



ADGM COURTS

محكمة أبوظبي العالمية



In the name of

His Highness Sheikh Mohamed bin Zayed Al Nahyan

President of the United Arab Emirates/ Ruler of the Emirate of Abu Dhabi

**COURT OF FIRST INSTANCE
COMMERCIAL AND CIVIL DIVISION
BETWEEN**

A8

Claimant

and

B8

Defendant

JUDGMENT OF JUSTICE WILLIAM STONE SBS KC



Neutral Citation:	[2023] ADGMCFI 0015
Before:	Justice William Stone SBS KC
Decision Date:	26 June 2023
Hearing Dates:	13 June 2013
Decision:	Claimant's application for recognition and enforcement of Abu Dhabi arbitral award granted within Abu Dhabi Global Market; Defendant's jurisdictional objection dismissed
Date of Order:	26 June 2023
Catchwords:	Recognition and enforcement of arbitral award; construction of Article 13(14) of the ADGM Founding Law, as amended, by Law No 12 of 2020; Guide to amendments of ADGM Founding Law; 'executory formula'; Practice Direction 10.15
Legislation cited:	ADGM Courts , Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 ADGM Arbitration Regulations 2015 Abu Dhabi Law No. 4 of 2013 (as amended by Abu Dhabi Law No. 12 of 2020) Practice Direction 10.15
Cases cited:	Attorney General v Barker [2000] EWHC 453 (Admin) A4 v B4 [2019] ADGMCFI 0007 Meydan Group LLC v Banyan Tree Corporate Pte Ltd CA-005-2014 (DIFC) A6 v B6 [2023] ADGMCFI 0005
Case Number:	ADGMCFI-2023-013
Parties and representation:	Nathan Baikie of Mahmood Hussain Law Firm for the Claimant David Russell KC and Ms Haifa Shakra of Khalid Atiq Almarri Advocates for the Defendant

JUDGMENT

The Applications

1. There are two applications before the Court:
 - a. A8's arbitration claim seeking the recognition and enforcement of an arbitral award dated 24 January 2023 (the "**Award**") pursuant to section 60(1)(c) of the ADGM Arbitration Regulations 2015; and
 - b. B8's application seeking a declaration pursuant to Rule 38 of the ADGM Court Procedure Rules that the Court does not have jurisdiction to try the claim, alternatively that the Court should not exercise any jurisdiction that it may have.



Procedural History

2. There is much background detail, but the material facts are in short compass and are not in dispute.
3. On 20 November 2015 the parties entered into a construction contract (the “**Agreement**”) whereby A8 appointed B8 to design and construct a residential apartment building in XXX, Abu Dhabi (the “**Building**”).
4. Clause 19.5 of the Agreement stipulated that any disputes were to be finally settled by an arbitration conducted under ICC Rules by a three member tribunal; the arbitration was to be: conducted in English; governed by UAE law; and was seated in Abu Dhabi.
5. A dispute arose between the parties resulting in A8 commencing arbitration proceedings against B8 on 17 June 2019.
6. On 4 September 2022 the arbitral tribunal rendered its award (the Award) which, in net terms after set-offs (as submitted by A8), directed B8 to pay the sum of AED 7,001,818.15 to A8 together with simple interest on certain amounts at the rate of 5% per annum, and further made a number of consequential declarations/ orders relating to the Building.
7. B8 made no response to a letter issued by A8 demanding payment, nor has B8 made any payment to A8 of the sum awarded or any part thereof.
8. On 11 October 2022 B8 filed an application with the Abu Dhabi Judicial Department Court of Appeal (the “**ADCA**”) to set aside the Award.
9. In turn, on 13 October 2022 A8 filed an application with the ADCA to ratify (recognise) the Award in order that it could be enforced in wider Abu Dhabi.
10. On 2 November 2022 the ADCA dismissed both the set aside and the ratification applications on the basis that it did not have jurisdiction, and that exclusive jurisdiction now resided with the ADGM Courts consequent upon the establishment of a representative office of the ICC International Court of Arbitration (the “**ICC**”) in the Abu Dhabi Global Market (the “**ADGM**”).
11. The parties respectively sought to appeal the decisions of the ADCA. On 19 December 2022 the Abu Dhabi Judicial Department Court of Cassation (the “**ADCC**”) dismissed A8’s appeal and on 29 December 2022 the ADCC similarly dismissed B8’s appeal. The ADCC affirmed its view of the significance of the existence of the ICC branch office conferring jurisdiction upon the ADGM Courts, noting that “*that branch is considered a representative office of the International Chamber of Commerce and is the place of arbitration subject to the aforementioned Abu Dhabi Global Market Law. Hence the appeal against it falls under the jurisdiction of the Global Market Court in Abu Dhabi*”.
12. On 28 February 2023 B8 filed a ‘Reversal Application’ with the ADCC to reverse its judgment and to stay enforcement of the Award.
13. On 30 March 2023 five senior judges of the ADCC dismissed the Reversal Application on the basis that the ADGM Courts have exclusive jurisdiction to hear and determine any challenge to the Award.
14. The hearing of these applications, originally listed for 16 May 2023, was adjourned on the understanding that this case remained before the ADCC. Following subsequent confirmation that this was no longer the case, the applications were re-listed for hearing on 13 June 2023, at which the applications were heard together.



