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ADGM Courts: Not Open for Business as a Conduit Jurisdiction?

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Offshore courts in the [UAE](#) have long been used as conduit jurisdictions, particularly by international parties seeking to enforce foreign arbitral awards. The Abu Dhabi Global Markets ("**ADGM**") and Dubai International Financial Centre ("**DIFC**") have signed Memoranda of Understanding ("**MoU**") with onshore authorities, pursuant to which onshore Emirati courts agree to recognise and enforce ADGM/DIFC judgments and/or arbitral awards without re-opening and exploring the substance of the dispute. Accordingly, parties awarded a favourable judgment offshore can then seek to have it enforced before an onshore court.

However, as explained below, under the New York Convention, offshore courts can refuse to recognise or enforce an award if it would be contrary to their public policy or public order. This post briefly explores how the ADGM Courts have responded to use as a conduit jurisdiction by parties seeking to avoid proceedings before local courts, in particular in the wake of the decision in [A4 v B4](#) and amendments to the [Founding Law](#). This question is one also currently facing the DIFC and similar developments should be monitored in Dubai.¹⁾

The Recognition and Enforcement of an LCIA Award in the ADGM Courts

In [A4 v B4](#) [2019] ADGMCFI 0007 - a case previously summarised in [Free Zone Arbitration in the UAE: Some Highlights of 2019 \(Part 1\)](#) - the ADGM Court of First Instance was tasked with considering the enforcement of a foreign award under the New York Convention. The case facts are relatively straightforward: originally, A4 brought arbitration proceedings under the rules of the LCIA against B4. In November 2018, the sole arbitrator ordered B4 to pay sums and interest owed to A4 for services rendered under English law-governed service contracts for work in Abu Dhabi (the "**Award**").

In June 2019, A4 applied to the ADGM Court of First Instance for recognition and enforcement of the Award as if it were a judgment of the ADGM itself, pursuant to section 56 of the [ADGM Arbitration Regulations 2015](#). As noted by Justice Sir Andrew Smith in his judgment, however, neither party had any presence in the ADGM, nor

were the services or contract connected to the jurisdiction. Justice Smith considered whether any jurisdictional bar to enforcement existed, ultimately concluding that there was none. He also considered B4's pre-Award challenge against the LCIA's jurisdiction; as B4 did not attend the ADGM hearing or make submissions in this respect, Justice Smith did not consider this a basis for refusing recognition.

Next, he turned to the issue of public policy. In particular, Justice Smith queried whether allowing a non-ADGM company, seeking to enforce a non-ADGM debt, should be allowed to enforce the Award in the ADGM, the effect of which would be to deprive the onshore courts of the chance to examine for themselves whether the Award should be enforced.

He concluded that the burden of establishing a valid objection to recognition and enforcement falls upon the party wishing to rely on public policy considerations, and B4 had clearly proffered none. Justice Smith added that it is "*always open to the court to take an illegality or other public policy point of its own volition*" provided there is a sound factual basis, which there was none here: there was no evidence - nor any reason for A4 to believe - that B4 did not have assets within the ADGM or would not have any in the foreseeable future. He concluded:

"Accordingly, there is no proper reason to suppose that A4 seek recognition and enforcement in these proceedings simply as a device to execute against assets elsewhere in the UAE." (paragraph 23).

Moreover, even though A4 had not brought proceedings in any other UAE forum, Justice Smith saw no public policy objection which arose simply as a result of the possibility of parallel enforcement proceedings. B4 did not face any unfairness or detriment due to the Award being recognised and enforced by the ADGM Courts.

The wording of Justice Smith's conclusion is interesting. The lack of a "*proper reason to suppose that A4 seek recognition and enforcement in these proceedings simply as a device to execute against assets elsewhere in the UAE*" implies that - where a party has sought recognition and enforcement in the ADGM solely to circumvent the onshore courts - the ADGM Courts may determine that there are public policy objections to granting recognition and enforcement.

Recent Amendments to ADGM Legislation

The [Abu Dhabi-ADGM MoU](#) - which is unaffected by the Amendment Law (further detailed below) - allows mutual recognition both onshore and offshore of arbitral awards, regardless of the location of the award debtor's assets, and without any merits review needed. This MoU thus appears to acknowledge, and even encourage, use of the ADGM Courts as a conduit jurisdiction. Article 7 of the Judicial Authority Law similarly provides for onshore enforcement of DIFC Court judgments.

Given the terms of these legal instruments, as well as the lack of any objection to

parallel enforcement proceedings, it seemed for a time that UAE authorities, both onshore and offshore, did not treat conduit proceedings as counter to public policy, even where a party had no obvious nexus to the jurisdiction.

