

Insight: Arbitration

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DIFC continues to establish its arbitration-friendly credentials with recent amendment to DIFC Arbitration Law

Following a recent amendment to the Dubai International Financial Centre¹ (DIFC) Arbitration Law, it is now clear that matters brought before the DIFC Courts which are governed by a valid arbitration agreement shall be stayed by the Courts in favour of non-DIFC seated arbitrations. This ensures that the DIFC Arbitration Law complies with the New York Convention and brings welcome certainty following two recent conflicting DIFC Court judgments. The change is particularly important as a significant number of international businesses operating in the Middle East choose to refer their disputes to arbitration.



The Tension of Conflicting Case Law

In *Injazat v Denton Wilde Sapte*,² Denton Wilde Sapte applied for a stay of proceedings brought by Injazat in the DIFC Courts on the basis that it had commenced an LCIA arbitration in London pursuant to an arbitration agreement between the parties. Justice Sir David Steel found that the DIFC Arbitration Law³ only imposed an obligation on the court to stay an action in favour of arbitration where the matter was subject to a domestic arbitration clause. This obligation did not apply in the case of foreign-seated arbitrations. The judge also refused to exercise a residual discretion to stay the proceedings: the legislation was “detailed and precise” and made it clear that it was not open to a party to apply for a stay in favour of a foreign-seated arbitration.

The DIFC Court’s finding in *Injazat* raised the possibility that the DIFC Courts would not honour a party’s choice to enter into non-DIFC arbitration agreements, producing the potential for arbitral and court proceedings to take place simultaneously (which would have negative consequences in terms of increased cost, inefficiency and potential injustice).

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¹ The DIFC is a financial free zone located near Dubai’s central business district. The DIFC has developed its own laws and court system which govern commerce within the DIFC and which are based on common law. Where DIFC law is silent, DIFC law provides that the DIFC Courts should apply English law. Moreover the DIFC Courts have developed their own court procedure rules based on the English courts’ Civil Procedure Rules. As a result, the DIFC is often referred to as a “common law island floating in a civil law sea”.

² CFI 019/2010 *Injazat Capital Limited and Injazat Technology Fund B.S.C. v Denton Wilde Sapte & Co (a firm)*.

³ DIFC Law No. 1 of 2008.

Soon afterwards, the same issue arose again, but this time the DIFC Courts came to a different conclusion. In *International Electromechanical Services v Al Fattan*,⁴ Al Fattan sought an order dismissing or staying proceedings brought in the DIFC Courts on the basis of an arbitration agreement providing for an arbitration seated in Dubai. Justice David Williams agreed with the finding in *Injazat* that the fact that there was a non-DIFC seat meant the mandatory stay provisions of the DIFC Arbitration Law were inapplicable. However, contrary to the decision in *Injazat*, the judge found that the DIFC Arbitration Act did not constitute a “detailed and precise Parliamentary intervention” as to the staying of proceedings brought in breach of non-DIFC seated arbitration agreements. He concluded that the DIFC Arbitration Law did not exclude the Courts’ established inherent jurisdiction to grant stays or injunctions in support of arbitration agreements.

Both judgments therefore recognised that there was no legislative basis in the DIFC Arbitration Law for staying DIFC proceedings in favour of arbitrations seated outside the DIFC, but disagreed on whether the DIFC Courts could instead exercise an inherent jurisdiction to stay proceedings.

A Problematic Potential Breach of the New York Convention

A second problem recognised by the judges in both *Injazat* and *Al Fattan* was that an inability on the part of the DIFC Courts to stay proceedings in favour of an arbitration seated outside the UAE would constitute a failure by the DIFC to implement the terms of the New York Convention on the Recognition and

Enforcement of Foreign Arbitral Awards 1958, to which the UAE acceded in 2006. This was because Article III(3) of the New York Convention provides that: “*The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made [a written arbitration agreement]... shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*”

Justice David Williams considered in *Al Fattan* that this was a further indication that removing the DIFC Courts’ inherent jurisdiction to stay proceedings could not have been the legislative intention behind the DIFC Arbitration Law.

The Legislative Solution

In light of these issues, the DIFC Authority’s April 2013 Consultation Paper, which sought public comment on a proposal to amend the DIFC Arbitration Law, was particularly welcome. The proposal centred around the application of Article 13 of the DIFC Arbitration Law. In effect, Article 13 provides that if a matter subject to an arbitration agreement (whether seated in or outside the DIFC) is brought before the DIFC Courts, the Courts shall dismiss or stay such action upon the request of a party so long as the arbitration agreement is valid. In both *Injazat* and *Al Fattan* the DIFC Courts had found that it only applied to DIFC-seated arbitrations. The DIFC Authority therefore proposed to amend the legislation to extend the application of Article 13 to arbitration agreements providing for a non-DIFC seat or which do not designate or determine the seat.

This amendment was enacted on 15 December 2013.⁵ It has removed the uncertainty created following *Injazat* and *Al Fattan* and the apparent disparity between the DIFC Courts’ treatment of DIFC-seated and non-DIFC seated arbitrations. The express purpose of this amendment was to align the DIFC Arbitration Law with the New York Convention. Taken alongside recent positive steps in respect of amendments to the DIFC Courts’ Rules (discussed in our October 2013 alert “[DIFC Courts open consultation regarding amendments to the Rules of the DIFC Courts](#)”), this rapid response to the emerging case law further affirms the DIFC Authority’s and the Ruler of Dubai’s commitment to providing businesses with a jurisdiction which is supportive of arbitration and compliant with the New York Convention.

⁴ CFI 004/2012 *International Electromechanical Services Co. LLC v (1) Al Fattan Engineering LLC and (2) Al Fattan Properties LLC*.

⁵ DIFC Law No. 1 of 2013.