Kluwer Arbitration Blog

Amendment to DIFC Arbitration Law brings DIFC into line with the New York Convention

Gordon Blanke (Blanke Arbitration LLC) · Sunday, January 12th, 2014

A recent amendment to Dubai International Financial Centre (DIFC) Law No. 1 of 2008, the DIFC Arbitration Law, brings the DIFC into line with the New York Convention (on the recognition and enforcement of foreign arbitral awards, done in New York on 10 June 1958). DIFC Law No. 6 of 2013, the Arbitration Law Amendment Law (the "Amendment Law"), which implements the amendment, was adopted on 15 December 2013. In the terms of the DIFC Authority's own coverage, *"[t]he amendments to the Arbitration Law 2008 have been made to ensure alignment of DIFC to the New York Convention, which require[s] a court of a member state to have the obligation to dismiss or stay an action, upon request of a party, in a matter which is the subject of a valid arbitration agreement."* (see https://www.difc.ae/news/difc-authority-announces-enactment-difc-laws-amendment-law-2013). More specifically, the introduced amendments focus on Article 7 of the DIFC Arbitration Law and ensure that Article 13 of the DIFC Arbitration Law also applies *"where the Seat of Arbitration is one other than the DIFC"* (see subparagraph (2) of Article 7 of the Amendment Law) and *"where no Seat has been designated or determined"* (see subparagraph (3) of Article 7 of the Amendment Law). Article 13 in turn provides in pertinent part that *"[i]f 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 amendment on the substance of the dispute, dismiss or stay such action unless it finds that the Arbitration Agreement is null and void, inoperable or incapable of being performed."*

Attentive readers of the present Blog will remember that the previous setting of Article 13, which did not expressly provide for the application of this Article to arbitrations seated outside the DIFC, provoked a stand-off between Justice Williams QC (see Claim No. CFI 004/2012 – *International Electromechanical Services Co. LLC v. (1) Al Fattan Engineering LLC and (2) Al Fattan Properties LLC*, ruling of 14 October 2012) and Sir David Steel J (see Claim No. CFI 019/2010 – *Injazat Capital Limited and Injazat Technology Fund B.S.C. v. Denton Wilde Sapte & Co*, ruling of 6 March 2012) in the DIFC Court of First Instance in 2012. To recap, at the time, Justice Williams QC and Sir David issued divergent rulings on the interpretation of the scope of application of Article 13 of the DIFC Arbitration Law: On Sir David's interpretation, which was based on a literal reading of Article 7 of the DIFC Law, the DIFC Courts did not have the power to stay its own proceedings in favour of arbitration proceedings seated outside the DIFC; Justice Williams QC, however, saved the day by finding that the DIFC Courts had an inherent jurisdiction to stay in favour of arbitration outside the DIFC irrespective of the seemingly restrictive wording of Article 7. By way of explanation, it will be worth repeating what I stated in my previous blog on the

subject-matter.

Article II(3) of the New York Convention imposes upon Convention countries – including the United Arab Emirates, which joined the Convention in 2006 – 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, which – read together with Article 7 – 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.

The present amendment to Article 7 has the salubrious effect of turning into an express power of the DIFC Court what previously could only be derived by implication from the "inherent jurisdiction to stay" of the DIFC Court as a common law court with English law heritage. As a result, the somewhat uncomfortable stand-off between Sir David and Justice Williams QC witnessed over the interpretation of the proper scope of application of Article 13 of the DIFC Arbitration Law in 2012 is likely to fade into the annals of history of the DIFC Courts as no more than an unfortunate incident of judicial disagreement. To be sure, going forward, international investors may rest assured that the DIFC Courts will stay their proceedings in favour of arbitration seated outside the DIFC in compliance with Article II(3) of the New York Convention, there remaining little (if any) margin for interpretation.

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