UAE High Court finds ICC ADGM office subjects Abu Dhabi seated ICC arbitrations to the jurisdiction of the ADGM Courts

February 3, 2023

Brief

Two parties to a construction contract agreed that all disputes would be subject to the International Chamber of Commerce Rules of Arbitration and for the arbitration to be seated in Abu Dhabi.

The arbitration award was challenged by one of the parties before the Abu Dhabi Appeals Court.

The Abu Dhabi Appeals Court found it had no jurisdiction and that jurisdiction was exclusive to the Abu Dhabi Global Market Courts.

The reasoning of the Abu Dhabi Appeals Court was that:

- the arbitration was subject to the ICC Rules which resulted in,
- the arbitration proceedings being subject to the ICC representative office in the ADGM,
- and as the ICC representative office in the ADGM is considered an ADGM establishment,
- then the ADGM Courts have exclusive jurisdiction to consider challenges to the arbitration award.

Petition

The party petitioning the Abu Dhabi Cassation Court argued substantively presenting a myriad of grounds addressing the UAE Federal Arbitration Law, the ADGM respective laws, and the New York Convention. The arguments of the petitioner were as follows:

- That the parties expressly agreed to settle disputes between them in accordance with the ICC Rules, provided that the procedures and place of arbitration are in the Emirate of Abu Dhabi, without allocating the spatial scope in the Emirate of Abu Dhabi, and that applying the ICC Rules does not make that ICC or any of its branches a place for arbitration because it violates the contract between the two parties.
- That the ICC having a representative office in the ADGM does not mean that the two parties have agreed that the seat of arbitration is this representative office as they agreed in the contract to subject arbitration and its procedures to the laws of the UAE, they also agreed that the Emirate of Abu Dhabi as the place for arbitration, and in accordance with Articles 1 and 2/1 of UAE Federal Arbitration Law No. 6/2018, the Abu Dhabi Appeals Court is the competent forum to adjudicate challenges against the arbitration award.
- That it was not mentioned in the arbitration award that it was issued by the ICC in its capacity as a local court in the ADGM or in its capacity as a local court in the Emirate of Abu Dhabi, and neither in the award nor in the contract was there agreement to apply the rules of the ADGM or the Arbitration Regulations of the ADGM.
- That the arbitration award was not issued in the name of The Ruler of the Emirate (Abu Dhabi) as required by Article 13/2 of ADGM Law No. 4/2013, and it was not issued by judges as required by Article 13/1 of said ADGM Law, nor by the representative office of the ICC

located in the ADGM, but rather by the Secretariat of the International Court of Arbitration affiliated with the ICC, nor did the ICC representative office in the ADGM notify the parties of the arbitration award, but the notification was rather conducted by the Secretariat.

- That assuming that the ADGM Courts are competent to hear challenges against the arbitration award, this causes a judicial vacuum because the Court of First Instance in the ADGM has no jurisdiction to hear the case and its jurisdiction is exclusively in accordance with the text of Article 7/13 of ADGM No. 4/2013.
- That neither the ADGM, nor any of the ADGM authorities, nor any of the ADGM establishments were party to the arbitration, and the contract was not concluded, completed, or executed, in whole or in part, and the incident was not completed in whole or in part in the ADGM, and the award is not an appeal against a decision or a procedure issued by any of the ADGM authorities.
- That the ADGM Courts apply the civil and commercial laws of the ADGM, specifically English laws, not the laws of the UAE, and the Abu Dhabi Appeals Court judgment violated the New York Convention, which requires under its Article Three the recognitions of arbitral awards as binding and enforceable in accordance with the rules of procedure of the territory where the award is relied upon, and para. (e) of Article V of the Convention prohibited those territories from refusing to recognize a foreign award or refusing to enforce it, and thus the Convention linked foreign awards to the legal system of the country that it was issued and in respect of the invalidity of arbitration awards and as the award is issued in the Emirate of Abu Dhabi, the Abu Dhabi Courts have exclusive jurisdiction to hear challenges against an award issued in the Emirate of Abu Dhabi and outside the ADGM.

Disposition of the Abu Dhabi Cassation Court

The petitioner filed their petition before the Abu Dhabi Cassation Court on 29 December 2022 and the Court issued its judgment on 18 January 2023 rejecting the petition and upholding the finding of the Abu Dhabi Appeals Court on the following legislative grounds:

