

Amendments to DIFC Arbitration law: Staying proceedings in favour of foreign-seated Arbitration

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Whether such a power existed had been the subject of inconsistent DIFC Court judgments, but the amendments have finally resolved the matter in a way that re-affirms the DIFC's commitment to international arbitration and the New York Convention.

The Issue

Although the DIFC is a separate civil and commercial jurisdiction in Dubai, as a jurisdiction within the UAE it is bound by the various international treaties and agreements entered into by the UAE. This includes the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, which despite its name also addresses the recognition of arbitral agreements. Article II(3) of the Convention states that a court of a state that has ratified the Convention must, at the request of one of the parties, refer a dispute to arbitration if the parties have made an agreement to arbitrate. The only exception is where the court finds that the arbitration agreement is void or inoperable.

Article II(3) is a vital provision of the Convention because if arbitral agreements are not recognised then the efficacy of international arbitration is undermined and there is the risk of simultaneous proceedings before an arbitral tribunal and national courts on the same matters.

The DIFC has its own arbitration law – the DIFC Arbitration Law 2008. This law is largely based on the UNCITRAL Model Law of International Arbitration, and as such is a modern and comprehensive law that will be familiar to international business and legal professionals. It is also a law which aims to comply (and is obliged to comply) with the New York Convention. However in the 2012 case of *Injazat Capital Limited v Denton Wilde Sapte & Co* [CFI 019/2010], the DIFC Arbitration Law was found by the DIFC Court not to be in compliance with the Convention.

Injazat

It was held in *Injazat* that because Article 7 of the 2008 Law states that the article regarding the recognition of arbitral agreements (Article 13) only applies when the seat of the arbitration is the DIFC, the Court could not stay court proceedings in favour of a foreign-seated arbitration.

The judge in that case, Sir David Steel, acknowledged that this represented a failure to implement Article II(3) of the New York Convention, but found that the court did not have inherent jurisdiction to remedy the oversight. This was because in his view the court had no residual discretion in matters explicitly covered by statute, and this was an issue that was explicitly covered in the 2008 Law.

IES v Al Fattan

The reasoning in *Injazat* was not however followed in the subsequent case of *International Electromechanical Services Co LLC v Al Fattan Engineering LLC* [CFI 004/2012]. In that case Judge Williams

QC held that the DIFC court had an inherent jurisdiction to stay proceedings which was 'wide-ranging and fundamental' and gave the court discretion to stay proceedings in favour of a foreign-seated arbitration, notwithstanding the terms of the 2008 Law. In his view Article 7 merely failed to provide that the mandatory stay provision applies to foreign-seated arbitration, and it takes more than an inference from silence to oust the court's inherent jurisdiction.

Although the judgment in *IES v Al Fattan* was welcomed by the arbitration community, it remained the case that the DIFC Courts had within a year rendered differing judgments on this issue, and the risk of further judgments could not be ruled out.

The Amendments

Article 7 of the 2008 Law (which describes the scope of the law's application), has now been amended pursuant to DIFC Laws Amendment Law No.1 of 2013, which came into force on 15 December 2013.

Article 7 now provides that Article 13 of the 2008 Law (concerning the recognition of arbitration agreements) applies (1) where the seat of arbitration is the DIFC; (2) where the seat is other than the DIFC; and (3) where no seat is designated or determined.

There can now be no doubt that the DIFC Courts will stay proceedings in favour of an agreement to arbitrate, irrespective of what seat, if any, is stated in the agreement. This brings the law into compliance with the New York Convention on this issue.

Conclusion

The amendment to the DIFC Arbitration Law is welcome because it removes any lingering doubt on the issue of whether the DIFC Courts have the power to stay proceedings in favour of foreign-seated arbitrations. Furthermore it demonstrates that the DIFC is committed to international arbitration and upholding the New York Convention, and that it will take active steps to preserve its reputation as an arbitration-friendly jurisdiction.

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