

A quick course correction by a DIFC Court on the application of the New York Convention

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On 14 October 2012, Justice David Williams of the DIFC Court of First Instance (Dubai International Financial Centre) applied a course correction by issuing a decision confirming the jurisdiction of the DIFC Courts to grant a stay in the presence of a valid arbitration agreement providing for a seat of arbitration outside the DIFC.

Justice Williams in his decision in *International Electromechanical Services Co. LLC v Al Fattan Engineering LLC (First Defendant) and Al Fattan Properties LLC (Second Defendant)*, CFI 004/2012 – departed from a previous decision issued earlier this year by Justice Sir David Steel on 6 March 2012 in *Injazat Capital Limited and Injazat Technology Fund ITF against Denton Wilde Sapte* refusing to grant a stay of the proceedings brought before him in violation of a none DIFC seated arbitration agreement – A case note on the latter decision can be found [here](#).

The two claims *Al Fattan* and *Injazat* are similar in many ways. Both contracts subject matter of the disputes included arbitration clauses providing for arbitration outside the DIFC, and the claimants in the two cases filed DIFC proceedings in violation of the arbitration clauses. The same defense was raised to grant a stay in application of article 13 of the DIFC Arbitration Law (Law No. 1 of 2008), and both Justices had to decide whether the Court can grant such a stay by each applying their own interpretation of that article and of the purpose of the DIFC as such. Concerns over the violation of article II(3) of the New York Convention of 1958 were taken into account in both cases as well, with the *Injazat* decision giving it a less favorable stance in face of the clarity and precision of article 13(1) of the DIFC Arbitration Law.

The latter article provides the following:

"If an action is brought before the DIFC Court in a matter which is the subject of an Arbitration Agreement, the DIFC Court shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, dismiss or stay such action unless it finds that the Arbitration Agreement is null and void, inoperative or incapable of being performed."

However, article 7(1) on the scope of application of the same Law provides:

"Parts 1 to 4 and the Schedule of this Law shall all apply where the Seat of the Arbitration is the DIFC."

In face of the clarity of the provisions of both articles above, Justice David Steel in *Injazat* decided that

since article 13 is in Part 3 of the Law, there was no room for interpreting it consistently with the New York Convention. The Court therefore had no statutory jurisdiction to grant a stay since it did not apply to non-DIFC seated arbitration agreements, and thus its powers were confined to the bounds of the DIFC Arbitration law without any particular reference to the Court's obligations to grant a stay under article II(3) of the New York Convention to which the UAE is a member State since 2006.

The response came quickly from Justice David Williams in *Al Fattan* case. In the matter at hand, the Court concurred with the *Injazat* decision that article 13 of the DIFC Arbitration Law is not applicable in this case as the seat of arbitration is not the DIFC. However, the Court declined to follow the ruling in *Injazat* and decided that it has an inherent jurisdiction to grant a stay.

On a true construction of the DIFC Arbitration Law, it considered that the latter does not exclude the established jurisdiction to grant stays or injunctions in support of arbitration seated outside the DIFC. In this line of argument, Justice Williams considered that where the purpose of articles 7 and 13 is to render it mandatory for the Court to stay proceedings in breach of arbitration agreements in the DIFC, the Court may stay proceedings brought in breach of a valid agreement to arbitrate outside the DIFC, but need not do so.

This contrast between mandatory stays and discretionary stays was also raised in *Injazat* decision, but the latter considered that the DIFC Arbitration Law would have expressly provided for discretionary stays in the case of an arbitration seated outside the DIFC. The Court in the present case rejected such reasoning and considered that discretionary stays are "*allowed unless provided otherwise*".

The decision in *Injazat* raised several critics as to the respect of the DIFC Courts of the UAE international commitments arising from the New York Convention. In the present case, the Court considered that a decision such as the one in *Injazat* would "thwart the promotion of the DIFC as a jurisdiction supportive of arbitration." The wordings of Justice Williams are clear enough to re-emphasize the envisaged role of the DIFC to ensure that companies in the region will have an expeditious and cost effective dispute settlement mechanism to Courts, making the system more attractive to the international community (DIFC consultation papers issued in February 2008).

Although the seat of arbitration in the present case is in Dubai, a domestic seat to which the provisions of article II(3) are not applicable, the seat of arbitration in *Injazat* was in London, thus putting the UAE in breach of the New York Convention. Article 5 of the Federal Law No. 8 of 2004 that created the DIFC provided for the respect of the Financial Free Zones of any international agreements to which the UAE is or shall be a party. As a clear response to the decision in *Injazat*, Justice David Williams decided that this cannot lead to finding that the intention of article 7 of the DIFC Arbitration Law is to remove the DIFC Court's inherent jurisdiction to stay proceedings for arbitration agreements seated outside the DIFC.

This is a welcome decision that reminds the DIFC Courts of the requirement to comply with the UAE international obligations, and we hope that other decisions will follow the same.