Kluwer Arbitration Blog

Free Zone Arbitration in the UAE: Some Highlights of 2019 (Part 1)

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As some readers of this blog will, no doubt, be aware, free zone arbitration is a comparatively recent phenomenon that has been championed in particular by the UAE in order to create an alternative to arbitrations seated onshore. By way of reminder, in the UAE, free zone arbitrations are seated in one of the judicial free zones, *i.e.* the Abu Dhabi Global Market ("***ADGM***") or the Dubai International Financial Centre (***"DIFC***"). Arbitrations seated in the ADGM are governed by the 2015 ADGM Arbitration Regulations (the ***"ADGMAR"***) and those seated in the DIFC by DIFC Law No.1 of 2008 (the ***"DIFC Arbitration Law"***), both modeled to some extent on the UNCITRAL Model Law, and benefit from the curial assistance of the ADGM and the DIFC Courts, both in essence English law courts, respectively.[1)]

Whereas the DIFC Courts have had ample opportunity to hear a number of arbitration-specific cases in their capacity as curial and enforcement courts under the DIFC Arbitration Law over the years, the younger ADGM Courts only had a first taste of arbitration-relevant case law in 2019. Two cases more specifically came up for decision before the ADGM Court of First Instance (***"ADGMCFI"***) in 2019, one concerning the enforcement of an ADGM arbitration agreement, the other the enforcement of a foreign award under the New York Convention 1958 (***"NYC"***). Apart from these two cases, which create important precedent for the enforceability of ADGM arbitration agreements and the enforcement of NYC awards in the ADGM, the DIFC Court of First Instance (***"DIFCCFI"***) was presented with an opportunity to re-consider the proper scope of application of Art. 7 of the UAE Judicial Authority Law as amended (Law No. 12 of 2004, the ***"JAL"***).

I will briefly discuss each case and its ramifications for free zone arbitration in the UAE in two blog posts. This Part 1 deals with the two rulings of the ADGMCFI, Part 2 will discuss the DIFCCFI's ruling on the scope of application of the JAL.

A3 v. B3 [2019] ADGMCFI 0004 (4 July 2019)

In this case, the ADGMCFI was asked to consider a claim for a declaration that a lease arrangement between A3 and B3 for a property in Al Maryah Island, Abu Dhabi, (the ***"Lease"***), which was governed by ADGM laws, contained a valid and binding arbitration agreement providing for arbitration under the ICC Rules with seat in the ADGM (the ***"Arbitration Agreement"***). This Arbitration Agreement was the result of the exercise by A3 of a unilateral

option to amend the underlying terms of arbitration, which provided for a dispute arising from the Lease to be finally settled by reference to the Arbitration Regulations of the Abu Dhabi Commercial Conciliation and Arbitration Centre (***"ADCCAC"***) with seat in Abu Dhabi (the ***"Arbitration Clause"***). The terms of the unilateral arbitration option under the Arbitration Clause stated, "*should the [ADGM] establish an arbitration centre, in advance of the formal commencement of any relevant proceedings, [A3] may notify [B3] that the arbitration provisions set out in [the Arbitration Clause] shall be replaced by reasonable alternative provisions in order to provide for jurisdiction by such newly established centre within [ADGM] and B3 shall sign such documentation as may reasonably be required by [A3] to give effect to such alternative.*"

By notice of late 2018 (the ***"Notice"***), A3 sought to exercise its unilateral option under the Arbitration Clause, (i) informing B3 that the ADGM Arbitration Centre (ADGMAC) had been established and had started operations in the ADGM from 17 October 2018 onwards; and (ii) introducing the following amendments to the Arbitration Clause: any dispute between the parties to be finally settled by arbitration under the ICC Rules with seat in the ADGM, default-appointments care of the ICC Court.

The ADGMCFI enforced the Arbitration Agreement on the basis that the unilateral arbitration option did not require the amendment of the Arbitration Clause in writing (B3 not having responded to the Notice), it was enforceable under English law and met with the requirements of commercial reasonableness (considering the ADGMAC a proper arbitration institution within the meaning of the unilateral arbitration option).

No doubt, the ADGMCFI's findings evince a distinctly arbitration-friendly message that forebodes well for the future of arbitration in the ADGM. Nevertheless, they raise a number of concerns:

- ***A conflict of jurisdiction*** – Albeit that the ADGMCFI was arguably properly seized in the prevailing circumstances, and that by virtue of the area of free movement for judicial instruments between the ADGM and the Abu Dhabi Courts,[2)] the ADGMCFI's order for enforcement of the Arbitration Agreement binds the onshore Abu Dhabi Courts, these latter would likely have had parallel jurisdiction to hear the action on the basis of the Arbitration Clause providing for arbitration seated in onshore Abu Dhabi (with the Abu Dhabi Courts exercising their curial competence under the 2018 UAE Federal Arbitration Law). In doing so, the Abu Dhabi Courts – contrary to the ADGMCFI – would likely have found in favour of the application of the ADCCAC Regulations with seat in Abu Dhabi given the lack of a clear agreement between the Parties in favour of arbitration offshore.
- ***Mis-qualification of the ADGMAC and ICC*** – The ADGMCFI's findings depart from the premise that the ADGMAC qualifies as an "ADGM-based arbitration centre which may have 'jurisdiction' over the dispute between the Parties" within the meaning of the Arbitration Clause. In reality, the ADGMAC is not such arbitration institution, but only an arbitration logistics provider, offering a venue (not a forum) and state-of-the-art hearing facilities for arbitrations seated in the ADGM or elsewhere. The ADGMAC does not dispense a set of institutional rules of its own and as such does not administer arbitral proceedings. As a result, it is arguable that (a) the Arbitration Agreement was invalid and as such unenforceable, any unilateral amendments to the Arbitration Clause depending on the establishment of a proper arbitration institution in the aforementioned terms as a condition precedent, and that (b) the original arbitration obligation under the Lease remained enforceable. This concern is not fully addressed by the presence of the ICC with offices at the ADGMAC, as even the ICC only operates as a *representative office* in the ADGM and not as an arbitration institution in its own right.

