ADGM COURTS
محاكم سوق أبوظبي العالمي

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

A6

Claimant

and

B6

Defendant

JUDGMENT OF JUSTICE WILLIAM STONE SBS KC

Neutral Citation:	[2023] ADGMCFI 0005
Before:	Justice William Stone SBS KC
Decision Date:	13 March 2023
Hearing Date:	3 March 2023
Decision:	1. The Application be dismissed. 2. The costs of and occasioned by the Application be to the Defendant, such costs, if not agreed, to be summarily assessed.
Date of Order:	13 March 2023
Catchwords:	Application to set aside arbitral award. 'Opt in' jurisdiction and applicable law where award is made outside ADGM. Whether application is time barred. Judicial reluctance to interfere with arbitral awards. Whether arbitration can be re-opened so evidence of a party can be considered by a new tribunal.
Legislation Cited:	Abu Dhabi Law No. 4 of 2013 (as amended by Abu Dhabi Law No. 12 of 2020), Art. 13(8) Arbitration Regulations 2015, ss.58 Federal Law No. 6 of 2018 on Arbitration, Arts. 53, 54 Federal Law No. 5 of 1985 on the Civil Transactions Law of the UAE, Art. 481
Cases Cited:	*Honeywell International Middle East Ltd v Meydan Group LLC* [2014] EWHC 1344 Abu Dhabi Court of Cassation, Case No. 1383-2021
Case Number:	ADGMCFI-2022-238
Parties and representation:	P.V. Sheheen, Bakertilly Law Corporation for the Claimant Ms Erin Miller Rankin and Mr Amr Omran, Freshfields Bruckhaus Deringer LLP for the Defendant

JUDGMENT

Introduction

1. This is the judgment of the Court on an application brought by the Claimant ("**A6**") on 13 October 2022 (the "**Application**") to set aside a 'Final Award' dated 19 January 2022 and the 'Decision and Addendum to the Final Award' dated 9 May 2022 (collectively, the "**Award**"), issued by a duly constituted arbitral tribunal in an arbitration between A6 and the Defendant ("**B6**") in ICC Case No. XX.

2. The remedy sought by A6 is that the Award be set aside to the extent that the claims of A6 had not been allowed, to re-open the arbitration, and to mandate/ instruct a newly-constituted tribunal to analyse the evidence as led by A6, together with costs.

Factual Background

3. B6 was the main contractor appointed by XXX on a project involving the procurement and construction of an integrated gas development pipeline, and A6 was the sub-contractor which entered into a contract dated 30 December 2015 with B6 for the execution of civil works and the erection of a steel structure at phase 1 of the project.

4. Disputes arose between A6 and B6 concerning the performance of their respective obligations under the sub-contract, and on 5 March 2019 A6 commenced an International Chamber of Commerce (ICC) arbitration pursuant to the arbitration clause within the sub-contract.

5. Clause 32.3.1 of the sub-contract provided that "*The Arbitration shall be conducted in Abu Dhabi City (U.A.E) in accordance with the Rules of International Chamber of Commerce (ICC Rules) in force at the time of the claim, controversy or dispute*", whilst Clause 32.1 entitled "*Governing LAW*" read, at 32.1.1: "*The SUBCONTRACT shall be governed by and construed in accordance with the LAWS of the Emirate of Abu Dhabi and the federal laws of the U.A.E.*"

6. In due course an ICC arbitral tribunal (the "**Tribunal**") was established consisting of three arbitrators.

7. The total claim made by A6 against B6 was USD 30,993,352.26, plus interest and costs, and after hearing the case the Tribunal (by majority) awarded the sum of USD 2,136,124.72 plus interest of 2% per annum.

8. The Tribunal subsequently amended the 'Final Award' by way of 'Decision and Addendum to Final Award' pursuant to Article 36 of the ICC Rules on 9 May 2022, this Addendum being notified to A6 on 19 May 2022.

Proceedings to set aside the Award in the Abu Dhabi Courts

9. Dissatisfied with the Award, on 20 June 2022 A6 brought proceedings before the Abu Dhabi Judicial Department Commercial Court of Appeal (the "**ADJD Court of Appeal**"), to annul (i.e. set aside) the Award to the extent that the Tribunal had disallowed its claims beyond the awarded amount pursuant to Articles 16 and 53 of Federal Law No. 6 of 2018 on Arbitration (the "**Federal Arbitration Law**").

10. On 6 July 2022 the ADJD Court of Appeal dismissed A6's application, holding of its own motion, that: (i) it had no jurisdiction to rule on the set aside application, and (ii) since the branch office of the ICC is located in the Abu Dhabi Global Market ("**ADGM**"), the jurisdiction to set aside the Award rested with ADGM Courts, and thus the set aside application should be heard by those Courts.

