



## **DIFC Court: high bar for anti-suit injunctive relief**

*Federal Express International Inc. v. Abdul Latif Jameel Transportation Company Ltd*  
[2018] DIFC CFI 038

Judgment: 15 July 2018

DIFC Court of First Instance

### **Summary:**

The Claimant's application for anti-suit injunctive ('ASI') relief to prevent the hearing of a 28 USC § 1782 application in the US District Court was dismissed with costs. The DIFC Court confirmed that there is a high bar to granting anti-suit injunctive ('ASI') relief. It followed its decision in *Brookfield Multiplex Constructions LLC v. DIFC Investments LLC* [2016] DIFC CFI 020 in finding that the test for non-contractual ASI relief was that the injunction respondent's proceedings should be vexatious and oppressive.

However, the DIFC Court emphasised that 'this is quite a high standard of proof for the Claimant to meet', and endorsed the prevailing English view that the test in obtaining *interim* ASI relief is more onerous than the ordinary *American Cyanamid* test for obtaining any other interim injunction. The Court further found that the Claimant did not have good prospects of success in related contractual and non-contractual claims for ASI relief restraining arbitral proceedings in the KSA (the 'KSA Arbitration').

### **Comments:**

The underlying dispute, on the case of the Respondent ('ALJ'), arose from FedEx's repudiation of a 'global' agreement (the 'GA'), under which ALJ acted as FedEx's contractor in the KSA and a 'domestic' agreement (the 'DA'), under which FedEx agreed to provide services to ALJ in supporting its domestic services under the FedEx brand. The repudiation occurred shortly after FedEx acquired its rival, TNT, and preferred TNT's KSA contractor.

ALJ commenced arbitral proceedings in the KSA under the DA, and FedEx commenced a DIFC-LCIA arbitration (the 'DIFC-LCIA Arbitration') under the GA, although neither tribunal had been constituted. ALJ claimed that FedEx had made misrepresentations in procuring ALJ's entry into the GA and DA, had acted in repudiatory breach of its duty of good faith, and had acted in breach of KSA competition law in failing to obtain the necessary merger approval. The KSA Courts had, on ALJ's application, supported the KSA arbitration by requiring FedEx to appoint its arbitrator.

ALJ further commenced expert determination proceedings in the Dubai Courts in seeking an expert determination on issues of quantum and made an application under 28 USC § 1782 (the '\$ 1782 Application') in the US District Court ('USDC') for document production and witness testimony from FedEx's ultimate parent company in Tennessee. The evidence sought related to specific issues



including the assurances FedEx had given to ALJ, FedEx's merger with TNT, alleged issues with ALJ's service, FedEx's preference for TNT's KSA contractor, and FedEx's communications (if any) with the KSA competition authority.

FedEx Corp duly moved the USDC to establish a briefing schedule and filed its responsive evidence, but also applied in the *DIFC* Court for ASI relief to prevent ALJ from pursuing its § 1782 Application at a hearing scheduled in the USDC.

The § 1782 Application was not in breach of the GA because it was a supportive evidential application rather than an application in the US Courts for substantive relief. FedEx accordingly accepted that it had to show, on the *non*-contractual basis, that ALJ's § 1782 Application was 'vexatious and oppressive', or more broadly 'unconscionable', being the English test adopted by the DIFC Court in *Brookfield*.

The DIFC Court accepted that there were issues of US law as to whether § 1782 disclosure could be ordered in support of a private arbitral tribunal and, if so, whether any application required the prior consent of that tribunal. However, those issues and the exercise of the USDC's discretion would be a matter for the USDC. In considering whether there was vexation and oppression, the DIFC Court was satisfied that all of the three minimal threshold requirements established by the US Supreme Court were satisfied.

FedEx argued that, at the very least, the § 1782 Application should, by a grant of interim ASI relief, be postponed until the formation of the tribunal and its approval of the application. The Court was so encouraged to 'hold the ring' until the tribunal had been formed.

The DIFC Court accepted that had power under Article 32 of the DIFC Court Law to order injunctive relief where just and convenient, and that the condition for granting ASI relief on the non-contractual basis was that the continuation of the foreign claim would be vexatious and oppressive. However, it agreed with ALJ that 'this is quite a high standard of proof for the Claimant to meet' and further that the test is 'more onerous than a simple application for interim relief'.

This followed the view in *Raphael on the Anti-Suit Injunction*, OUP, 2008 at [13.27]-[13.29] and other texts that interim ASI relief should not be governed by *American Cyanamid* principles (a mere 'serious issue to be tried' on the merits, and the 'balance of convenience'). This was because, even if ASI relief was binding on the party rather than the foreign court, it still inevitably raised serious issues of comity between courts.

The Court noted all of FedEx's various arguments, that the § 1782 Application was not properly and honestly made, was not against the proper party, was too broad in its scope and should await the formation of the DIFC-LCIA tribunal. However, the Court reminded itself that 'there is high bar to granting anti-suit relief', and FedEx had not cleared that bar.

ALJ had further resisted the granting of ASI relief on the basis that it would serve no useful purpose because ALJ was in any event entitled to pursue its § 1782 Application in support of the KSA



Arbitration. FedEx had responded by seeking further ASI relief against ALJ's continuation of those arbitral proceedings, even though they were pursued pursuant to a KSA arbitration provision in the DA and the KSA Courts had already acted in their supervisory jurisdiction in support of the KSA Arbitration.

The DIFC Court found that FedEx did *not* have good prospects of success in obtaining ASI relief against the KSA Arbitration. It could see no basis on which the DIFC Courts had jurisdiction to restrain ALJ, a KSA party, from acting in the KSA Arbitration. It further noted that, if it were to grant ASI relief only insofar as the § 1782 Application were pursued in support of the KSA Arbitration, it would then be impossible or impracticable to determine which parts of it related to each of the DIFC-LCIA and KSA Arbitrations.

Further, insofar as the application for ASI relief against the KSA Arbitration invited the DIFC Court to engage in a preliminary assessment of its competence, that was an issue to be addressed in the first instance by the tribunal itself and not then by the DIFC Court.

There has been some frustration to date in Dubai legal circles that the DIFC Court has not yet had the opportunity to set out the principles applying to the grant by it of ASI relief. In the leading case, *Brookfield*, the Court did not grant ASI relief, Justice Sir Jeremy Cooke went no further than stating the basic requirements for contractual and non-contractual relief. In a later anonymised case in which he *did* grant ASI relief, *Hayiri International LLC v. Hazim Telecom Private Ltd* [2016] DIFC ARB 010 (9 March 2017), the judge upheld an injunction he had previously granted, but did so on the basis that he needed add nothing to the ruling he had previously made on the *ex parte* basis, which is not reported.

The DIFC Court has now gone some way further in confirming both that there is a 'high standard of proof' and that the test is more onerous than for any other interim injunction. This is consistent with the requirement under English law that an applicant for interim ASI relief must show a 'high degree of probability' that it is entitled to that relief.

**Rupert Reed QC acted with Sami Tannous, Seema Bono and Patricia Snell of Freshfields Bruckhaus Deringer for ALJ in resisting the grant of interim ASI relief.**