The Argument

15. Mr Baikie for A8 reviewed the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 (the “**Courts Regulations**”) which set out the Court’s jurisdiction: he noted that the Arbitration Regulations 2015 were amended on 23 December 2020 (the “**Arbitration Regulations**”), and that these Regulations fall within section 16 of the Courts Regulations, which are defined within section 227(1) as meaning “*regulations enacted by the Board under Article 6(1) of the ADGM Founding Law.*”
16. He submitted that section 60 of the Arbitration Regulations therefore applied, in particular section 60(1)(c) of Part 4 which states that Part 4 applies to “*all other arbitral awards which are sought to be recognised and enforced in the Abu Dhabi Global Market, irrespective of the State or jurisdiction in which they are made.*”
17. In addition, Mr Baikie drew attention to the terms of section 61(1) of the Arbitration Regulations which made it clear that an award within the meaning of section 60(1) “*shall be recognised as binding within the Abu Dhabi Global Market on the persons between whom it was made*” and “*shall be enforced within the Abu Dhabi Global Market as if it were the judgment of the Court...*” and emphasized the mandatory nature of the statutory language.
18. Mr Baikie alluded to the difficulty facing his client in terms of that which is generally referred to as the ‘conduit jurisdiction’ issue, and accepted that recent amendments to Abu Dhabi Law No. 4 of 2013 (the “**Founding Law**”) amended by Abu Dhabi Law No. 12 of 2020 on 27 May 2020 (together, the “**Amended Founding Law**”) precluded this Court being used for the enforcement of non-ADGM arbitral awards in other jurisdictions.
19. Nevertheless he asked the Court to take into account the particular circumstances by which his client came to be before this Court requesting recognition and enforcement of the Award, having exhausted all available options before the Abu Dhabi Judicial Department (“**ADJD**”) and said that manifestly this was not a case where A8 had approached this Court in order to circumvent directly seeking enforcement in the ADJD: hence his position was that this Court nevertheless should recognise and enforce the Award, certainly within ADGM, but in addition that the ‘executory formula’ also should be affixed to the Order, thereby facilitating enforcement of the Award in wider Abu Dhabi.
20. The objections of Mr Russell KC, for B8, to this application were wide-ranging, but in substance essentially were two-fold.
21. First, Mr Russell submitted that the Award was not an arbitral award falling within the terms of section 60(1)(c) of the Arbitration Regulations because A8 was not seeking to enforce the Award in ADGM – as indeed its prior application before the ADJD amply had demonstrated – and thus the required factual predicate remained unsatisfied: there were no assets of B8 within ADGM, there was witness evidence to this effect, and this requirement could not be fulfilled merely by the filing of an application for recognition and enforcement. Moreover, he said, notwithstanding its view as to the jurisdictional effect of the establishment of an ICC office in ADGM, the ADCC had no power to confer jurisdiction on this Court which it did not otherwise possess, and in the particular circumstances of this case this Court simply lacked the jurisdiction to act.
22. The second limb of his submission was that A8 had not sought recognition of the Award in order to enforce it within ADGM, but rather wished to have it enforced by one or more competent entities outside ADGM. Consequently, there remained the obvious and insurmountable problem facing A8 resulting from Article 13(14) of the Amended Founding Law, which disapplies Article 13(13) “*in respect of the recognition or enforcement of: ... (b) any arbitral award rendered by a tribunal where the seat is outside the Abu Dhabi Global Market*”, the effect of which was to preclude use of the ADGM Courts as a ‘conduit