11. On 6 August 2022 A6 challenged the Court of Appeal judgment on appeal to the Court of Cassation, and on 19 September 2022 the Court of Cassation rejected the appeal and rendered a final and conclusive judgment upholding the Court of Appeal judgment.

12. On 13 October 2022 the Application was filed with the ADGM Court of First Instance.

The Issues

13. After a case management hearing on 20 December 2022, this Court formulated a 'List of Issues' to be determined at the hearing of the Application which was appended as a Schedule to the Order of that date, and save where certain issues now have fallen away, argument in this application has proceeded under the following heads:

    a. In the circumstances of this case, do ADGM Courts have jurisdiction to grant the relief sought in the Claim, and if so, on what basis?

    b. Is the application time-barred?

    c. Should the provisions of Part 3 of the ADGM Arbitration Regulations 2015 (the "**ADGM Arbitration Regulations**") be applied in determining this application, or should the Federal Arbitration Law be applied, and if so, why?

    d. Do any of the irregularities alleged on the part of the Tribunal form a basis for granting the relief sought by the Claimant?

    e. Is the relief pleaded by the Claimant at paragraph 6.2 of the Claim sustainable as a matter of law?

    f. Should the costs of the application follow the event?

***In the circumstances of this case, do ADGM Courts have jurisdiction to grant the relief sought in the Claim, and if so, on what basis*?**

14. The circumstances of this case are unusual. B6 recognises this, arguing that for the avoidance of doubt it is not suggested that ADGM is the proper seat of any ICC arbitration conducted in the Emirate of Abu Dhabi, but that in the "*exceptional circumstances*" of A6's application, and in light of the written consent of both parties to submit to the jurisdiction, there exists a "*narrow exception*" for ADGM Courts to assume jurisdiction and to decide the present application on its merits.

15. This Court's initial hesitation as to jurisdiction has been met by the parties' express agreement, contained in writing in the papers filed in these proceedings and confirmed through counsel, that they wish to submit to the jurisdiction of this Court, and that in so doing they wish to 'opt in' to the jurisdiction of the Court pursuant to Abu Dhabi Law No. 4 of 2013 (as amended by Abu Dhabi Law No 12 of 2020) (the "**Founding Law**"), which permits parties to refer their disputes to ADGM Courts notwithstanding a lack of nexus to ADGM; Article 13(8) of the Founding Law reads:

> *"The Global Market's Courts may hear and adjudicate any civil or commercial claim or dispute where the parties agree in writing to file such claim or dispute with them whether before or after the claim or dispute arises".*

16. Given the parties' written agreement as to jurisdiction, which satisfies one of the jurisdictional gateways contained in the Founding Law, there is no need for the Court to consider whether, on the facts of this particular case, any of the other jurisdictional gateways have been satisfied, and the Court declines to do so. Accordingly, this case shall proceed on the basis that the parties have opted into the jurisdiction of the Court which of itself is sufficient to found jurisdiction.

Should the provisions of Part 3 of the ADGM Arbitration Regulations be applied in determining this application, or should the Federal Arbitration Law be applied, and if so, why?

17. Acceptance of jurisdiction begs the question as to the law to be applied in determining the Application.

18. B6 says that A6's application falls to be decided under the Federal Arbitration Law since under the sub-contract the arbitration was seated in Abu Dhabi and the contractual governing law specifies the laws of the Emirate of Abu Dhabi and the federal laws of the UAE. Further, the Federal Arbitration Law is the default procedural law governing arbitrations conducted in the UAE unless the parties have agreed to a different procedural law or the arbitration is seated in one of the financial free zones of the UAE.

19. For its part, A6 finds itself on the horns of a dilemma as the result of the circumstances as have arisen, the Court of Cassation having declined to hear its action in nullity in favour of deferring to the jurisdiction of ADGM Courts. A6 now adopts essentially a 'hybrid' position, on the one hand acknowledging the contractual relevance of the Federal Arbitration Law (and also, in context of the time bar argument, Federal Law No. 5 of 1985 on the Civil Transactions Law of the UAE (the "**Federal Civil Code**")), but conversely inviting substantive recourse to the ADGM Arbitration Regulations – when this application was filed for hearing before this Court it was expressly stated to be filed "*in accordance with Section 58 of the ADGM Arbitration Regulations 2015*".

20. The difficulty A6 faces, however, is that under the provisions of Section 58, the title appended to which is 'Application for setting aside as exclusive recourse against arbitral award', recourse to ADGM Courts against an arbitral award is predicated upon the arbitration in question having its seat in ADGM, which is not the present case, it being undisputed that the seat of the subject arbitration is mainland Abu Dhabi, and neither A6 nor B6 sought to argue that establishment of an ICC Case Management Office within ADGM affects the contractual choice of arbitral seat.

