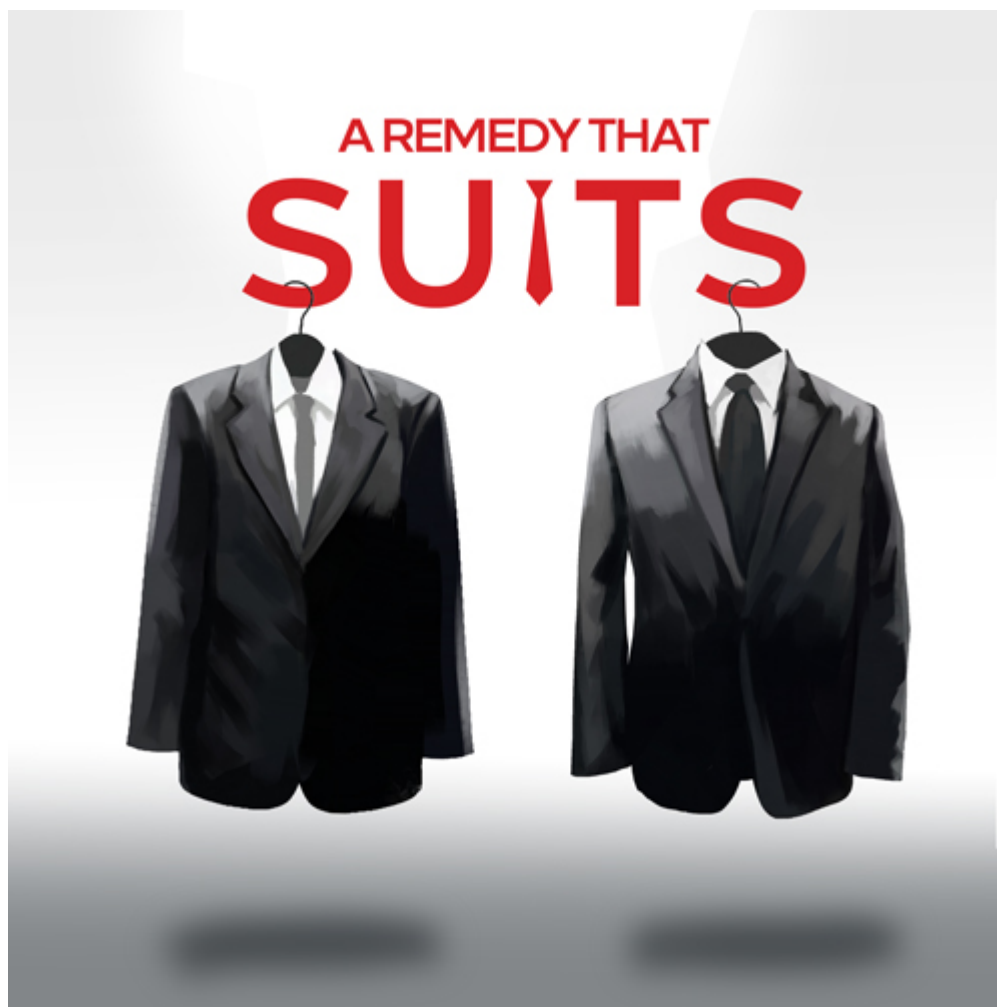


A remedy that Suits: Interim Remedies in Arbitration Proceedings and the Powers of the Curial Courts

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Interim measures, also known as conservatory remedies, constitute an immediate and temporary relief aimed at safeguarding a right or an asset pending the determination of a case on its merits. These include measures to preserve the status quo or prevent the dissipation of assets before issuance of the final award and/or enforcement of the same. An interim measure is, therefore, a strategic tool that is useful to protect a party's rights in arbitration proceedings and is generally available upon application to the arbitral tribunal and/or the supervisory court of the arbitration proceedings, subject to the agreement between the parties.

The pool of available measures, as well as the powers of the courts and arbitral tribunals, may vary depending on the seat of the arbitration and the procedural law governing the framework of the arbitration proceedings, also known as the law of the seat (*lex arbitri*).

This article considers the power of the courts of three separate common law jurisdictions in the region, namely: (1) the Civil and Commercial Court of the Qatar Financial Centre (**QFC Courts**); (2) the Dubai International Financial Centre (DIFC) Courts; and (3) the Abu Dhabi Global Markets Courts (**ADGM Courts**), to order interim measures in support of arbitration proceedings and the legal framework which affords them such power.