jurisdiction' for the enforcement of foreign judgments and arbitral awards.

23. As a concomitant to his primary submissions, Mr Russell also suggested that what was happening in A8's application amounted to an abuse of process in the classic sense of the term, namely "*use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process*": *Attorney General v Barker* [2000] EWHC 453 (Admin) at [19].
24. Thus, Mr Russell concluded, as a matter of discretion the Court should in any event dismiss the current application for recognition and enforcement.

Decision

25. As its starting point, this Court dismisses any allegation of abuse of process. In this Court's view, A8's application is nothing of the sort.
26. A8 has done nothing wrong. It had a contractual dispute with B8, that dispute went to arbitration consistent with the Agreement, it secured an arbitral award from a duly constituted ICC tribunal, and thereafter sought unsuccessfully to have the Award recognised (or ratified) and enforced in wider Abu Dhabi. This endeavour was refused, for the reason given by both the ADCA and ADCC, A8 being directed to this Court in an attempt to obtain the redress to which it now is entitled under the terms of the Award. That is the historical sequence, and in these circumstances A8's course of conduct cannot properly be classified as an abuse of process.
27. As to the substance of the arguments presented in relation to both applications, it seems to this Court that there are three elements which require consideration: the issue of recognition *simpliciter*, the issue of enforcement, and (as a corollary to the latter) the issue of the affixation or otherwise of the 'executory formula' to the Order that A8 seeks on its application.

Recognition

28. This Court fails to see any reason why the Award should not be recognised.
29. As Justice Sir Andrew Smith observed in *A4 v B4* [2019] ADGMCFI 0007 [12], given that the language of section 61(1) of the Arbitration Regulations is in mandatory terms, "*the Court is required to do so [recognise and enforce] unless one of the grounds for refusing recognition or enforcement stated in section 62 of the Arbitration Regulations is satisfied.*"
30. None of the well-known (and exclusive) grounds for refusal of recognition and enforcement as specified in section 62(1)(a) and (b) of the Arbitration Regulations are invoked in the instant case, and although Mr Russell alluded in passing to the "*public policy of the UAE*" (vide section 62(b)), essentially this was made in the context of the submission relating to the improper exercise of the 'conduit jurisdiction' and identified none of the usual matters which are statutorily identified as grounds for refusal of recognition and enforcement.
31. Accordingly, the view of this Court is that there is nothing in this case which precludes recognition of the Award.

Enforcement

32. Paragraphs 29 and 30 of this judgment apply equally to enforcement; nevertheless the issue of enforcement loomed large in this case.
33. Mr Russell makes much of the fact that the evidence filed on his client's behalf positively asserts that B8 has no assets within ADGM, and that it is plain that A8 first sought to enforce the Award in wider Abu



Dhabi because that was where B8 had assets against which A8 wished to execute; indeed the alleged absence of assets within ADGM is employed to underpin the assertion that this Court possesses no jurisdiction to deal with the issue of enforcement.

