

Abu Dhabi's Puzzling Choice To Send ICC Arbitration Offshore

By **Sam Song and Dara Sahab** (February 14, 2023)

On Jan. 18, the Abu Dhabi Court of Cassation ruled that an International Chamber of Commerce arbitration seated in Abu Dhabi was actually seated in the Abu Dhabi Global Market and subject to the jurisdiction of the Global Market's courts, because that is where ICC's regional office is located.

The ICC, which is based in Paris, opened a branch office in the ADGM in 2020 with a dedicated case team to assist in administering ICC arbitrations in the region. The ADGM is a free economic zone that has its own court system separate from that of the local, or onshore, Abu Dhabi court system.

The rationale for the Court of Cassation's judgment was that because the ICC was the institution administering the arbitration, and because the ICC opened a branch office in the ADGM, the arbitration was also in the ADGM.

Background

Two parties[1] to a construction contract agreed that all disputes would be subject to arbitration pursuant to the ICC Rules of Arbitration and that the arbitration would be seated in Abu Dhabi.

Prior to this ruling, general practice in the region meant that (1) the United Arab Emirates' Federal Law No. 6 of 2018 on arbitration would be the procedural law governing the arbitration, and (2) the Abu Dhabi Court of Appeal would be the supervisory court over the arbitration.

One of the parties subsequently challenged an arbitral award in the Abu Dhabi Court of Appeal. The Court of Appeal dismissed the challenge on the basis that it had no jurisdiction over the challenge, because jurisdiction sat with the offshore ADGM courts.

The challenging party appealed the dismissal to the Abu Dhabi Court of Cassation, which considered the appeal and confirmed the Court of Appeal's decision. The appellant raised several arguments, two of which we set out below as in line with the understood general arbitration practice in the region.

First, the appellant argued that the contract provided for arbitration pursuant to the ICC rules to be seated in Abu Dhabi "without identifying the geographical scope within the Emirate of Abu Dhabi." The appellant argued that reference to the ICC rules did not render the location of the ICC or any of its branches or representative offices as the seat of the arbitration.

The appellant further argued that even if the parties had not agreed on a seat, reference to the ICC rules did not mean that the parties agreed that the location of a branch of the ICC constitutes the seat of arbitration.

In any event, the appellant confirmed that the parties had expressly agreed on Abu Dhabi[2] as the seat of arbitration and that the parties expressly agreed in the relevant



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contract that the arbitration proceedings would be subject to UAE law.

By this, the parties meant that the federal laws and, potentially, the local laws of Abu Dhabi, applied to the exclusion of laws of any free zone such as the ADGM or the Dubai International Financial Centre, which have separate legal systems and their own sets of laws.

The appellant noted that the arbitration clause did not provide for or include reference to the ADGM or the ADGM's Arbitration Regulations 2015. Another key point not mentioned in the judgment is that the parties and tribunal presumably conducted the arbitration in accordance with the UAE Arbitration Law. The appellant also noted that the contract was not signed, executed or performed in ADGM, apparently to highlight that the contract and the arbitration agreement had no nexus, express or otherwise, to the ADGM.

Second, even considering the Court of Appeal's rationale, the appellant noted that the arbitral award was not issued or served by the ICC secretariat in the ADGM. Rather, this particular award was administered, issued and served by the ICC secretariat in Hong Kong, meaning that the ADGM ICC secretariat had no involvement in this case.

Despite the appellant's arguments, the Abu Dhabi Court of Cassation rejected the appeal and affirmed the Court of Appeal's ruling, even though the Court of Cassation acknowledged that the arbitration clause expressly provided that the arbitration proceedings would be subject to UAE laws and seated in Abu Dhabi.

The Court of Cassation instead referred to Abu Dhabi Law No. 4 of 2013, as amended by Law No. 12 of 2020, establishing the ADGM, which in Article 1 defines ADGM entities as a

Company, Any branch, representative office, institution entity, or project registered or licensed to operate or conduct any activity within the Global market by any of the Global market Authorities according to the provisions of this law or the Global market regulations or the executive resolutions including the licensed financial Global market Establishments.

