural law of the arbitration. The parties are free to choose a seat, or specifically, a procedural law of the arbitration, which may be different from the proper law of the contract and the proper law of the arbitration agreement. English law does not recognise the possibility of “delocalised” arbitral procedures which do not have a connection with any national system of law. Under English law the procedural law of an arbitration is generally the law of the country in which the arbitration has its seat. The parties’ choice of a seat is therefore extremely important, not simply in relation to the proper law of the contract, but also because the law of a particular seat may contain provisions which have important consequences for the conduct of the proceedings. The expression “seat” is often used to refer to the particular city chosen, rather than the country (for example, “arbitration in London”) and while the parties’ agreement is on a city, the crucial choice is of the jurisdiction in which the city is located. An effective choice of procedural law can always be made without reference to a specific venue for the arbitration, but

by specifying a jurisdiction: but this is much less common. The seat is the legal, rather than the physical, place of arbitration proceedings, and hearing can be held in other jurisdictions.”

38. Thus, an arbitration must have a seat which signifies a geographical location to prescribe the procedural law of the arbitration. There is an autonomy and freedom which inheres in the parties to choose a seat (specifically procedural law of the arbitration) and which, according to Russell and the case law on which it is based, may be different from the proper law of the contract and the proper law of arbitration agreement. Thus, the parties' choice of the seat is extremely important simply because the law of a particular seat may contain provisions which have important consequences for the conduct of the proceedings. It has further been stated in Russell that the seat is the legal rather than physical place of arbitration proceedings and it does not matter whether hearings are held physically at the seat chosen by the parties or some other jurisdiction. This will not detract from the fact that the seat of arbitration chosen by the parties will be the curial law of arbitration. The contractual wording of clause 14 makes clear that the parties to MSA 2014 resolved that the seat of arbitration would be Dubai, UAE. Clause 14 of the agreement goes on to state further that arbitration shall be pursuant to the rules of arbitration of DIFC. This, however, does not depreciate the primary argument regarding the seat of arbitration and the reference to the rules of DIFC (though the parties agree that there are no rules of DIFC as such) has connection with the conduct of the arbitration proceedings to be in accordance

with such rules. The parties, therefore, selected the procedural rules of arbitration proceedings independently from the seat of arbitration. It is conceded in any case that DIFC has no independent rules of arbitration which have been formulated by DIFC-LCIA, which is an arbitral institution, distinct and separate, though within DIFC's jurisdiction.

39. *Russell* further alludes to the concept of hearings in different location to state that:

"Hearing in different locations. In international arbitrations meeting or hearings may take place in several countries, without changing the seat. In these cases it is important not to confuse the seat with what is simply the appropriate or convenient geographical location for particular hearings. It will be necessary to ensure that any mandatory local law requirements of the place where the meeting or hearing takes place are complied with."(2-104)

40. It is now an established principle of arbitration that while the law of an arbitration agreement usually follows the proper law of the main contract, an arbitration agreement is separable from the main contract between the parties and an arbitration agreement may have a different law from that of the proper law. As to what matters are covered by the procedural law, the concept has been explicated in *Russell* to mean that:

"An exhaustive list of the matters covered by the procedural law of an arbitration is not possible: their nature and scope are determined by the law of the particular country. Conflicts may thus arise between the procedural law, the proper law of the contract and the law of the arbitration agreement or the law of the place of enforcement, particularly in relation to questions of arbitrability and validity, appointment of an arbitral tribunal, time limits, and the form and validity of the award. Under English law, in the absence of agreement, the procedural law of the arbitration normally determines questions relating to the appointment and revocation of the authority of the arbitration tribunal. For example where English law is the procedural law a party is able to apply to the court in relation to the appointment of an arbitrator where the other party does not concur. The procedural law also governs the

powers and duties of the arbitral tribunal, and remedies for breach of duty are also to be ascertained from the procedural law. The availability of interim and procedural remedies from the court, and the exclusion of such remedies, is also governed by this law, as are challenges to the award and the question of which law is to apply to the substance of the dispute..."

