Claim No: ARB 004-2016

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai IN THE COURT OF FIRST INSTANCE BEFORE THE DEPUTY CHIEF JUSTICE SIR DAVID STEEL BETWEEN

GIACINTA

Claimant

and

GILAM LLC

Defendant

Hearing: 6 September 2016 Counsel: XXX Judgment: 20 September 2016

JUDGMENT OF THE DEPUTY CHIEF JUSTICE SIR DAVID STEEL

ORDER UPON hearing Counsel for the Claimant and Counsel for the Defendant on 6 September 2016 **AND UPON** reading the submissions and evidence filed and recorded on the Court file **IT IS HEREBY ORDERED THAT:**

Issued by:

Mark Beer

Registrar

Date of Issue: 20 September 2016

At: 12 pm

SCHEDULE OF REASONS 1.The Court is faced with an application which raises various issues as to the impact of Decree 19 of 2016 concerning the establishment of the Judicial Tribunal for the Dubai Courts and the DIFC Courts which was issued on 9 June 2016. 2. The context is as follows. The parties had entered into an arbitration agreement as part of a Sale and Purchase Contract dated 7 October 2008. The Claimant apparently deposited something in the region of 10% of the purchase price which is now the equivalent of USD 49,140.34. It is common ground that the building which was the subject matter of the SPA was significantly delayed and in the event the Claimant, as purchaser, purported to terminate the agreement and demand the return of the deposit. 3. The issue was referred to arbitration on 18 February 2014. The arbitrator issued a final award on 5 November 2015 in which he ordered the Defendant, the Applicant in the present application, to repay the deposit to the Claimant together with interest. 4. It is a sorry commentary on these present proceedings that it has been thought appropriate by Gilam LLC and their lawyers to expend a sum far in excess of the size of the award. I would estimate it runs into a hundred thousand dollars or more. Quite why that is thought appropriate I do not know. It seems to the Court to be a case which cried out for settlement. The only beneficiaries of the present dispute are lawyers. In due course, when issues of costs come to be considered by the Court, this particular background is likely to feature significantly. 5. When the award was not paid the Claimant eventually issued proceedings for enforcement on 24 March 2016. On 10 May 2016, Justice Sir Richard Field acceded to the application which had been properly made ex parte. This was on the usual terms, namely that the award should be recognised and enforced and that interest was payable together with costs but the Defendant had the right to apply to set aside or vary that order within 14 days of being served with it. 6. In due course, the Defendant applied to the court for an order that the DIFC Courts had no jurisdiction to hear the claim for enforcement and that accordingly the order should be set aside. The grounds for that application are somewhat remarkable. I read from the application notice:

> 1)Articles 2 and 43 of the DIFC Arbitration Law do not apply to the Award, being an award from an arbitration seated in Dubai outside the DIFC.
>
> 2) The Defendant intends to bring proceedings in the Dubai Courts for the annulment of the Award
>
> 3) No valid arbitration agreement existed between the parties within the meaning of Article 44 (1) (a)(i) of the DIFC Arbitration Law
>
> 4) The Claimant failed to make full and frank disclosure of material facts in seeking and obtaining the Order.

7. That application is yet to be determined by the Court. Nonetheless it is legitimate for present purposes, to comment as follows. Firstly, the suggestion that Articles 42 and 43 do not apply is in direct conflict with a number of decisions of this Court, including in particular the decision of the Court of Appeal in Banyan. 8. As regards Item 2 so be it. Why that has any effect on the validity of the order remains wholly obscure. 9. Item 3 again so be it. It is clearly open to the Defendants to make an application to the court of the seat as they were threatening so to do in order to challenge the validity of the arbitration contract. However the basis for that application namely that it was signed on their behalf by someone who had no authority to do so, despite the fact that the very same person had authority to sign the SPA does not look promising. But it matters not. The Arbitration Law makes express provision for the situation in which the validity of an award is being challenged in the seat. It must be open to the court in due course either to enforce the award or refuse to enforce the award or adjourn the application generally or with the provision of security by the Defendant. It seems likely that the last course would be the most likely. 10. Fourthly non-disclosure is a point which was a regular feature of applications to challenge the enforcement of the award. But since the rules require that the Defendant or Respondent to it should be afforded an