The Court of Cassation reasoned that, because the ICC has a representative office located in the ADGM, and thus is an ADGM entity, this representative office must be deemed the place, i.e., seat, of the arbitration, and as such the seat of arbitration must therefore be the ADGM.

Notably, the judgment demonstrates that the Court of Cassation did not consider, and the parties did not argue, how the parties conducted the arbitration proceedings on the basis that the legal seat of the arbitration was onshore Abu Dhabi, including, for example, whether the tribunal and parties referred to and relied on the UAE Arbitration Law.

Impact of the Judgment

The arbitration community in the UAE will be surprised and perplexed by the Abu Dhabi Court of Cassation's judgment.

Many will recall instances where a party argued in arbitration that if an arbitration clause provided Dubai as the seat of arbitration, the offshore DIFC would be included. These arguments, however, are no longer raised, and it has been the case now that a choice of seat in Dubai shall mean onshore Dubai, otherwise the clause must expressly provide for a DIFC seat for DIFC law to apply.

This practice was codified by Article 4 of Dubai Decree No. 34 of 2021:

1. If the arbitration parties agree to choose the Emirate to be the seat or legal place of arbitration, the arbitration agreement and procedures shall be governed by the provisions of the aforementioned Federal Law No. (6) of 2018, and the Courts shall have the jurisdiction to hear any case, petition or appeal related to any award or arbitration procedure issued by the arbitral tribunals of DIAC;
2. In the event that the parties to the arbitration agree to choose the DIFC to be the seat or legal place of arbitration, the arbitration agreement and procedures shall be governed by the provisions of the aforementioned Financial Centre Law No. (1) of 2008 or any other legislation that replaces it, and the DIFC Courts shall have the jurisdiction to hear any case, petition or appeal related to any award or arbitration procedure issued by the arbitral tribunals of DIAC.

However, this may be the first time that an entire arbitration was conducted where neither party argued that the seat of arbitration providing for Abu Dhabi meant the ADGM, yet the curial court, the Abu Dhabi Court of Appeal, then determined on its own volition that the ADGM is the seat by virtue of the ICC having a branch in the ADGM.

It is commonly understood, where parties agree to refer the arbitration to the rules of an arbitral institute, such referral is limited to the administration of the arbitration and the specific rules that would apply to the arbitration. This is more so in ICC arbitrations, where the rules do not correlate the location of the ICC, or its representative offices, to the seat of the arbitration.

Additionally, where parties agree to a seat of arbitration, the arbitration laws of that seat would govern the arbitral proceedings and the courts of that seat will supervise the arbitration, and be the forum to ratify or annul awards issued in that seat.

Nevertheless, it has become clear in recent years that the UAE, with its distinct free zones and their different sets of laws, has created additional uncertainties as to the conduct of an arbitration and the ratification or challenge of an arbitral award.

As the UAE, and its common-law free zones of the ADGM and DIFC, will continue to be hubs for commerce and investment, it is likely that a significant number of disputes may be affected by this judgment.

There is every indication that the parties to this contract intended for their arbitration to be seated in onshore Abu Dhabi and subject to its laws and courts. In this context, this recent Court of Cassation judgment should be a good reminder for parties set out their intent expressly and clearly as to terms of their agreement, particularly the arbitration clause, and for parties to existing contracts with Abu Dhabi seats to consider this nuance prior to or after commencing arbitration proceedings.

For example, parties may consider expressly excluding specific free zones where the parties' intent is for the onshore law and courts to apply. Alternatively, parties may consider expressly stating which specific laws and courts apply.

The Court of Cassation judgment may signify the Abu Dhabi onshore courts' attempt, although likely incorrect, to appear more pro-arbitration and pro-ADGM. Along with recent murmurs running through the UAE arbitration community, this may signify potential and

significant changes in Abu Dhabi and the ADGM regarding existing and potential new arbitration centers.

As to this specific Court of Cassation's judgment that essentially removes the award's enforcement proceedings to the ADGM courts, it is unclear whether and how the challenging party will seek annulment with the ADGM courts and, more importantly, how the ADGM courts would treat any such proceeding.

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[1] The parties were not identified in UAE court filings, as is customary.

[2] The judgment refers to city of Abu Dhabi and the Emirate of Abu Dhabi interchangeably.