41. The list given above is not exhaustive as the statement itself admits. But the instances which have been referred and the challenges if brought, would certainly feed through the result of the decision-making process in arbitral proceedings. Some of them, if sustained, would be fatal to the decision. In the factual context of the present case, the distinction in jurisdictions of courts at Mainland Dubai, UAE and DIFC courts has already been underscored and leads indubitably to conclude that they operate under separate legal systems. The parties thus consciously and unmistakably chose Dubai as the seat of arbitration and it is unarguable on SpaceCom's part to contend otherwise. Learned counsel for SpaceCom in his arguments in this Court asserted that clause 14 was drafted by Wateen but the parties understood at all times that DIFC was to be the seat of Arbitration. This argument cannot prosper. Drafting of clause 14 loses significance when both parties signed the contract. Further, no material has been brought forth to establish the intentions of parties in the form of correspondence exchanged between parties prior to execution of contract. After the arbitration was triggered, Wateen's stated position did not waver and continued to be pegged to the notion of Dubai as the seat of Arbitration. (**Email of 25.7.2016**). Procedural objections were taken not only before the DIFC court but also before the Arbitrators.

These acts are sufficient to hold that at no point of time did Wateen forego its objection regarding seat of Arbitration. If we rummage through the emails exchanged with DIFC-LCIA one is driven to hold that the discourse revolved around which rules will apply to arbitral proceedings (since DIFC had no rules), rather than on the question respecting seat of arbitration which was a more fundamental question.

There is a palpable keenness on the part of DIFC court to assume jurisdiction in the matter in order to keep the arbitration within DIFC. This appetite to latch on to the arbitration permeates the orders which were handed down.

There is no discussion by DIFC court on the issue of seat of Arbitration in the judgment of 9 March 2017 which was given ex-parte as Wateen refused to appear while stating in a letter that “they had not been given sufficient time and also suggesting that the court had a closed mind.” Such a judgment could hardly be termed as *res judicata* between the parties on the issue of seat.

Dubai as the seat of Arbitration:

42. Wateen submits that the Tribunal wrongly conducted the arbitration in DIFC against the express agreement of the parties which has been explained by reference to historical facts and timelines.

- “Prior to the execution of the Master Services Agreement dated 15 August 2014 (“MSA 2014”), the Parties executed the Master Services Agreement dated 25 September 2007 (“MSA 2007”), the Master Services Agreement dated 9 May 2013 (“MSA 2013”), and the Settlement Agreement dated 30 April 2014 (“the Settlement Agreement”).

- *MSA 2007, the MSA 2013, the Settlement Agreement – the precursors to MSA 2014 – stated that the arbitration shall take place in Dubai, U.A.E but pursuant to the arbitration rules of the ICC, as set out below:*

Agreement	Clause
MSA 2007, Clause 14	“Any dispute arising under this Agreement shall be resolved through arbitration in Dubai pursuant to the arbitration rules of the International Chamber of Commerce (ICC)..”
MSA 2013, Clause 14	“Any dispute arising under this Agreement shall be resolved through arbitration in Dubai pursuant to the arbitration rules of the International Chamber of Commerce (ICC)..”
Settlement Agreement Clause 15	“Any dispute arising in connection with or out of the construction, validity, performance or the interpretation of this Agreement, which the Parties cannot settle amicably, shall be finally settled by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three (3) arbitrators appointed in accordance with said Rules unless the parties agree on one (1) arbitrator. The arbitration proceedings shall be conducted in Dubai in the English Language.”
MSA 2014, Clause 14	“Any dispute arising out of or in connection with this Agreement, or the breach, termination, or validity hereof, shall be resolved through arbitration in Dubai U.A.E. pursuant to the Rules of Arbitration of the Dubai International Financial Centre (DIFC)”

43. It is submitted by Wateen that the history of the contracts between the Parties demonstrate that the Parties manifestly understood the distinction between the seat of arbitration (and its consequences) and procedural rules applicable to the arbitration. The Parties selected Dubai as the seat of arbitration in all four agreements above but selected arbitration rules of the ICC in MSA 2007, MSA 2013 and the Settlement Agreement whereas the non-existent “*the Rules of Arbitration of the Dubai International Financial Centre (DIFC)*” in MSA 2014. The Parties could have but did not change the status of Dubai as the seat of arbitration in MSA 2014. To read the arbitration agreement in any other way would be contrary to the intention of the

Parties, as expressed in the arbitration agreement set out in MSA 2014, and presume that the Parties, despite being sophisticated entities, did not know the difference between the seat of arbitration and procedural rules applicable to the arbitration.