opportunity to set aside the award, it is probably not a situation which calls for full and frank disclosure.�� And even if it was there is no basis for asserting that there had been a failure to identify that there was a challenge to the enforceability of the award by reason of lack of authority in signing the arbitration agreement. Such was unknown. 11. Shortly after the issuance of that application notice challenging jurisdiction, the Defendant filed an application in the Dubai Courts for the annulment of the award as they had stated they would on the basis that the arbitration agreement was not valid. There have been a series of hearings. The most significant was on 4 August 2016 where there was a hearing at which the Defendant filed a memorandum addressed to the Judicial Tribunal requesting the stay of proceedings in accordance with the Decree. 12. The next hearing in the Dubai Courts is listed for 27 October 2016 where despite the application for a stay it appears that the Gilam LLC will file documentation in support of its application for the annulment of the award. 13. In the meantime, on 13 June 2016 the Claimant filed an application with this Court that the application dated 31 May 2016 be set aside as having been made out of time. On 13 July, Justice Sir Jeremy Cooke dismissed that application and awarded the Defendant its costs. 14. On 14 July 2016 the Claimant filed an application with this Court for urgent relief. It is a very lengthy application covering a wide range of orders. I quote some of them: an application that it be treated as an expedited application, that it be treated as an application for immediate judgment, that there be a declaration that the DIFC Courts have exclusive jurisdiction in this matter having been the Court first seized that the defendants has acted in abuse of process that the defendants should pay $25,000 by way of damages and so on. 15. Suffice it to say for present purposes, these applications seem to be based on a complete misconception of the nature of the relevant jurisdiction of the DIFC Courts on the one hand and the Dubai Courts on the other. The Dubai Courts are the court of the seat and thus the Dubai Courts clearly have jurisdiction to determine an application to annul the award. The DIFC Courts have exclusive jurisdiction in respect of the enforcement of awards within the DIFC: no question of their jurisdiction can arise. 16. It is not arguable that the DIFC Courts have (other than in respect of enforcement within the DIFC) exclusive jurisdiction in this matter B reason of the order recognising the award dated 10 May 2016 nor can it be argued that the Defendant is engaged in some form of abuse of process by taking parallel proceedings in the Dubai Court in order to seek the annulment of the award. It follows that the Court has no jurisdiction to make an award by way of damages nor at the moment is open for this Court to make an order for posting the security up to the value of the award in circumstances where no reliance is placed on the relevant article in the Arbitration law. So for the present purposes we can leave aside the entirety of the Claimant's application filed on 14 July 2016. 17. We now come to the rather more important issues. On 20 July 2016, the Defendant purportedly filed an application with the Judicial Committee under Decree 19. I say filed an application: that is a gloss which I will have to deal with in a moment. The document is before me but before I cite from it I ought to identify the relevant provisions of the Decree. The Decree establishing the Tribunal records in Article 1 the formation of that tribunal, not in terms of names but in terms of identity, including the Head of the Dubai Court of Cassation as chairman and the Head of the DIFC Courts as a member. There is then provision for five other members.� I indicated during the course of argument that I had been nominated by the Head of the DIFC Courts as one of the judges of the DIFC Courts of First Instance and/or Court of Appeal to sit on this committee. Iit is important to note that the committee has yet to meet.�� Indeed at� the moment it cannot readily be said that the Judicial Tribunal has been established. 18. When it is established, the jurisdiction of the tribunal is recorded in Article 2 and in particular having the authority and power to "determine the competent court to consider any claim or applications as to which conflict of jurisdiction may arise between the Dubai Courts and the Center's Courts". There are various other provisions in relation to jurisdiction which are not material for the present purposes. 19. Article 3 deals meetings of the Committee. Most notable under paragraph b of Article 3 "the judicial tribunal must consider the applications submitted to it and hand down its final decision within no more than 30 working days from the date of the application submission" and "provide reasoning for its decisions which shall be notified to the applicant within no more than 7 working days from the date of the decision". 