

Kluwer Arbitration Blog

Dubai Court confirms jurisdiction to stay proceedings in favour of foreign arbitrations: Nothing more to fear ... and further lessons to be learnt

Gordon Blanke (Blanke Arbitration LLC) · Wednesday, January 30th, 2013

Those who feared that following Sir David Steel J's ruling in *Injazat Capital Limited and Injazat Technology Fund B.S.C. v. Denton Wilde Sapte & Co* before the Dubai International Financial Centre (DIFC) Court of First Instance (ruling of 6 March 2012 in Claim No. CFI 019/2010, for previous reporting see [here](#)), the DIFC Courts and by extension the United Arab Emirates more generally found themselves in a situation of *de facto* violation of Article II(3) of the New York Convention, may now utter a sigh of relief. In its most recent ruling in *International Electromechanical Services Co. LLC v. (1) Al Fattan Engineering LLC and (2) Al Fattan Properties LLC* (ruling of 14 October 2012 in Claim No. CFI 004/2012, for previous reporting see [here](#)), the DIFC Court of First Instance in the person of Justice Williams QC expressed its disagreement with Sir David Steel J's previous ruling in *Injazat* and brought the interpretation of DIFC law back into line with terms proper of the New York Convention.

Article II(3) of the New York Convention imposes upon Convention countries an obligation to recognize arbitration agreements and give to them precedence over pending litigation that has been brought in another Convention country in violation of an existing foreign arbitration clause, unless this latter is “*null and void, inoperative or incapable of being performed*”. Even though Sir David and Justice Williams QC coincided in their view that the terms of Article 13 of the DIFC Arbitration Law (DIFC Law No. 1 of 2008), which – read together with Article 7 of the same Law – confine a DIFC Court's *obligation* to stay in favour of domestic, i.e. arbitrations seated in the DIFC only, Justice Williams QC found – contrary to Sir David – that the DIFC Courts did retain a *discretion* to stay in the presence of foreign or non-DIFC arbitration proceedings on the basis of a surviving “*inherent jurisdiction to stay*”. According to Justice Williams, this inherent jurisdiction had not been displaced by Article 7(2), which did not contain any express wording to that effect, nor by Article 10 of the same Law, according to which “*in matters governed by this law, no Court shall intervene except to the extent so provided in this Law.*” As a result, the surviving inherent jurisdiction of the DIFC Courts could be invoked to stay in favour of non-DIFC arbitration and more specifically to comply with obligations to stay under international enforcement instruments, such as the New York Convention. Importantly, Justice Williams clarified that for present purposes, arbitrations seated in Dubai, i.e. outside the DIFC, did not qualify as foreign arbitrations within the meaning of the New York Convention and did therefore not trigger the UAE's obligation to stay in favour of a foreign arbitration within the terms of the Convention. According to Justice Williams: “*Whilst the DIFC and Dubai are separate legal zones, they are part of the*

same State, namely the United Arab Emirates. Hence, the State of the seat of the arbitration agreement [whether providing for arbitration in Dubai or the DIFC] is the United Arab Emirates ... The New York Convention does not require a stay." (see the DIFC Court's ruling in *International Electromechanical*, at para. 122).

We agree in essence with the previous reporting on the above-referenced rulings on this site and will therefore not enter here into further detail on what has already been said elsewhere. Nevertheless, we would like to believe that in light of the common law origin of the DIFC Courts, the primary source of Justice Williams QC's reasoning in finding in favour of the existence of an "inherent jurisdiction to stay" in *favorem arbitrandi* deserves emphasis. In essence, Justice Williams bases the existence of the DIFC Court's inherent jurisdiction to stay on a reading of Article 33 of the DIFC Court Law (see Law No. 10 of 2004) and Rule 4.1 of the Rules of the DIFC Court (RDC) together with Article 8(2) of the Application of Civil and Commercial Laws (see DIFC Law No. 3 of 2004) and DIFC Rules 2.10, which permits reliance by the DIFC Courts on the English Civil Procedure Rules, where their application is considered appropriate. More specifically, Article 33 empowers the DIFC Court to "*if it considers it appropriate: (a) stay any ... proceeding*". RDC 4.1 clarifies that any powers expressly attributed to the DIFC Court in the RDC are in addition to "*any other powers it may otherwise have*", thus intimating the existence of additional sources of power other than the RDC. Finally, Article 8(2)(e) of the DIFC Law No. 3 of 2004 provides for the default application of "*the laws of England and Wales*" where no other express specification on the governing law are contained in prevailing legislation of the relevant jurisdiction. All these provisions taken together, Justice Williams found that "*it was clear that the DIFC Court possesses an inherent jurisdiction to stay proceedings, codified [in particular] in [Articles 33 of DIFC Law No. 10 of 2004 and RDC 4.1]*", but that "*neither [of] those provisions nor any DIFC cases to date detail the scope or content of the jurisdiction.*" (see para. 99 of the ruling) Given this lacuna, he then relied on the commentary on inherent jurisdiction provided in the White Book on English Civil Procedure as a codification of the relevant provisions of English law. Given the importance of this reference to the White Book, it warrants citation *in extenso*:

