ICC ARBITRATION SEATED IN ABU DHABI HELD TO BE SUBJECT TO THE SUPERVISORY JURISDICTION OF THE COURTS OF THE ABU DHABI GLOBAL MARKET

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Litigation and Dispute Resolution Alert

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The Abu Dhabi Court of Cassation has ruled that an arbitration seated in Abu Dhabi and conducted under the International Chamber of Commerce (ICC) arbitration rules (ICC Rules) was seated in the Abu Dhabi Global Market (ADGM), and therefore subject to the supervisory jurisdiction of the ADGM Courts, based on the presence of an ICC representative office in the ADGM.

BACKGROUND

Abu Dhabi's financial free zone, the ADGM, was established in 2013 as an international financial centre and a common law jurisdiction with its own courts and legal system. The ADGM Courts operate in the English language, and are equipped to handle international cases as well as having a supervisory jurisdiction over arbitrations seated in the ADGM, which has its own arbitration law (the Arbitration Regulations 2015).

The case (Abu Dhabi Court of Cassation, Case No. 1045 of 2022) concerned a dispute under a construction contract (Contract). The dispute resolution clause in the contract provided for disputes to be resolved by arbitration, seated in Abu Dhabi, under the ICC Rules .

The appellant commenced proceedings in the onshore Abu Dhabi Courts, seeking annulment of an arbitral award issued in relation to the Contract. The appellant sought annulment of the award on various grounds, including alleged discrepancies between the signatures of members of the tribunal, counsel exceeding the scope of a power of attorney, the tribunal violating the rule of objectivity in its reliance on evidence, double-counting of damages awarded, and violation of the parties' agreement concerning the seat of arbitration.

The Abu Dhabi Court of Appeal ruled that it did not have territorial jurisdiction to consider the claim, holding that the ICC representative office located within the Abu Dhabi financial free zone, the ADGM, “is considered a representative office of the ICC and is the place of arbitration governed by the aforesaid ADGM Law,”[1] and dismissed the challenge. The appellant appealed to the Court of Cassation. The appellant argued that the arbitration clause provided for Abu Dhabi to be the seat of arbitration without specifying any particular geographical location in Abu Dhabi, and that the selection of the ICC rules in itself did not amount to an agreement that the ICC, or any of its branches or offices, should be the seat. Therefore, the onshore Abu Dhabi Courts, and not the ADGM Courts, should have jurisdiction to hear the case.

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JUDGMENT

The Court of Cassation rejected the appeal. Its reasoning was as follows:

- First, under Article 1 of Federal Law No. 6/2018 (UAE Federal Arbitration Law), competence to hear cases relating to an arbitration resides with the federal or local court of appeal agreed by the parties, or within whose jurisdiction the arbitration is held.
- Under Article 1 of the ADGM Law (Abu Dhabi Law No.4/2013), “ADGM Establishments” include any company, branch, representative office, institutional entity, or project registered or licensed to operate or conduct any activity within the ADGM.
- The ADGM Courts are considered courts of the Emirate of Abu Dhabi.
- The ICC representative office in the ADGM was opened during the course of the arbitration proceedings.
- Therefore, the ICC office in the ADGM was considered to be the place of arbitration, and so the ADGM Courts were the Courts with supervisory jurisdiction over the arbitration.

In essence, therefore, the Court of Cassation reasoned that, because the parties chose the ICC Rules to govern the arbitration, and that because the ICC maintains a representative office in the ADGM, the ADGM should be taken to be the seat of arbitration, giving the ADGM Courts jurisdiction over any claims or applications arising out of the arbitration. The Court noted that the arbitration clause providing for the arbitration to be seated in Abu Dhabi was not specific, and that both the onshore courts and the ADGM Courts are courts of the Emirate of Abu Dhabi.

ANALYSIS

The outcome of the case may be considered surprising. The Court appeared to elide the arbitration rules and seat of the arbitration. The judgment also states that the ICC office in the ADGM opened during the course of the arbitral proceedings, which would imply that, at the outset, the arbitration was seated in onshore Abu Dhabi, and that its seat 'moved' to the ADGM with the opening of the ICC office there.

It remains to be seen whether the Court's decision will be followed in future cases. For the time being, though, there appears to be a risk that an arbitration seated in Abu Dhabi and conducted under the ICC Rules may be deemed to be seated in the ADGM, whether or not this was the intention of the parties.

The decision also shines a spotlight on the inherent ambiguity of an arbitration clause providing that “the seat of the arbitration shall be the Emirate of Abu Dhabi,” or similar, notwithstanding that the Emirate of Abu Dhabi contains two separate supervisory regimes for arbitration: the onshore Courts applying the UAE Federal Arbitration Law, and the ADGM Courts applying the ADGM Arbitration Regulations 2015. Parties should take care to be specific in specifying the seat of arbitration in their arbitration agreement and consider, when seating an arbitration in the United Arab Emirates, also specifying the courts that have supervisory jurisdiction over the arbitration.

FOOTNOTES

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[1] Referring to Abu Dhabi Law No. 4/2013 Concerning the Abu Dhabi Global Market.

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