- Article 18/1 of the UAE Federal Arbitration Law applies which states that: “The jurisdiction to examine the arbitration matters referred by the present Law to the competent Court shall be according to the applicable procedural laws in the State, and they shall, solely, have the power until all arbitration proceedings are terminated.”
- Article 1 of the UAE Federal Arbitration Law defines the ‘Court’ as: “The federal or local Appeal Court agreed by all Parties or which the Arbitration is carried out within its area of jurisdiction.”
- Article 1 of ADGM Law No. 4/2013 defines ‘ADGM Establishments’ as: “Any company, branch, representative office, establishment entity, or project registered or licensed to operate or conduct any activity within the ADGM by any of the ADGM authorities according to the provisions of this law or the ADGM regulations or the executive resolutions including the licensed financial ADGM Establishments.”
- Article 13/1 of ADGM Law No. 4/2013 states that: “The ADGM Courts shall be of two degrees, first instance (formed of a single judge) and appeal (formed of three judges). Without prejudice to the provisions of this law and the ADGM Regulations, the ADGM Courts shall be considered as courts of the Emirate, with jurisdiction over disputes and matters in accordance with the provisions of this law and the ADGM Regulations.”
- Article 13/7/d of ADGM Law No. 4/2013 states that: “The Court of First Instance and shall have exclusive

jurisdiction to consider and decide on matters according to the following … Any request, claim or dispute which the ADGM Courts have the jurisdiction to consider under the ADGM Regulations."

- Article 13/10 of ADGM Law No. 4/2013 states that: "The Court of Appeal shall have exclusive jurisdiction to consider and decide on appeals made against the judgments or orders issued by the Court of First Instance."
- Article 13/11 of ADGM Law No. 4/2013 states that: "Judgments of the Court of Appeal are final and may not be challenged by any method of appeal."

Relying on these provisions, the disposition of the Abu Dhabi Cassation Court was:

- All disputes arising from or in connection with the contract are to be finally decided by arbitration subject to the ICC Rules, the laws of the UAE, and seated in the Emirate of Abu Dhabi.
- There was no dispute between the parties that the ICC opened its fifth branch in Abu Dhabi during the arbitration procedures and before the issuance of the arbitration award.
- The ICC branch in the ADGM is considered a representative office of the ICC, and an ADGM establishment, and hence the place of arbitration is the ADGM subject to ADGM Law No. 4/2013.

Conclusively, the Abu Dhabi Cassation Court upheld the Appeals Court finding that the ADGM Courts have exclusive jurisdiction over challenges against the arbitration award because the arbitration agreement was subject to the ICC Rules and seated in Abu Dhabi, because the ICC representative office in the ADGM is considered an ADGM establishment.

Significance of this judgment and takeaways

The judgment is a high court judgment. The Abu Dhabi Cassation Court is the highest level of court proceedings in the Emirate of Abu Dhabi.

The judgment does not carry the status of stare decisis, and a conflicting judgment could be issued by the Abu Dhabi Cassation Court in the future.

However, for the time being, and given the expediency in which the Cassation Court issued its judgment in less than a month from the date the petition was filed, it appears the Cassation Court has taken a relatively resolute position on this matter.

By subjecting all arbitrations seated in Abu Dhabi and subject to the ICC Rules to the ADGM Courts, parties to such arbitration agreements need to consider the following:

- Review existing contracts and consider future dispute clause language to ensure that the parties choose which courts will have jurisdiction over the arbitration proceedings.
- Parties to an arbitration agreement can utilize the ADGM Courts for procedures outlined in the UAE Federal Arbitration Law, even where the ADGM is not the seat of arbitration, so long as the ICC Rules are agreed to be the rules of arbitration.
- Parties may utilize the ADGM Courts for various procedural powers under the UAE Federal Arbitration Law, even if the parties have no connection with the ADGM, as long as the arbitration agreement applies the ICC Rules and for the arbitration to be seated in the Emirate of Abu Dhabi, such as the following:
- Issuance of interim or precautionary measures under Article 18/2 of the UAE Federal Arbitration Law.
- Ruling on the jurisdiction of the arbitration tribunal under Article 19/2 of the UAE Federal Arbitration Law.
- Enforcement of interim orders and awards granted by the arbitration tribunal under Article 21/4 of the UAE

Federal Arbitration Law.

- Seek the assistance of the ADGM Courts in taking evidence during arbitration proceedings under Article 36/1 of the UAE Federal Arbitration Law.
- Amendment of the fees and costs assessed by the arbitration tribunal under Article 46/2 of the UAE Federal Arbitration Law.
- Challenging an arbitration award under Article 53 of the UAE Federal Arbitration Law.

Looking forward, the ratio decidendi of the Abu Dhabi Cassation Court may apply across the UAE, including before the Dubai Cassation Court and the Federal Supreme Court.

Because the reasoning relies on the provisions of the UAE Federal Arbitration Law which applies on a Federal level across the UAE.

Hence the analysis that the ICC representative office encapsulates arbitrations seated in Abu Dhabi to the ADGM, may also arguably apply to arbitrations seated elsewhere in the UAE.

This increases the necessity for parties with arbitrations seated in the UAE to agree on the courts that would have jurisdiction over the arbitration procedures, and not just rely on agreement on the seat of arbitration as an indicator.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile:
https://waselandwasel.com/about/mahmoud-abuwasel/

Lawyers and consultants.
Tier-1 services since 1799.
www.waselandwasel.com
business@waselandwasel.com