

Opting to Arbitrate in the ADGM: A Recent Judgment of the ADGM Court of First Instance

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Introduction

On 4 July 2019, the Abu Dhabi Global Market Court of First Instance ('ADGM Court') issued its first arbitration-related judgment since its enactment in 2016 (A3 v B3 [2019] ADGMCFI 0004). The ADGM Court considered an application for a declaration that an arbitration agreement was valid and binding on the parties. The Claimant applied to the ADGM Court after it had initiated arbitral proceedings before the International Chamber of Commerce ('ICC'), and the ICC Court had decided not to proceed with the arbitration.

Background

The parties entered into a lease agreement on 25 October 2017 (the 'Lease'). The Claimant leased a property on Al Maryah Island, Abu Dhabi to the Defendant for a period of five years. Less than a year later, the Defendant sought to terminate the Lease. The Claimant disputed the Defendant's right to do so and, on 12 November 2018, purported to terminate the Lease on the basis that the Defendant was in breach of its terms.

The Claimant sought to initiate arbitration proceedings against the Defendant, and relied on the dispute resolution terms of the Lease, as follows:

- clause 33 of the Lease provides that the agreement is governed by and construed in accordance with Applicable Law, which the Lease defines as "*any Abu Dhabi Global Market enactment and Applicable Abu Dhabi Law ... for the time being*";
- clause 32 of the Lease is titled "*Dispute Resolution*". Clause 32.1 provides that, in the event of a dispute, the parties shall amicably settle the dispute;
- clause 32.2 of the Lease is titled "*Arbitration*". Clause 32.2.1 provides that "*to the extent permitted by Applicable Law, they [should] adopt the dispute resolution procedures set out in [the other provisions of clause 32.2]; however, otherwise, they [should] accede to the dispute resolution forum with competent jurisdiction*";
- clause 32.2.2 states that "*[the parties] further agree that should Abu Dhabi Global Market establish an*

arbitration centre, in advance of the formal commencement of any relevant proceedings, [the Claimant] may notify [the Defendant] that the arbitration provisions set out in this clause 32 shall be replaced by reasonable alternative provisions in order to provide for jurisdiction by such newly established centre within Abu Dhabi Global Market...";

- clause 32.2.3 provides that, if the parties do not reach a solution as provided for in clause 32.1, the dispute should be *"finally settled under the Arbitration Rules set out in the Proceedings Regulation of the Abu Dhabi Commercial Conciliation and Arbitration Centre"*; and
- clause 32.2.6 provides for the seat of the arbitration to be Abu Dhabi.

On 25 November 2018, the Claimant notified the Defendant that the ADGM Arbitration Centre was established and became fully operational on 17 October 2018 and exercised its right to replace the contractual arbitration provisions in accordance with Clause 32.2.2 ('Notice'). The Claimant replaced Clauses 32.2.2 and 32.2.3 with a provision that stated:

If the parties do not reach a solution as provided for in clause 32.1 within 20 days of the date of the Dispute Notice, then "the Dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce".

The Claimant also amended other provisions of the Lease, notably changing the seat of the arbitration from Abu Dhabi to the ADGM (hereinafter referred to as 'Amended Provisions').

The Defendant did not object to the Claimant's Notice. The Defendant also did not respond or return a signed copy of the Notice, notwithstanding the Claimant's request in the Notice to sign and return *"a copy of the letter... to confirm your acceptance of and agreement to its terms"*.

International Chamber of Commerce Proceedings

On 9 December 2018, the Claimant initiated arbitration proceedings before the ICC, in which it sought, *inter alia*, a declaration that the Defendant was in breach of the Lease, and that the Claimant had validly terminated the Lease.

The ICC accepted the Claimant's request for arbitration. The Defendant, however, did not submit a reply nor did it participate in the proceedings. The ICC referred the matter to the ICC Court to determine whether the arbitration would proceed pursuant to Articles 6.3 and 6.4 of the ICC Rules. On 18 April 2019, the ICC Court decided that the arbitration would not proceed.