21. In entertaining this application, which is the wish of each party, this Court therefore must apply the Federal Arbitration Law, which represents the governing arbitration law the parties agreed in the sub-contract, and the ADGM Arbitration Regulations have no application.

Is the application time-barred?

22. This aspect of the Application poses an immediate difficulty for A6, given that it wishes to bring itself within the provisions of section 58(2)(c) of the ADGM Arbitration Regulations.

23. Under Article 54(2) of the Federal Arbitration Law the action to set aside the arbitral award (termed an 'action in nullity') "*shall not be heard after thirty (30) days have elapsed following the date of notification of the arbitral award to the applicant requesting the nullification*"; it is a matter of record that initiation of A6's proceedings before the ADJD Court of Appeal was in compliance with that time requirement, notwithstanding that the Court of Appeal and the Court of Cassation subsequently declined to hear the merits of the case in light of their view that jurisdiction was vested in ADGM Courts.

24. A6 contended that for the purpose of the present application there had been compliance with the three month period set out in section 58(2)(c) of the ADGM Arbitration Regulations if the 63 days cumulatively spent in its proceedings before the ADJD Court of Appeal and the Court of Cassation were subtracted from the 144 days as now had elapsed between the date of the Award notification and the filing of this application; this computation meant that only 81 days now had passed, and thus that it had brought itself within the three month requirement contained in the ADGM Arbitration Regulations, and therefore could not be said to be out of time.

25. A6 further submitted that the appearances before the ADJD Courts could not be said to have been other than in good faith and bona fide, and in support of this argument sought to invoke Article 481 of the Federal Civil Code which provides, inter alia, that the running of a prescriptive time period shall be suspended if there is "*a lawful excuse*" whereby the claim for the right could not be made: there was, A6 contended, 'a lawful excuse' why it had not come before this Court earlier, and in so doing A6 simply had accorded with the direction of the ADJD Courts.

26. A6's computation obviously is correct as a matter of mathematics, but the short point is that the ADGM Arbitration Regulations do not and cannot apply since the predicate condition is unsatisfied – this is not an arbitration with its seat in ADGM, which is the trigger for the application of Part 3 of the ADGM Arbitration Regulations (containing section 58(2)(c) on which A6 seeks to rely), nor is there inherent jurisdiction to act outwith those Regulations.

27. If this application be properly founded within this jurisdiction – and both parties insist that it is for the reasons set out earlier – and if it be correct that the governing law which this Court now should apply is the Federal Arbitration Law, the inescapable fact is that A6 filed its application to set aside this Award before the ADJD Court of Appeal within the statutory 30 day period, however A6's application to set aside failed before the ADJD Courts on jurisdictional grounds and not after judicial evaluation by the ADJD Courts of the substantive arguments A6 wished to employ in its bid to set aside the Award.

28. Accordingly, this Court holds that there can be no reliance upon the three month prescriptive period, and A6's contentions to the contrary must fail.

29. In terms of the satisfaction, or otherwise, of a prescriptive period – there is considerable international jurisprudence as to whether, as a matter of public policy, there even exists a residual discretion to extend time in applications to set aside arbitral awards – what is less obvious is why compliance with such period should have become an issue, the application having been filed before the ADJD Court of Appeal within the 30 day period provided for in the Federal Arbitration Law.

Do any of the irregularities alleged on the part of the Tribunal form a basis for granting the relief sought by the Claimant?

30. As to the broad 'merits' of this application to set aside, A6 makes a number of submissions. It invokes public policy and natural justice, and infringement of its "*civil rights*", and argues that the Tribunal was responsible for procedural irregularities which themselves amount to contraventions of public policy and natural justice, and further and in particular that there was failure on the part of the Tribunal to accord full and fair opportunity to A6 to put its case.

31. The Court has considered these arguments and has concluded that none of these varying contentions have been made out as a matter of fact. In this regard the Court accepts the argument on behalf of B6 that A6's 'grounds' for setting aside amount to no more than alleged factual and/ or legal errors on the part of the Tribunal in its assessment and evaluation of the merits of the arbitral dispute, and that even were such criticisms to be valid, which they were not, this could and would not undermine the validity of the Award as issued. B6 further submitted, correctly in the view of this Court, that A6 failed to demonstrate, far less to prove, how the alleged 'errors' of the Tribunal now relied upon offended the public policy of the UAE.

32. It is well established that courts faced with applications to set aside arbitral awards are loath to trespass upon the duly constituted tribunal's assessment of the case before it except in instances in which egregious and particularly obvious errors have occurred which clearly can be seen to impact upon the intrinsic fairness and veracity of the arbitral process. This basic principle underpins both legislative provision and the substance of judicial pronouncement, and on this point there is a substantial correlation of view between different jurisdictions.