However, amendments made to the ADGM's Founding Law on 27 May 2020, by [Law No. 12 of 2020](#) ("the **Amendment Law**") have cast doubt on the longevity of such an interpretation. The Amendment Law extends the ADGM Courts' jurisdiction to allow parties to select the ADGM Courts as the forum for their disputes even where the parties and dispute have no connection with the ADGM. However, another amendment appears to prevent the use of the ADGM Courts as a conduit jurisdiction for the enforcement of non-ADGM Court judgments and arbitral awards. Whilst it is unclear if these legislative changes were introduced in the wake of the *A4 v B4* decision, the timing certainly suggests a possible link to the case.

In particular, Articles 13(13) and (14) of the Amendment Law state that the provisions applying to recognition by onshore courts of ADGM judgments do not apply to ADGM judgments recognising foreign judgments or awards.

The guidance note to the Amendment Law explicitly rejects conduit jurisdiction, stating that:

"parties cannot use ADGM for the enforcement of non-ADGM judgments and awards in other jurisdictions - the limited exception being where the originating judgment comes from another court within the Emirate". It continues: "if parties wish to take advantage of the favourable enforcement framework that ADGM Courts have in place with other jurisdictions... they must submit their original dispute for determination by ADGM Courts or by arbitration in ADGM."

To date, the ADGM and Abu Dhabi authorities have provided no further commentary or responses to the effects of the Amendment Law, in particular concerning the use of the ADGM Courts as a conduit jurisdiction. However, the recent amendments may be interpreted as an attempt by the ADGM Courts to avoid the issues of conduit jurisdiction litigation with which the DIFC Courts have had to grapple for years.

Concluding Remarks

As the Amendment Law is so recent, it will prove interesting to see how these changes impact the use and popularity of the ADGM Courts by international companies, and the extent to which the ADGM Courts will push back on these new restrictions on their jurisdiction.

It remains to be seen whether the ADGM Courts seek to flex their jurisdictional muscle and - as evidenced by *A4 v B4* - agree to conduct proceedings that might otherwise not have been properly heard offshore. In the face of the Amendment Law and similar legislative developments in Abu Dhabi, however, it is clear that there is no

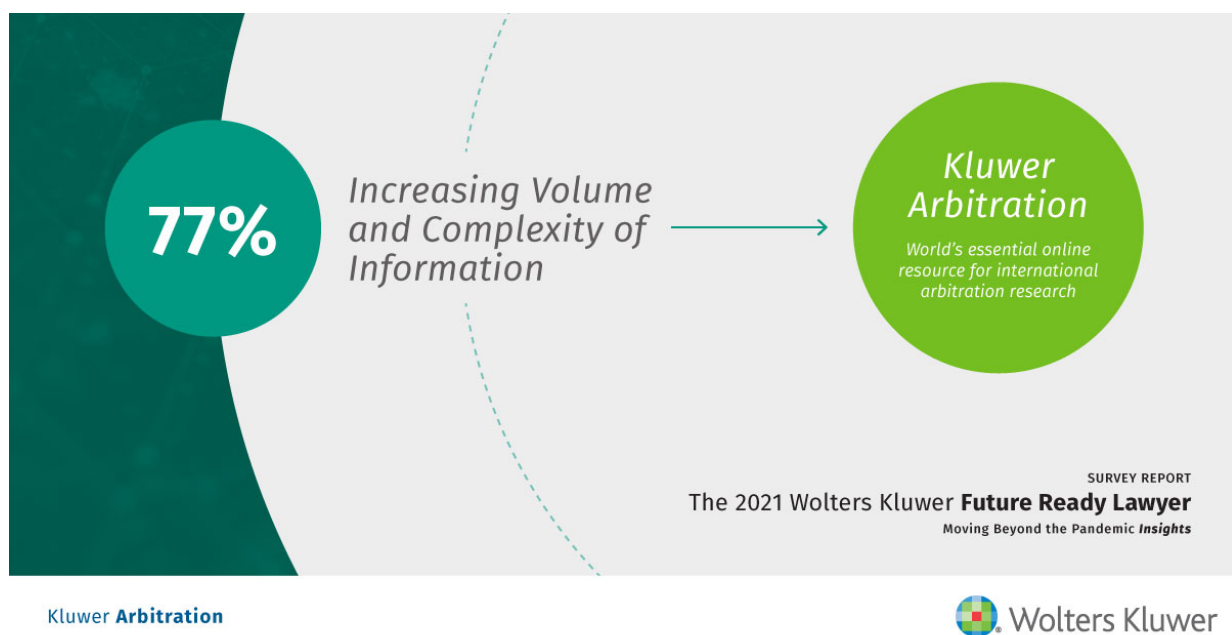
straightforward path ahead.

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References

- A full-length article appearing in the *International Journal of Arab Arbitration* (Issue IJAA 1/2020) (not yet released) also assesses conduit jurisdiction through the DIFC ↑ 1 courts, in addition to setting out an introduction to the offshore jurisdictions and their court systems, offshore enforcement of foreign awards and the public policy exception to recognition/enforcement internationally.

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