Qatar Financial Centre (QFC)

Where the parties to an arbitration have agreed that such arbitration is to be subject to Qatar Law No. 2 of 2017 Issuing the Law of Arbitration in Civil and Commercial Matters (the '**Qatar Arbitration Law**'), the arbitral tribunal's power to grant interim measures will extend to measures "*dictated by the nature of the dispute, or for the purposes of preventing irreparable harm*" (Article 17 of the Qatar Arbitration Law).

The Qatar Arbitration Law empowers the QFC Courts, by way of the "Competent Judge" (which includes the enforcement judge in the QFC Courts) to grant interim measures in arbitration proceedings but only "where the Arbitral Tribunal, or any other person to which the Parties have granted certain authority, **does not have jurisdiction, or is incapable to act effectively at the time**" (Article 9).

QFC Regulation No. 8 of 2005 (the 'QFC Arbitration Regulations') empowers an arbitral tribunal to grant "interim measures of protection" at any time prior to the issuance of the final award. Article 22 sets out an exhaustive list of such measures, by which the arbitral tribunal may order a party to:

1. maintain or restore the status quo pending determination of the dispute;
2. take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm, or to prejudice the arbitral process itself;
3. provide a means of preserving assets out of which a subsequent award may be satisfied; or
4. preserve evidence that may be relevant and material to the resolution of the dispute.

The QFC Arbitration Regulations also provide that, the issuance of an interim measure by any court or organ of the judicial system of a state would not be incompatible with an arbitration agreement (Article 12 of the QFC Arbitration Regulations).

The position was recently clarified by the QFC Courts in its "Note on Ruling" issued on 17 March 2021 in relation to the case of *C v D [2021] QIC (F) 8*. In this case, the Court considered an arbitration agreement which provided for a seat in the Qatar Financial Centre (QFC) and an application for an injunction.

The case concerned an application made by C to the QFC Courts for an injunction to maintain the status quo in relation to contemplated arbitration proceedings between two parties, both of which were established outside of the QFC, on the basis that the arbitration agreement between the parties provided for institutional arbitration (under the LCIA Rules) seated in the QFC with the venue being "Qatar".

In *C v D*, the QFC Courts recognised its jurisdiction under the Qatar Arbitration Law as a supervisory court where the parties to an arbitration had opted into the QFC Courts' jurisdiction (by virtue of an agreement upon the seat of the arbitration) and confirmed that such jurisdiction could be exercised "*in circumstances in which an arbitral tribunal could not yet act, or act effectively*".

The "Note of Ruling" has also provided much needed and valuable clarity on the issue of "opting-in" to the QFC Courts' jurisdiction in relation to arbitration proceedings. The position is notably different in the case of litigation before the QFC Courts where an "opt-in" appears to require that at least one of the parties to the dispute is established in the Qatar Financial Centre. However, Article 9.2 of the QFC Civil and Commercial Court Regulations and Procedural Rules (which provides that "*in accordance with fundamental international principles and international best practice, the Court will take into account the expressed accord of the parties that the Court shall have jurisdiction*") seems to suggest that parties established

outside of the QFC may “opt-in” to the QFC Courts’ jurisdiction.

The DIFC Courts

Where an arbitration is seated in the DIFC, the DIFC Courts have the power to award interim measures in support of arbitration proceedings pursuant to DIFC Arbitration Law No. 1 of 2008, as amended in 2013 (the “**DIFC Arbitration Law**”).

In accordance with Article 15 of the DIFC Arbitration Law, a party may apply to the Court for interim measures for protection, before or during arbitral proceedings, and doing so would not be “*incompatible with an arbitration agreement*”.

The DIFC Courts have the same powers to issue interim measures in arbitration proceedings as they would in relation to DIFC Court proceedings, irrespective of the place of the arbitration proceedings (which is to be construed as a reference to the venue of the arbitration and not the seat) (Article 24(3)).

Where the arbitration is seated in the DIFC, the DIFC Courts may issue interim measures before or during the arbitration proceedings, which include orders that a party:

- “*Maintain or restore the status quo pending determination of the dispute;*
- *Provide a means of preserving assets out of which a subsequent award may be satisfied or other means for securing or facilitating the enforcement of such an award;*
- *Take action that would prevent or refrain from taking an action that would likely cause current or imminent harm or prejudice to any party or to the arbitral process itself; or*
- *preserve evidence that may be relevant and material to the resolution of the dispute.*”

The DIFC Arbitration Law sets out a non-exhaustive list of the interim measures the Court may order in support of prospective or ongoing arbitration proceedings. Accordingly, the DIFC Courts’ powers to award interim measures in arbitration proceedings are broad ranging. Also, such powers may be exercised at any time and irrespective of the place of the arbitration and the arbitral tribunal’s availability to award interim measures.