33. To take but one example, under English law the threshold for a successful challenge to an arbitral award on public policy grounds is high, the English High Court in *Honeywell International Middle East Ltd v Meydan Group LLC* [2014] EWHC 1344 noted that it "*should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds*".

34. A broad similarity of approach in terms of judicial reluctance to interfere with arbitral awards can be seen in the application of the Federal Arbitration Law: see, for example, the observations of the Abu Dhabi Court of Cassation in Case No. 1383-2021, a Cassation Petition against Judgment No. 10/21 Setting Aside an Arbitral Award, wherein the Court of Cassation observed (at page 3 of the English translation):

> *"It is settled that an application to set aside an arbitral award does not lead to a new trial of the matter (which the arbitral tribunal has decided) before the annulment court. Nor does the application for setting aside allow for a review of how the arbitrator has applied the law or the extent to which he has violated the law or erred in its application or interpretation. This is because the validity of the arbitral award as regards its reasoning is not measured by the criteria of ordinary court judgments, and the evaluation of evidence in an arbitration case is within the remit of the arbitrator. Thus, it is impermissible to challenge the arbitral award by way of setting aside on the basis of the arbitrator's assessment of the evidence and the documents presented as it is not a procedural defect that permits any party to invoke it to set aside an award under Article (53) of the Federal Arbitration Law No. (6) of 2018. The only permissible recourse against an arbitral award is to file an application for setting aside with the court or in the course of proceedings for ratification of the arbitral award. The applicant for setting aside must prove any of the following grounds:*

and thereafter the specific provisions of Article 53(1)(a)-(h) of the Federal Arbitration Law are quoted verbatim.

35. In deciding this application this Court has carefully considered the differing categories itemised in Article 53(1)(a)-(h) of the Federal Arbitration Law, none of which apply in the instant case, and thus the answer to the question posed within this heading must be 'No': no case has been made out which would satisfy any of the statutory requirements and thus justify setting aside this Award.

36. It follows that this application must fail on the detailed grounds variously advanced within A6's skeleton argument relating to contravention of public policy, the assessment of the evidence and the fairness of the arbitral hearing, the alleged unequal treatment of the parties and failure to follow the provisions of natural justice, together with the allegations relating to the prevention of proper presentation of A6's case, the wrongful award of liquidated damages, the erroneous decision on delay, and the error in application of the burden of proof.

Is the relief pleaded by the Claimant at paragraph 6.2 of the Claim sustainable as a matter of law?

37. The Claim as filed requests, at paragraph 6.1, that this Court set aside the Award "*to the extent that the claims of the Claimant in the arbitration have not been allowed therein, beyond the sum of USD2,136,124.72*" and, at 6.2, to "*re-open the Arbitration and mandate/instruct a newly constituted Arbitration Tribunal to analyse the evidences placed by the Claimant*".

38. Clearly, A6 appears to wish to 'cherry pick' and retain what has fallen in its favour in the Award, but to set aside the remainder and to have another go with a fresh tribunal appointed to consider A6's evidence on those parts of the dispute which did not find favour with the Tribunal.

39. This submission is at variance with both first principles and accumulated arbitral jurisprudence.

40. There is no mechanism under the Federal Arbitration Law (nor, for that matter, under the ADGM Arbitration Regulations) to 're-open' any arbitration after the Final Award is rendered: in principle either the Award is set aside or it is not, and there can be no question of any 'halfway house' such as now is canvassed by A6.

41. Should an Award be set aside, that is an end of that: the issue(s) between the parties the subject of the initial reference can of course be subject to consideration in a new second arbitration before a newly-constituted tribunal, but there can be no appointment of a new tribunal solely to consider/ analyse those parts of the evidence submitted by a particular party which did not attain success in the existing reference, as A6 now wishes to achieve.

42. Accordingly the remedy sought is not available in law and is rejected.

Should the costs of the application follow the event?

43. Costs lie in the discretion of the Court hearing the application, and there is no disagreement between the parties that costs should follow the event.

44. This position was confirmed at the hearing of this application, save that A6 indicated that if this Court were to decide that it had no jurisdiction notwithstanding the parties' submission thereto it would wish to revisit the costs argument.

45. However this is not the position: the Court has heard the case, the Application has been dismissed, and thus there is no question but that costs should follow the event.

46. Accordingly, B6 is to have the costs of and occasioned by the Application, such costs, if not agreed, to be summarily assessed. If the parties are unable to agree costs, they have liberty to apply to the Court for directions for the filing of costs submissions.

Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
13 March 2023