"Inherent jurisdiction of High Court

The provision ... that there shall be exercisable by the High Court 'all such other jurisdiction (whether civil or criminal) as was exercisable by it immediately before the commencement of the Act' of 1981, subsumes and incorporates 'the inherent jurisdiction of the court'. Such jurisdiction has been exercisable by the superior courts from the earliest days of the common law

The court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rules of court ...

An important practical illustration of the court's inherent jurisdiction is the Court's power to stay proceedings. The power may be exercised in various contexts (e.g. on abuse of process grounds) ..." (see para. 101 of the ruling; bold in the original)

On this basis, Justice Williams concluded that "*[i]t is clear that the DIFC Court's inherent jurisdiction to stay proceedings is wide-ranging and fundamental.*" (see para. 101 of the ruling) In light of the prevailing circumstances in the reference before him, Justice Williams exercised the

DIFC Court's discretion to stay in respect of both Defendants, finding – *inter alia* in reliance on authority of the English Court of Appeal (see *Reichhold Norway ASA v. Goldman Sachs International* [2000] 1 WLR 173) – that (i) such dual stay would eliminate any danger of inconsistent findings in concurrent yet divergent fora, (ii) a resolution of the dispute at hand would most likely ensue most readily from arbitration against the First Defendant and (iii) the Claimant was not prevented from pursuing its claims against the Second Defendant, a non-signatory to the underlying arbitration agreement, should proceedings against the First Defendant fail (with any delay in proceedings being adequately compensatable through an award of interest). Justice Williams concluded with a reminder to the Defendants that “*an arbitration agreement, while placing a negative obligation on the parties not to litigate, also imposes a positive obligation to cooperate with all aspects of the arbitral procedure and to comply with the resulting award.*” (para. 137 of the ruling) The approach taken by Justice Williams to the inherent jurisdiction to stay in favour of non-DIFC arbitration clearly confirms the overall arbitration-friendliness of the DIFC Courts and their unwavering support for arbitration both inside and outside the DIFC.

Apart from the DIFC Court's proper jurisdiction to grant a stay, the DIFC Court of First Instance's ruling in *International Electromechanical Services v. Al Fattan* addresses at least one further issue that is of relevance to arbitration in the DIFC and may set valuable lessons for UAE arbitration more generally, namely the validity and scope of the underlying arbitration agreement. In shorthand, the DIFC Court confirmed the validity of back-to-back clauses in relation to arbitration agreements in a FIDIC contractual setting. More importantly, the Court spelt out its deference to the principle of *kompetenz-kompetenz* of the competent arbitration tribunal in the following terms:

“[The Parties'] agreement is governed by Dubai law, a law technically foreign to this Court, so that the agreement is to arbitrate in a foreign seat under a foreign law. Therefore, this Court will not make a final finding as to the validity and scope of the arbitration agreement. Instead, this Court, if it finds it has jurisdiction, will order a stay if, on the evidence before it, it concludes that *prima facie* a valid arbitration agreement covers the present dispute and that a stay is appropriate. If the matter is submitted to arbitration, neither the DIAC [in accordance with Article 6.2 of the DIAC Arbitration Rules] nor the arbitration tribunal would be legally bound by this Court's finding that the agreement is *prima facie* valid. They would be free to rule on the tribunal's jurisdiction, no doubt paying some regard to the *prima facie* finding of this Court.” (at para. 35 of the ruling, original footnote omitted)

In concluding in favour of the *prima facie* validity of the arbitration agreement, Justice Williams relied on the requirement in writing of arbitration agreements in the terms of Article 203(2) of the UAE Civil Procedures Code and the judgment of the Dubai Court of Cassation in Case no. 164/2008 confirming the authority of a director of a limited liability company to bind that company to arbitration.

Apart from these further lessons to be learnt, Justice Williams QC's ruling in *International Electromechanical Services v. Al Fattan* will, no doubt, in a first instance be remembered for confirming the DIFC Court's inherent jurisdiction to grant a stay of litigious proceedings pending in the DIFC *in favorem arbitrandi*, both outside the narrower DIFC and outside the wider UAE, and for having taken the fear that the UAE may be in breach of its international obligations under Article II(3) of the New York Convention going forward.

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