44. In insisting on DIFC as the seat of arbitration, the Applicant has conflated: (a) the seat of arbitration with procedural rules applicable to the arbitration; and (b) the seat of arbitration with the appointing authority (in case of deadlock in the appointment of the third arbitrator) in Clause 14 of the MSA 2014. The Parties often select appointing authorities, such as presidents of arbitral institutional and other reputable bodies, to appoint an Arbitration Tribunal in case of a deadlock between the Parties in relation to the appointment. The object and purpose of these selections is to embody efficiency in the arbitration agreement and not to designate the seat of arbitration. If the Parties wanted their arbitration to be seated in DIFC, the Parties would have stated so expressly in their arbitration agreement.

45. The historical facts above are undisputed and have been brought forth by Wateen to demonstrate that in the historical context the parties manifestly understood the distinction between the seat of arbitration and the procedural rules applicable to the arbitration. At all times, the parties selected Dubai as the seat of arbitration in all four agreements whereas the arbitration rules were differently selected to apply to the agreement to arbitrate. It would be a fallacy on the part of the applicant/ SpaceCom to confuse the two concepts and to assert that notwithstanding the seat

of arbitration to be Dubai UAE, since the procedural rules applicable were those of DIFC, the arbitration proceedings ought to be held at DIFC as the seat of arbitration. On this basis, Wateen has made out a case that the arbitral award does not merit recognition and enforcement under the laws of Pakistan as it is not the result of arbitration that the parties had bargained for which was an arbitration in Dubai as opposed to DIFC.

46. There are two conflicting strands of judgments of DIFC courts relied upon by both the parties. But the overwhelming view is that “if parties want the DIFC Arbitration Law to apply and the DIFC courts to have jurisdiction over an arbitration, they should expressly select the DIFC as the seat in their arbitration agreement.”

(*Gaetan inc. v Geneva Investment Groups LLC [2015] ARB 010*). These judgments do not require an expansive dissection by this Court since they do not even have persuasive value in arriving at a conclusion.

47. In addition to the judgments of DIFC courts, the DIFC-LCIA Arbitration Centre—which prescribes accessible norms on drafting of arbitration agreements based on expertise and experience—recommended the parties to expressly mention DIFC as the seat of arbitration next to the seat/ place of arbitration for designation of DIFC as the seat of arbitration. The DIFC-LCIA Arbitration Centre’s model arbitration clause states:

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Arbitration Rules of the DIFC – LCIA Arbitration Centre, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three]

The seat, or legal place, of arbitration shall be [City and/or Country] (See Footnote)

The language to be used in the arbitration shall be [].

The governing law of the contract shall be the substantive law of [].

Footnote: If the intention is to choose Dubai International Financial Centre/DIFC as the seat, insert "Dubai International Financial Centre" or "DIFC" here.

48. In addition, Rule-1 of the DIFC-LCIA Arbitration Rules state:

"Where any agreement, submission or reference provides in writing and in whatsoever manner for arbitration under the rules of the DIFC-LCIA Arbitration Centre, the parties shall be taken to have agreed in writing that the arbitration shall be conducted in accordance with the following rules (the Rules) or such amended rules as the DIFC-LCIA Arbitration Centre that the Court of LCIA (the LCIA Court) may have adopted hereafter to take effect before the commencement of the arbitration."

49. The DIFC-LCIA Arbitration Centre's recommended arbitration clause is, unsurprisingly, consistent with the judgment in Dhir and Gaetan. The Parties did not follow either the prescriptions of the DIFC courts or the recommendation of the DIFC-LCIA Arbitration Centre. When read with the Parties contractual history, the only conclusion that can emerge is that the Parties unambiguously chose Dubai – and not DIFC – as the seat of arbitration. If the Parties had any other intention, the Parties would have (following clear instruction in DHIR, Gaetan, and the DIFC-LCIA Arbitration Centre's model arbitration clause) stated so in their arbitration agreement.