20. There is then a crucial article which defines the jurisdiction of the Tribunal: "In the event of a dispute over jurisdiction arises between the Dubai Courts and the DIFC Courts that none of the two courts rejected the claim or both courts refused to hear the claim or where contradicting judgments are issued by the two courts" an application can be submitted by one of the parties which is what the defendants purports to have done. 21. Article 5 identifies the consequence of a referral of such a dispute namely "a stay of the claims or applications" until a decision is handed down by the tribunal determining that the Court has the jurisdiction. 22. As I identified, on 20 July 2016 the Defendant purported to tender a document to the Judicial Body of the Dubai Courts which is headed `Before the Judicial Body of the Dubai Courts and Dubai International Financial Center Court Petition No ... 2016 (requesting determination of the competent Court). The introductory paragraph refers to the arbitration award asserting that it was null and identifying the application that had been made under Article 213 and 216 of the Civil Procedures Code requesting the Dubai Courts to nullify the award. It refers in paragraph 2 to the application for recognition and enforcement in the DIFC and the Court had issued a decision in the absence of the plaintiff and that the Plaintiff had challenged the decision on the basis that the DIFC had no jurisdiction to recognise or enforce the arbitral award. 23. Then in paragraph 3 it contends that the DIFC Courts have no jurisdiction because the claim for enforcement falls outside Article 5 of law 12 of 2012 and because the provisions of Articles 42 and 43 of the Arbitration law are not applicable to DIAC awards. All the observations that I have made above apply with equal force to those propositions.� Nobody is challenging or could challenge that the Dubai Courts are the Court of the seat, but the suggestion that the Dubai International Financial Centre has no jurisdiction hits the buffers at the start namely that only the DIFC Courts have jurisdiction to consider the enforcement of the award in the DIFC. It has exclusive jurisdiction.� it is somewhat unfortunate that the proposition as regards the Arbitration Law is set out without reference to the decision in Banyan Tree supra. 24. Then paragraph 4 goes on: "Whereas the ratification or annulment of the arbitral award issued in arbitral case no. 24/2014 DIAC s also brought at the same time before the Dubai Courts and the DIFC Courts and whereas the courts of the Dubai International Financial Centre did not waive its right to hear the case despite that it lacks jurisdiction then the Plaintiff files the present petition before the court requesting a determination of the competent court in accordance with Article 4 of Decree 19. and the Plaintiff requests to stay both case in accordance with Article 5 of the same decree." 25. In fact, it is difficult to see how it can be said that there is a relevant dispute under Article 4. Article 4 as I have already recorded requires a dispute over jurisdiction between the Dubai Courts and the DIFC Courts i.e. a dispute between the courts not a dispute between the parties. Neither court has rejected the claim or refused to hear it.� Nor are there any contradictory judgments.� As presently advised it is difficult to see how the jurisdictional dispute could arise given that there is no difficulty in the Dubai court considering the validity of the award and the DIFC courts being requested to enforce the award in the DIFC subject to the implications if any of the possibility of the award being set aside in Dubai. 26. My analysis of the existence or otherwise of a dispute over jurisdiction is not very different from my analysis in SCB v IGPL. CFI 026/2014. It is notable that the terms of Article 4 are almost word for word the same as article 60 of the Union Supreme Court Law No 10 of 1973.�� and the conclusion I reached is very similar to the conclusion I reached in IGPL. 27. There is no conflict. But again perhaps that does not matter since the copy of the petition or application to the Committee that has been tendered to the Court contains a notation by the Chief Justice of the Court of Cassation which says this: "After the fees are paid and application is registered" proceedings "shall be suspended by the force of law pursuant to article 5 of the decree". Thus there must be some doubt whether the jurisdictional dispute (if there is one) has yet been been referred to the Committee and thus whether a stay has been effected. No fees have been set and no registration system has been established.� It follows that the 30 day period to which I have referred earlier may yet to commence.� Accordingly, it is potentially premature for this Court to be invited to stay the application by reference to the terms of Article 4 of the Decree. 28. I may be wrong about this analysis in

saying that the stay has yet to take effect. But if I am, it follows that more than 30 days have passed.&#65533; The terms of the decree require a final decision within that 30-day period together with reasons within 7 days, none of which has occurred.&#65533; Accordingly, since the stay only bites until the decision of the committee is announce and the period permitted has expired it would appear that any stay has been lifted (although an application to the Union Supreme Court might be in order).&#65533;&#65533; It follows that the application must be refused with costs. 29. USD 4,500 shall be paid to the Claimant by the Defendant in respect of their costs of this application within 14 days.