Article 6.6 of the ICC rules provides that, where the ICC Court decides not to proceed with the arbitration, the Claimant may request *"any court having jurisdiction"* to determine whether the arbitration agreement is valid and binding. The Claimant thus referred the matter to the ADGM Court pursuant to Clause 33 of the Lease.

ADGM Court Proceedings

On 16 May 2019, the Claimant initiated a claim before the ADGM Court to confirm the validity of the arbitration agreement, pursuant to Article 6.6 of the ICC Rules and Rule 231 of the ADGM Court Procedure Rules 2016.

The Claimant sought a declaration *"that there is a valid and binding arbitration agreement providing that disputes arising under a Lease dated 25 October 2017... be subject to arbitration in the ADGM Arbitration Centre under the ICC Arbitration Rules"*. In the alternative, the Claimant sought a declaration that *"such*

disputes be referred to ad hoc arbitration in the ADGM Arbitration Centre”.

The ADGM Court determined that it has jurisdiction to determine the dispute. The Defendant did not participate in the ADGM Court proceedings.

In determining the dispute, the ADGM Court considered seven questions:

First, the ADGM Court considered whether Clause 32.2, as a whole, has a binding contractual effect. Clause 32.2 purports to provide for arbitration, but does not specify which disputes the parties agreed to arbitrate. The court stated that this should not prevent the clause from having a binding contractual effect. The court stated that an arbitration agreement could be valid without expressly identifying the disputes that it covers. The court also determined that Clause 32 must be read as a whole, which makes clear that Clause 32.2 was intended to apply to the disputes covered by Clause 32.1 (i.e., “disputes and differences arising between [the Claimant and the Defendant] out of or relating to the Lease or any breach of the Lease”).

Second, the ADGM Court considered the validity of Clause 32.2.2, which provides for one of two options to resolve disputes. The court stated that the English common law recognises options in contractual clauses. While Clause 32.2.2 of the Lease is rather unusual, the court stated that there could be no objection, in principle, to the option it stipulated, even if it “imports an unilateral aspect and in that sense an element of imbalance into the dispute resolution provisions”, with the court noting that:

“...the notion, once current, that mutuality is a requirement of a valid arbitration agreement was rejected by the English Court of Appeal in Pittalis v Sherefettin, [1988] 2 All ER 227.”

Third, the ADGM Court considered whether Clause 32.2.2 provides the Claimant with a “legally enforceable option”. Clause 32.2.2 provides that the Claimant may replace the initial terms of Clause 32 with “reasonable alternative provisions”, but there is no express guidance on how to assess reasonableness. The court determined that Clause 32.2.2 does not entitle the Claimant to replace the initial provisions with “reasonable” provisions of any kind, but only with reasonable provisions that: (a) are alternative to the initial term; and (b) provide for the jurisdiction of the newly established arbitration centre. The court thus stated that:

“[it does] not need to consider whether an option to make reasonable changes simpliciter would be sufficiently certain to have legal effect: here the wording of clause 32.2.2 and the context provide sufficient guidance as to what provisions will satisfy the requirement.”

Fourth, the ADGM Court considered whether the condition precedent for the exercise of the option in Clause 32.2.2 was satisfied. Clause 32.2.2 operates only if “Abu Dhabi Global Market establish an arbitration centre, in advance of the formal commencement of any relevant proceedings”, that is to say, in this case, before 9 December 2018 (i.e., the date of the commencement of the ICC proceedings). The court determined that the notion of an arbitral centre does not refer to a physical or geographical location, but an institution. This interpretation is dictated both by commercial sense and by the wording of the clause, which refers to “alternative provisions in order to provide for jurisdiction by such newly established centre”, and not “at such newly established centre”. In addition, on 17 October 2018, before the date of the commencement of the ICC proceedings, the ADGM Arbitration Centre became fully operational, together with an ICC representative office. The court thus determined that the condition precedent for the exercise of the option in Clause 32.2.2 was satisfied.

Fifth, the ADGM Court considered the validity of the Notice. This question arose because the Claimant requested that the Defendant confirm its agreement to the terms of the Notice by counter-signing a copy of the Notice. The court considered whether the Claimant’s request for the Defendant’s consent could

mean that the Claimant was not purporting to exercise the option unilaterally. The court's answer to this question was two-fold.