50. In the present case, the DIFC-LCIA refused to even register the First Request for Arbitration dated 18

June 2015 because the arbitration agreement did not expressly refer to the arbitration rules to the DIFC-LCIA Arbitration. The Applicant then commenced the Second Request for Arbitration on 26 June 2016 and pressed for an ad hoc arbitration (i.e., an arbitration not conducted under the auspices of any arbitration institution). Only after the issuance of the injunctions of the DIFC court, the Applicant again initiated the arbitration before the DIFC-LCIA Arbitration Centre by submitting the Third Request for Arbitration on 9 August 2017. Thus, in the absence of judgments of the DIFC courts, the DIFC-LCIA Arbitration Centre had declined jurisdiction in relation to the arbitration initiated by the Applicant. Even though the arbitration agreement did not designate DIFC as the seat of arbitration, the DIFC court assumed supervisory jurisdiction over the arbitration based on the misreading of the chosen seat of arbitration and read the arbitration rules of the DIFC-LCIA Arbitration Centre into the arbitration agreement between the Parties.

51. So the significance of the seat of Arbitration must not be lost on the parties or for that matter on the courts adjudicating such issues. This is a fundamental issue and should remain relevant at all stages of any arbitration. It cannot be rendered *non est* on the misplaced notions of approach in favour of enforcement and causality. It was argued that the procedural defect must be essential to the award and

prevents outcomes where new arbitral proceedings would eventually lead to the same result. This is based on a treatise, *New York Convention, edited by Dr. Reinmar Wolff (second edition 2019)*. This argument could prosper in respect of a procedural defect but the seat of arbitration is a jurisdictional fact and determines the curial / procedural law of the arbitration. The parties' choice of a seat is therefore extremely important because the law of a particular seat may contain provisions which have important consequences for the conduct of the proceedings. The list of matters covered by the procedural law of an arbitration has been set out in *Russell*. To allege that none of those arose in these proceedings would be taking a simplistic view of the entire issue. If Wateen had brought a challenge on any of the procedural issues before DIFC courts, it would be precluded from raising the issue by way of defence under Article V. Wateen was thus caught in a quandary and cannot be faulted on this account.

52. Wateen would also be confronted by another issue. In view of the meandering jurisprudence and since the stance on preclusion is not uniform in all contacting states, a respondent that fails to attack the award at the seat of arbitration may find itself able to resist enforcement in some jurisdictions, but may fail to prevent enforcement in others. It is stated in *New York Convention*:

“Courts from several common law countries have held that the failure to initiate setting-aside proceedings at the seat of the arbitration does not preclude a party from resisting enforcement in proceedings for the recognition and enforcement of the award. According to the Hong Kong Court, the losing party has a choice between both options. This was also the position adopted by the UK Supreme Court in Dallah real Estate v. Ministry of Religious Affairs, Pakistan. Similarly, the Singapore Court of Appeal, citing the above decisions, held that the enforcement regime of Article 36 of the Model Law (which is modelled on the enforcement regime of Article V) affords the party resisting enforcement a choice of remedies.”

53. The position has been summed up by Wolff in the following paragraph:

*“The position taken by the majority of courts in the more recent case law is in line with the concept that arbitral awards are subject to dual control. Where an award suffers from a defect under Article V, the losing party may, in principle, choose to attack the award in annulment proceedings at the seat of the arbitration. However, it is, in principle, not bound to do so. In particular, in cases in which the losing party does not have any assets in the country of the seat of the arbitration or where the law at the seat of arbitration does not afford effective legal remedies against the award, it may also choose to restrict its defense against the award to the proceedings for recognition and enforcement. Such behavior does not conflict with the prohibition of *venire contra factum proprium* as an underlying principle of the Convention. However, this is not without risk in practice: since the stance on preclusion is not uniform in all Contracting States, a respondent that fails to attack the award at the seat of the arbitration may find itself able to resist enforcement in some (or even most) jurisdictions, but may fail to prevent enforcement in others.”*

54. Thus the choice of forum is crucial in the context of seat of arbitration and the rule of dual control would suffer a serious setback if the agreed procedure were not followed.

55. United Nations Commission on International Trade Law (UNCITRAL) has issued a Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It affirms the prevalence of

party autonomy in the context of Article V(1)(d) in the following analysis:

“9. Article V (1)(d) expressly affirms the supremacy of the parties’ agreement concerning the composition of the tribunal procedure, and that the law of the place of arbitration should apply only ‘failing such agreement.’ Courts have consistently recognized that the grounds enumerated in article V (1)(d) must be measured, in the first instance, against the agreement of the parties.”

56. These observations are premised on a Report by the Secretary-General, Recognition and Enforcement of Foreign Arbitral Awards, E/2822, Annex II. The agreement of the parties, thus, retains primacy concerning arbitral procedure. Although the standard of proof for showing that the agreed arbitral procedure was breached is high and the burden is substantial, yet the agreement regarding the seat is a core arbitral procedure and the prerequisite of causality is not attracted. This defect is essential to the award and constitutes a ground for refusal.

