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Overriding an agreement to arbitrate, a DIFC Court of First Instance rejects an application to grant a stay

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On 6 March 2012, Justice Sir David Steel of the Court of First Instance of the Dubai International Financial Centre – DIFC – rendered a decision refusing to grant a stay of the proceedings, and ignoring an option in the underlying contract to opt out of the Court's jurisdiction by referring to LCIA arbitration.

In summary of the facts, Injazat Capital Limited and Injazat Technology Fund ITF (Claimants) brought a claim before the Court of First Instance against Denton Wilde Sapte DWS (Defendant) for alleged negligence and failing to advice the Claimant in regard to the existence or exercise of an option to sell shares it acquired under a Share Subscription Agreement.

DWS submitted a claim to stay those proceedings since DWS's terms of business, attached to an engagement letter sent to ITF, provided for a jurisdiction clause that reads, i.e.: *"If any claim, dispute or difference of any kind whatsoever (…) arises out of or in connection with those agreements (…), you and we each agree to submit to the exclusive jurisdiction of the Dubai Courts. However, we may at our sole option, refer the claim, dispute or difference to LCIA arbitration in London (…)"*.

The Claimant asserted that the terms of business and the arbitration option were not received, and in any event they were not accepted, although DWS's position was that the terms were forwarded by fax and e-mail to the Claimant who did not respond to it.

The grounds based on which the Court refused to grant a stay

DWS pointed to the application of article 13 of the DIFC Arbitration Law (Law No. 1 of 2008) obliging the Court to grant a stay in the presence of a valid agreement to arbitrate. The Court accurately rejected its application on the basis that the said Law only applies where the seat of arbitration is the DIFC as provided in its article 7.

Following that, the Court has made several misconceptions in its justification to refuse granting a stay.

Turning to the New York Convention NYC to which the UAE is a member since 2006, the Court could have granted a stay in accordance with article II(3) of the NYC, instead it rejected its application on the basis that there is no ambiguity with regard to the scope of application of article

13 of Law No.1 despite that there is a presumption that legislation is drafted in a manner consistent with treaty obligations (*Salomon v. Commissioners of Customs and Excise* [1967] 2 QB 116). Article II(3) of the NYC sets out the maximum threshold that a member State can adopt and provides for the obligation of the Court to refer the parties to arbitration unless the arbitration agreement is null and void, inoperative or incapable of being performed. The Court, in clear violation of that article, relied on the more onerous provisions of the scope of article 13 of Law No.1 conditioning the grant of a stay only to those arbitrations where the seat is in the DIFC.

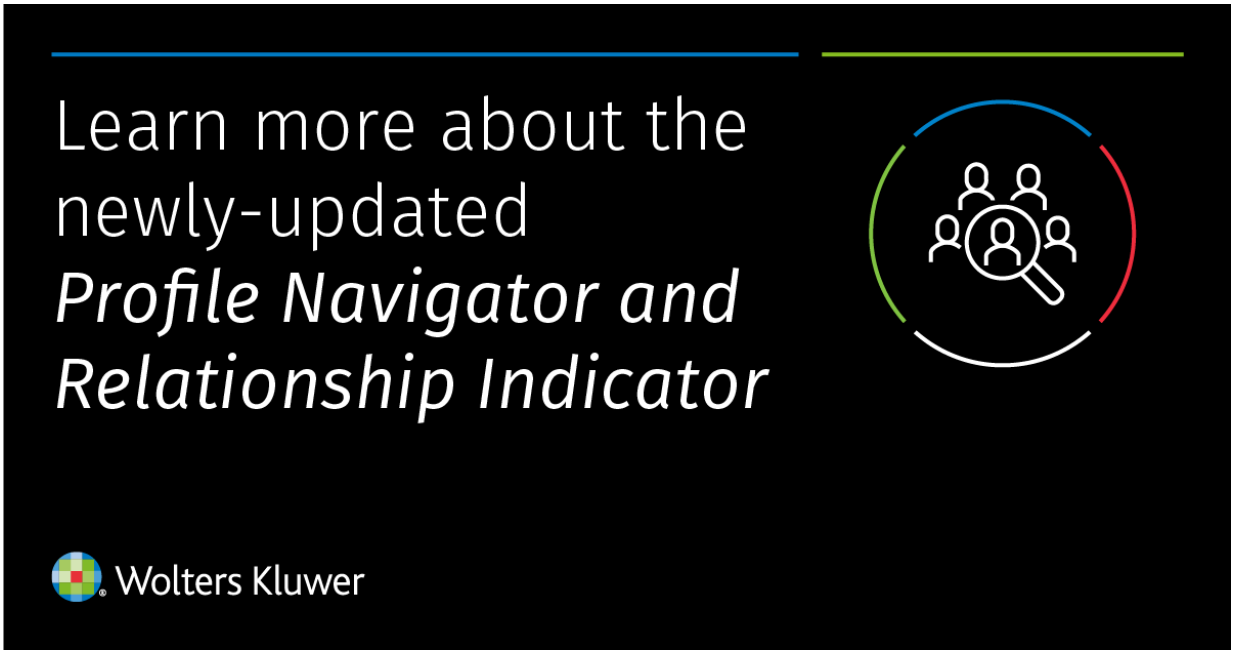
In strengthening its position, the court referred to article 5 of the Dubai Law No. 12 of 2004 relating to the jurisdiction of the DIFC Court (as amended by Law No.16 of 2001), and which allows the parties to submit to the jurisdiction of any other Court. Although the term "any other Court" is wide enough to encompass a reference to an arbitration tribunal or Court, the Court of First Instance decided that there is no room for construing Law No.12 as if it covers parallel proceedings before a Court and an arbitral tribunal.

Back to the jurisdiction clause of DWS's terms of business, the latter referred to the jurisdiction of the Dubai Courts. DWS contended that the Dubai Courts meant the national Courts of Dubai other than the DIFC. Strangely, the Court of First Instance decided that the onus is on DWS to establish that it constituted an agreement to contract out of the DIFC Courts, and further construed that the background circumstances in which the contract was entered into – the provision of legal advice within the DIFC – leads to the conclusion that the reference is to the DIFC Courts.

It is common sense however for all practitioners in the UAE that a reference to the Courts of Dubai is, rather than being construed, a clear reference to the non-DIFC Courts (*Hardt v Damac* – CFI 036/2009). Additionally, the aforementioned Law No.12/2004 amended by Law No.16/2001provides in article 2 a clear definition of the Dubai Courts as those of the "Emirate of Dubai".

The decision of the Court of First Instance raises several concerns as to how similar applications for a stay will be dealt with in the future, and poses questions as to the enforceability of the New York Convention by DIFC Courts.

It is noteworthy that the DIFC Courts system provides for a mechanism of appeal before the Court of Appeal, and a decision by the same on that matter should be worth waiting for.



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