34. Mr Baikie does not accept the proposition that B8 has no assets in ADGM: A8's Skeleton Argument averred that its preliminary investigations appeared to show the opposite, noting (amongst other things) the existence of a company registered with the ADGM Registration Authority on 18 August 2021 known as 'Site Technology Head Office Ltd' and that entity has a common director with B8.
35. The Court does not know whether B8 has any assets within ADGM, which now has been formally expanded to include Al Reem Island (a development so recent that this aspect was not considered at the time of preparation of this case) and is in no position to comment further. Mr Russell also makes the procedural point that this information is not vouchsafed in any witness statement filed by A8, nor has any attempt been made to cross-examine B8's witnesses on the issue, but this strikes the Court as not amounting to very much; were it significant there would be no difficulty in A8 undertaking to file a supplemental witness statement, but in substance this matters not at all.
36. This is because the presence or otherwise of assets is an arid debate, since this not a pre-condition to the grant of an enforcement order: see for example the observations in *Meydan Group LLC v Banyan Tree Corporate Pte Ltd*, CA-005-2014 in the DIFC Courts, where the Court of Appeal in that case rejected the submission of the appellant that there was a requirement for the presence of the respondent or its assets within the DIFC as a prerequisite to recognition and enforcement of a domestic arbitration award made within the Emirate of Dubai but outside the DIFC in favour of the respondent; at para 33 of their Judgment the Court stated:

"The absence of assets in the jurisdiction may be relevant consideration in the exercise of discretion to grant execution. But even then, a judgment creditor is entitled to levy execution against assets which come into the jurisdiction after the judgment is entered or which did not even exist at that time. Furthermore an enforcement order alone may be of value in the tracing of assets by, for example, oral examination...In any event, it is clear that there is no barrier to enforcement given the absence of assets within the jurisdiction..."

37. This Court respectfully agrees with this approach. There is no established international jurisprudence requiring the existence of assets as a necessary precursor to an enforcement application of an arbitral award, albeit in practice parties with an award in their favour inevitably seek enforcement in the jurisdiction wherein the majority of the award debtor's assets are perceived to exist, and in fairness to Mr Russell he declined to go that far, limiting himself to the assertion that in the circumstances there had been non-compliance by A8 with section 60(1)(c) of the Arbitration Regulations.
38. In the context of the debate as to the existence of assets, the Court notes that the 'Guide to amendments to Article 13 of Abu Dhabi Law No 4 of 2013' (the "**Amendment Guide**"), the document which narrates and seeks to explain the amendments to the Founding Law (as contained in Abu Dhabi Law No. 12 of 2020), states (at para 14):

"In practice, parties are still able to apply to ADGM Courts for the recognition and enforcement of non-ADGM judgments and awards, even if there are no relevant assets in ADGM. But save for the limited exception referred to in paragraph 11 [where the originating judgment comes from another court within the Emirate], the Registry of the ADGM Courts will not affix the 'executory formula' to any subsequent ADGM Courts judgment or order for the purpose of enforcement (including execution) in other jurisdictions."

39. In summary, this Court entertains no doubt but that it possesses jurisdiction, and in the circumstances and in the exercise of its unfettered discretion is minded to exercise such jurisdiction to grant A8's



application for recognition and enforcement of the Award within ADGM. It follows, therefore, that B8's jurisdiction application is dismissed.

40. This begs the question, however, about whether in the particular circumstances of this case this Court can go further and extend such recognition and enforcement in order to facilitate execution in wider Abu Dhabi, which at bottom is the prime purpose of the application A8 as the successful party in this arbitration is now pursuing, given that it has been precluded from so doing to date.