56. Article V(1)(d) has two types of potential violations, concerning

- the composition of the arbitral Tribunal;
- the arbitral procedure.

(See, *ICCA's Guide to the Interpretation of the 1958 New York Convention, A Handbook for Judges, relied upon by SpaceCom*). According to this Guide, the second option of Article V(1) (d) is aimed at more fundamental deviations from the agreed procedure, which includes situations in which the parties agreed to use the rules of one institution but the arbitration is conducted under the rules of another. Reference has

been made in the Guide to the decision of a Turkish court of appeals which refused recognition and enforcement of a Swiss award on the ground that the procedural law agreed upon by the parties had not been applied. (*Turkey: Court of Appeals, 15th Legal Division, 1 February 1996, Yearbook Commercial Arbitration XXII (1997) pp. 807-814*). This is a clear case of deference to parties' autonomy and the whole structure of arbitration agreements is built around this concept. The point of agreeing a seat is to agree that the law and the courts of a particular country will exercise control over an arbitration which has its seat in that country to the extent provided for by that country's laws. A choice of seat can in these circumstances aptly be regarded as a choice of the curial law. Whether the seat was DIFC or Dubai mainland, it was irrational for DIFC courts to insist that jurisdiction lay with them to decide upon all procedural challenges. This is all the more perverse when we analyse SpaceCom's uncertainty on the issue. SpaceCom was always in doubt as to the seat of arbitration. This is evident from the correspondence and emails exchanged between the parties and with DFIC-LCIA. Hence the invoking of the doctrine of *contra proferentum* by SpaceCom.

57. In the written brief submitted by Space Com, states that "both parties have acknowledged that Clause 14 of 2014 MSA contains a pathology". This Court has not come across any acknowledgment of the kind by Wateen. The brief then goes on to refer to the "role of

an Arbitration Court in interpreting a pathological clause” to conclude that the intent was on designating DIFC as the seat when using the words “arbitration in Dubai, UAE.” This conclusion is unsupported by evidence and based upon a view which could not reasonably be held. The use of the term ‘pathological’ for a clause in an agreement is inapt and does not comport with legal jargon. SpaceCom cannot rely on such a term to steer clear of any liability and, in the same vein, to invite this Court to interpret the clause in its favour while imputing an intention to parties which cannot be discerned. SpaceCom argues that judgments have held that the word “Dubai” can be interpreted to include DIFC. This argument has no legal basis in view of the discussion above on the distinct status of the two in terms of their legal systems. Finally SpaceCom submits that “Applicant was forced to approach the DIFC due to the Respondents constant attempts to frustrate the arbitration proceedings”. This statement clearly establishes that DIFC was chosen by SpaceCom to suit its best interests and was not what the parties intended in Clause 14. This is the ineluctable inference from the statement set out above.

Contra Profrentem Rule:

58. During oral arguments, SpaceCom invoked the *contra profrentem* rule to its aid repeatedly. Suffice to say that the rule has no application in this matter. The rule is only applicable where there is ambiguity in the agreement. Clause 14 of MSA 2014 does not suffer

from any ambiguity in relation to the seat of arbitration, in my opinion. If the parties have equal bargaining strength (which, doubtless, is the case here) then the rule is inapplicable. They are also sophisticated entities engaged in international commercial transactions.

59. In *Persimmon Homes Ltd. v Ove Arup & Partners Ltd [2017] EWCA Civ 373*, the Court of Appeal of the United Kingdom constricted the applicability of the rule and held at Para 52:

"The contra proferentem rule requires any ambiguity in an exemption clause to be resolved against the party who put the clause forward and relies upon it. In relation to commercial contracts, negotiated between parties of equal bargaining power, that rule now has a very limited role."

Conclusion:

60. In sum, Wateen has furnished proof that the composition of the arbitral authority and the arbitral procedure was not in accordance with the agreement of the parties in terms of Article V (1)(d) of the Convention and thereby undermines the legitimacy of the Awards. The recognition and enforcement of the Awards is thus refused. Application **dismissed** with costs.

(SHAHID KARIM)
JUDGE

Announced in open Court on 04-12-2024

Approved for reporting

JUDGE

★

Rafaqat Ali