This was considered in *Dhir v. Waterfront Property Investment Ltd and Linarus FZE [2009] DIFC CFI 011 (8 July 2009)*, in which the DIFC Court of First Instance confirmed that its power arose where the seat was the DIFC. The Court also clarified that reference to the “place” of the arbitration in the DIFC Arbitration Law was to be construed as a reference to the physical place of the hearing, or the venue of arbitration, as opposed to the “seat” or legal place of the arbitration. Further, the Court determined that the arbitration agreement between the parties did not provide for a DIFC seat and so, the DIFC Courts did not have jurisdiction to grant interim measures under the DIFC Arbitration Law.

In *Brookfield Multiplex Constructions LLC v. (1) DIFC Investments LLC (2) Dubai International Financial Centre Authority [2016] DIFC CFI 020*, the DIFC Courts considered its power to award interim measures and identified the distinction between its supervisory and supportive jurisdiction in relation to arbitration proceedings.

In order to grant interim measures, the DIFC Courts must first have assumed jurisdiction. It follows that, where the arbitration proceedings are seated in the DIFC, the DIFC Courts are able to exercise their supervisory jurisdiction. Notably, the parties’ agreement to a DIFC seat constitutes an “opt-in” to the DIFC Courts’ jurisdiction for the purposes of the DIFC Arbitration Law.

Parties to litigation, irrespective of where they are established, are free to “opt-in” to the jurisdiction of the DIFC Courts by way of a written agreement in accordance with Dubai Law No. 12 of 2014 (as amended)

(the “**Judicial Authority Law**”). The Judicial Authority Law also sets out several other gateways granting the DIFC Courts exclusive jurisdiction over a dispute, even where the parties have not actually agreed (in writing) to the same.

The ADGM Courts

The ADGM Courts’ power to award interim measures in support of arbitration proceedings is set out in the ADGM Arbitration Regulations 2015, as recently-amended by Amendment No. 1 of 2020 to the ADGM Arbitration Regulations 2015) (the “**ADGM Arbitration Regulations**”), which came into force on 23 December 2020, apply where the “seat” (or legal place) of the arbitration is the ADGM or where the parties have agreed that the ADGM Regulations apply (Article 8 of the ADGM Regulations). However, Article 31(3) confirms that the Courts’ power may be exercised irrespective of: (a) the seat of the arbitration (including where no seat has been agreed); and (b) whether the party against which the interim measure is sought is a party to the arbitration agreement.

Under Article 31(1), the Court may issue interim measures before or during arbitration proceedings and, as is the case in the DIFC, the ADGM Courts have the same power to issue interim measures as they have in relation to ADGM Court proceedings (Article 31(2) of the ADGM Arbitration Regulations).

However, with respect to the *rationae temporis* jurisdiction, the position differs insofar as the ADGM Courts may only grant interim measures where the arbitral tribunal (or any other institution or person vested by the parties with power to award interim measures) “has no power or is unable for the time being to act effectively” (Article 31(6) of the ADGM Regulations).

The parties’ agreement to an ADGM seat or the application of the ADGM Arbitration Regulations constitutes an “opt-in” to the ADGM Courts’ jurisdiction for the purposes of the ADGM Arbitration Regulations, irrespective of the location of the parties’ themselves. The position is similar to that concerning litigation, where the parties can “opt-in” by way of written agreement and a connection with the ADGM is not necessarily required (as is the position in the DIFC Courts).

Conclusion

Parties to arbitrations seated in the QIFC, DIFC or ADGM generally have access to the same interim relief as would be available in litigation in each of these respective fora. While the foregoing courts’ powers, as supervisory courts of an arbitration, are wide ranging, in the case of the QFC and the ADGM Courts, the Court must be satisfied that the arbitral tribunal was not able to exercise its powers to award interim measures. This is particularly the case in instances where the arbitration proceedings are yet to be filed or the arbitral tribunal has not yet been constituted. This contrasts with the more flexible approach taken by the DIFC Courts, which have the power to order interim relief in arbitration proceedings irrespective of the arbitral tribunal’s ability to do so.

It is to be noted that arbitral tribunals, under most modern institutional arbitration rules, are afforded powers, with varying degrees and scope, to order interim measures which would be subject to enforcement by the courts. This firm recently secured the enforcement by the DIFC Courts of an arbitral tribunal ordered interim measure aimed at preventing the liquidation of a performance security issued in the context of DIFC-LCIA arbitration proceedings seated in the DIFC in accordance with Article 24(3) of the DIFC Arbitration Law.

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*Obtaining interim relief need not be as problematic as depicted in the popular television series **Suits**.*