“Executory Formula”

41. Thus is brought into sharp focus that which is referred to as ‘the executory formula’, the statement which in appropriate cases is affixed by the Registry to an order of this Court to facilitate the enforcement of the order in other Courts of the United Arab Emirates: this has its origin in Article 12(a) of the Memorandum of Understanding of 11 February 2018 between the ADJD and the ADGM Courts Concerning the Reciprocal Enforcement of Judgments.

42. The wording of the ‘executory formula’ is in the following terms:

“The authorities and competent bodies must proceed to execute this instrument and to carry out the requirements thereof, and they must give assistance in the execution thereof even by force if so requested.”

43. A8 wishes to obtain an order with this endorsement thereon. It recognises the ‘conduit jurisdiction’ hurdle contained in Article 13(14) of the Amended Founding Law, the commentary of the Amendment Guide reading in part (at para 13):

“...if parties wish to take advantage of the favourable enforcement framework the ADGM Courts have in place with other jurisdictions (including with Abu Dhabi Judicial Department), they must submit their original dispute for determination by ADGM Courts or by arbitration in ADGM. If parties do not do this, and execution against debtor assets is to take place in a jurisdiction other than ADGM, then the judgment or award creditor must bring an enforcement application in that other jurisdiction.”

44. A8's approach to the dilemma is to argue that having exhausted all available options in ADJD, this application cannot and should not be regarded as a ‘classic’ case of attempting to use the ADGM Courts as a conduit jurisdiction in order to get to enforcement elsewhere; this was in no sense an example of an attempt to circumvent the accepted rules since the ADJD declined to recognise and enforce the Award and determined that as a matter of jurisdiction the ADGM Courts must be the starting point. Viewed in this light, A8 submits, there should be no reason why the ‘executory formula’ should not be affixed in this case.

45. The Court has sympathy with this argument, but is not in a position to grant A8's request to affix the executory formula. The earlier case of *A6 v B6 [2023] ADGMCFI 0005* does not assist the argument as now made, since not only did that case involve an application to set aside an arbitral award, but both parties elected to ‘opt in’ to the jurisdiction and the Court was requested to apply the federal arbitration law in its evaluation of that case: a far cry from the current circumstances in which jurisdiction now is challenged head-on by B8.

46. The main issue in this case, however, lies in the mandatory wording of Article 13(14) of the Amended Founding Law, which in the view of the Court does not permit factual circumvention of the law therein laid down, it being unequivocally stated that the enabling Article 13(13) “shall not apply to a judgment or order rendered by the Global Market's Courts in respect of the recognition or enforcement of...(b) any arbitral award rendered by a tribunal where the seat is outside the Global Market”.



47. This fundamental principle is reflected in specific amendment to the Practice Direction concerning enforcement of the Court's orders and judgments outside the jurisdiction, Practice Direction 10.15 stating:

“The Registry shall not affix an executory formula, for the purpose of recognition and enforcement in any other jurisdiction, to an order or judgment rendered by the Court in respect of the recognition or enforcement of: (b) any arbitral award rendered by a tribunal where the seat is outside the jurisdiction.”

48. This Court does not have the latitude to qualify the terminology of the Amended Founding Law, nor to construe the peremptory mandate otherwise than as applying to each and every instance wherein the ADGM Courts are sought to be used to enforce a non-ADGM arbitral award outside ADGM, however such has arisen: whilst it is accepted that A8 did not initially intend this to be the situation in this case, the practical effect is that de facto this is precisely what would occur should the order of this Court be affixed with the ‘executory formula’, and the Court does not direct the Registry to do so.
49. Accordingly, this Court can only grant an order recognising and enforcing the Award within ADGM, which may or may not be of immediate assistance to A8 in the enforcement context, albeit no doubt it remains open to A8 to utilise the Order of this Court as the foundation of a renewed enforcement (or similar) application elsewhere as it sees fit.
50. The Order as now granted reflects this position.
51. The Court will invite the parties’ written submissions as to the costs of and occasioned by these applications.



Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
26 June 2023