- the court determined that the Claimant's request could not reasonably be taken to have compromised its right unilaterally to stipulate the Amended Provisions, considering that it was already in dispute with the Defendant about the termination of the Lease. This is also supported by the wording of the Notice, which stated *"the following changes are hereby made to the Lease with effect from the date of this letter"*. The court stated that the intent of the Claimant's request could have been for the sole purpose of a record of an already complete and binding agreement;
- the court determined that the Defendant was obliged under the terms of Clause 32.2.2 to sign documentation as might be reasonably required by the Claimant. A counter-signed copy of the Notice was thus reasonably required by the Claimant. The Defendant breached its contractual obligation, and therefore is not entitled to take advantage of its own breach.

Sixth, the ADGM Court considered whether the Amended Provisions in the Notice were: (a) reasonable; and (b) within the limits of what Clause 32.2 permitted. The court determined that the Amended Provisions satisfy the requirement of reasonableness, and *"serves the commercial purpose of the clause"*. The court highlighted that the Claimant also purported to amend the seat of the arbitration from Abu Dhabi to Abu Dhabi Global Market. The court determined that, while this change was not necessary, it was reasonably incidental to the other changes, and within the scope of the power of the Claimant to require the reasonable Amended Provisions.

Seventh, the ADGM Court considered whether the arbitration agreement is "in writing" within the scope of Section 13 of the ADGM Arbitration Regulations. The Claimant argued that Clause 32.2.2 of the Lease, together with the Notice dated 25 November 2018, constitute a written arbitration agreement. The court considered that, while the arbitration agreement is in fact in writing, the arbitration agreement is, notwithstanding the Amended Provisions, simply contained in the Lease.

The court further determined that the *"proper legal analysis is that an option constitutes an offer to enter into a contract, which may be accepted by exercising the option, here the option was exercised in writing"*. The applicable law does not require that each party to the agreement sign a document containing its terms. The court thus determined that the arbitration agreement was in writing, whether the writing was only the Lease, or the Lease and the Notice together.

ADGM Court Judgment

The ADGM Court thus held that the Claimant was entitled to a declaration, namely that:

"[t]here is a valid and binding arbitration agreement between the Claimant and the Defendant that disputes arising under a lease between them dated 25 October 2017 be subject to arbitration under the Rules of Arbitration of the International Chamber of Commerce and that the seat or legal place of arbitration is the Abu Dhabi Global Market".

The court however reflected on two points in its decision. In considering the precise terms of the declaration, the court determined that Clause 32.2 actually provides for arbitration for all disputes arising between the parties out of or relating to the Lease or any breach of the Lease. The court's determination is wider in scope than the Claimant's request for a declaration that only *"disputes arising under [the] lease ... be subject to arbitration"*. The court stated that:

“the wording is wider than that in the proposed declaration, but that does not seem to me a reason to refuse permission for a declaration with the narrower wording as sought by [the Claimant]. The greater includes the lesser.”

The court also determined that the Claimant’s wording of the declaration that it sought is different from the relief in its original claim form. The court highlighted that the Defendant probably did not have notice of the proposed declaration given its failure to engage in the court proceedings. In the interest of the Defendant, the court ordered the Claimant not to enforce the declaration or seek to take any steps with regard to arbitral proceedings in reliance upon it before 14 days have elapsed after the service of the judgment on the Defendant.

Commentary

The judgment marks an auspicious start by the ADGM courts in their supervisory role over arbitrations seated in the ADGM – it is well reasoned, cogent, and practical in its treatment of the rather novel situation presented by the wording of the arbitration clause, its amendments, and the facts of the case.

The judgment serves as a reminder to simplify the drafting of arbitration clauses as far as possible, while at the same time assuring parties of the authority of the ADGM courts to address complex drafting issues where they arise.

Al Tamimi & Company’s [Arbitration team](#) regularly advises on arbitration-related matters. For further information, please contact [John Gaffney \(j.gaffney@tamimi.com\)](mailto:j.gaffney@tamimi.com).