- ***Unilateral arbitration clauses*** – Even though unilateral arbitration options might well be enforceable under English common law, the procedural imbalance they create question their enforceability under UAE law (which might come to bear within an enforcement context). More specifically, the mutuality of arbitration agreements might qualify as public policy under UAE law and as such would also bind the ADGM Courts (which form part of the UAE family of courts and are as such subject to UAE public policy). On this premise, the ADGMCFI should have investigated whether the unilateral option under the Arbitration Clause and hence the Arbitration Agreement might have been invalid and as such unenforceable.

A4 v. B4 [2019] ADGMCFI 0007 (8 October 2019)

In this case, the ADGMCFI considered an award rendered under the LCIA Rules in London for recognition and enforcement in the ADGM. Importantly, both the award creditor, A4, and the award debtor, B4, were incorporated in mainland Abu Dhabi, and the award debtor was not known to have any assets in the ADGM. Nor were there any other reported links to the ADGM.

By way of background, the subject arbitral award found in favour of A4, ordering B4 to make outstanding payments to A4 for services provided under a series of service contracts between the two, plus interest. The service contracts were governed by English law and contained a reference to A4's General Terms and Conditions, which, in turn, provided for disputes to be resolved by arbitration under the LCIA Rules with seat in London. In its answer to request for arbitration, B4 raised jurisdictional objections, stating a lack of privity between the parties. In further course, B4 essentially fell silent, failing to attend the ADGM Court proceedings in order to substantiate its jurisdictional objections.

In essence, the ADGMCFI emphasised that Art. 56(1) ADGMAR was cast in *mandatory* terms and required the ADGMCFI to recognise and order the enforcement of an award unless one of the grounds for refusing recognition and enforcement under Art. 57 ADGMAR was satisfied. In the presently prevailing circumstances, the ADGMCFI could identify none. In any event, under Art. 57(1)(a)(ii) ADGMAR, it was not for the ADGMCFI to consider *ex officio* the potential invalidity of the underlying arbitration agreement, which formed the basis of B4's jurisdictional objections, the burden of proof resting on B4 as the applicant party.

The ADGMCFI also tested whether the recognition and enforcement of the subject award might be contrary to UAE public policy within the meaning of Art. 57(1)(b)(ii) ADGMAR or the corresponding provision of Art. V(2)(b) of the NYC, either of which invites a competent supervisory court to initiate a public policy investigation *ex officio*. In essence, it concluded that there was no sound factual basis that would warrant an investigation into any public policy violation. In this context, the ADGMCFI focused in particular on the question of whether the ADGM Courts were able to operate as a conduit jurisdiction for the recognition and enforcement of non-ADGM awards for onward execution against award debtor's assets onshore. The ADGMCFI seemed to intimate that if the sole purpose behind the offshore enforcement application was execution outside the ADGM (no assets of the award debtor being present within), the ADGMCFI should not entertain the application:

> "there is no evidence that B4 do not have assets within the ADGM, and still less is

> there any proper basis to conclude that they will not have assets within the ADGM in the foreseeable future or that A4 have no reason to believe that they will do so. 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." (para. 23)
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> "Should this Court be concerned about whether A4 might be seeking recognition and enforcement of the Award not in order to enforce it against assets in the ADGM, but as a device to have an order of this Court (rather than the Award itself) enforced elsewhere in the UAE, and in particular elsewhere in Abu Dhabi, without having other UAE Courts, including those of the Abu Dhabi Judicial Department ('ADJD'), examine for themselves whether the Award should be recognised and enforced within their jurisdictions?" (para. 20)

That said, it is worth noting in this context that the Memorandum of Understanding Between Abu Dhabi Judicial Department and ADGM Courts Concerning Reciprocal Enforcement of Judgments, dated 11 February 2018 (the ***"MoU"***) facilitates the mutual recognition onshore/offshore of ratified arbitral awards irrespective of the location of an award debtor's assets and without allowing – let alone requiring – a review on the merits. This evidently reflects the position under Art. 7 JAL, which establishes an area of free movement of judicial instruments, including ratified awards, between the onshore Dubai and offshore DIFC Courts. In this sense, both Art. 7 JAL and the MoU encourage the operation of the free zone courts as conduit jurisdictions.

Part 2 will discuss a ruling issued by the DIFCCFI, which re-considers the proper scope of application of Art. 7 JAL.

References

?1 That said, whereas the DIFC has custom-made its own body of substantive laws on the basis of English law, the ADGM has incorporated almost the entire body of English law by reference.

?2 Established by the Memorandum of Understanding between the Abu Dhabi Judicial Department and the ADGM Courts concerning the Reciprocal Enforcement of Judgments, dated 11 February 2018.

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