



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

A15

Claimant

and

B15

Defendant

JUDGMENT OF JUSTICE SIR ANDREW SMITH



Neutral Citation:	[2024] ADGMCFI 0012
Before:	Justice Sir Andrew Smith
Decision Date:	5 August 2024
Decision:	<ol style="list-style-type: none"> 1. The Jurisdiction Application is adjourned. 2. The Claimant's application for recognition and enforcement of the Award under section 62(2) of the ADGM Arbitration Regulations is adjourned. 3. Costs reserved.
Hearing Date:	26 July 2024
Date of Order:	5 August 2024
Catchwords:	Application for recognition and enforcement of arbitral award. Jurisdiction challenge. Sections 60(1)(a) and (c), 61 and 62 of ADGM Arbitration Regulations. UAE Federal Arbitration Law. Determination of seat of arbitration. Estoppel. Discretion to adjourn an application for recognition or enforcement of an award pending determination of other court.
Cases Cited:	<p>A8 v B8 [2023] ADGMCFI 0015</p> <p>Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38</p> <p>Braes Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd [2008] EWHC 426 (TCC)</p> <p>Dihl v Waterfront Property Investment Ltd [2009] DIFC CFI 011</p> <p>Ledger v Leeor [2022] DIFC CA -13</p> <p>Dubai Court of Cassation Case No. 508/2022</p> <p>Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2019] EWHC 3568 (Comm)</p> <p>Dubai Court of Cassation Case No. 1132/2020</p> <p>Abu Dhabi Court of Cassation Case No. 1045/2022</p> <p>Dubai Court of Cassation Case No. 460/2023</p> <p>Abu Dhabi Appeal Court Case No. 81/2022</p> <p>Abu Dhabi Appeal Court Case No. 57/2023</p> <p>Abu Dhabi Court of Cassation Case No. 635/2022</p> <p>Abu Dhabi Appeal Court Case No. 101/2022</p> <p>Abu Dhabi Appeal Court Case No. 87/2022</p> <p>Abu Dhabi Appeal Court Case No. 53/2021</p>



	<p>NMC Healthcare Ltd v Dubai Islamic Bank PJSC [2023] ADGM CFI 0017</p> <p>Good Challenger Navigante SA v Metalexportimport SA [2003] EWCA Civ 1668</p> <p>Kebab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2021] UKSC 48</p> <p>AIC Limited v The Federal Aviation Authority of Nigeria [2019] EWHC 2212 (TCC)</p> <p>Daman Real Capital Partners Co LLC v Oger Dubai LLC, Cassation No 1/2016 (JT)</p> <p>Dubai Water Front LLC v Chenshan Liu, Cassation No 2.2016 (JT).</p>
Legislation Cited:	<p>Abu Dhabi Law No. (4) of 2013, as amended by Abu Dhabi Law No. (12) of 2020</p> <p>ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015</p> <p>United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)</p> <p>UAE Federal Law No. (6) of 2018 on Arbitration</p> <p>Law No. (9) of 2004 Concerning Dubai International Financial Centre, as amended by UAE Federal Law No. 7 of 2011</p> <p>Law No. (12) of 2004 in respect of The Judicial Authority at Dubai International Financial Centre</p>
Case Number:	ADGMCFI-2024-073
Parties and representation:	<p>Claimant</p> <p>Mr David Russell KC (Instructed by Wasel & Wasel)</p> <p>Defendant</p> <p>Mr Jeremy Speller of Pinsent Masons LLP</p>

JUDGMENT

INTRODUCTION

The Claim and the Application

1. By a claim form dated 17 April 2024, the Claimant, A15 (“**A15**”), applied under section 61 of the Abu Dhabi Global Market (“**ADGM**”) Arbitration Regulations 2015 (the “**Arbitration Regulations**”) for the recognition and enforcement of an arbitration award (the “**Award**”) against the Defendant, B15 (“**B15**”), dated 14 February 2024. The claim was supported by a witness statement dated 17 April 2024 by Mr Mahmoud Abuwasel, a solicitor of the Supreme Court of Victoria and the Managing Partner of Wasel & Wasel, A15’s lawyers.



2. By a notice of application dated 28 May 2024 (the “**Jurisdiction Application**”) made under rule 38 of the ADGM Court Procedure Rules 2016 (the “**CPR**”), B15 sought a declaration that this Court has no jurisdiction to hear and determine the claim. The Jurisdiction Application was supported by a witness statement dated 28 May 2024 and made by Mr Mark Raymont, a Partner of Pinsent Masons LLP, its solicitors. In a second witness statement dated 10 June 2024, Mr Raymont put the application on a wider basis, describing it as made “*for an order declaring that [the Court] has no jurisdiction to try the claim and/or it should not exercise any jurisdiction it may make (sic) ...*”.
3. By an Order dated 3 June 2024, I gave directions for the service of further evidence and the listing of the Jurisdiction Application. I heard the Jurisdiction Application at a hearing on 26 July 2024. B15 was represented by Mr Jeremy Spiller of Pinsent Masons LLP. A15 was represented by Mr David Russell KC.

The ADGM Statutory Provisions

4. Article 13.7(d) of Abu Dhabi Law No. (4) of 2013, as amended by Abu Dhabi Law No. (12) of 2020, (the “**Founding Law**”) provides that this Court “*shall have exclusive jurisdiction to consider and decide on matters according to the following: ... d) Any request, claim or dispute which the Global Market’s Courts has the jurisdiction to consider under the Global Market Regulations*”. “*Global Market Regulations*” are defined by Article 1 to mean “*Any regulations or resolutions related to the Global Market and issued by the Board of Directors*”, and therefore the Arbitration Regulations are within the definition.
5. Further, Article 16(2) of the *ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015*, themselves within the definition of Global Market Regulations, provides that, “*... there shall be exercisable by [this Court] all such jurisdiction as is conferred on it by ... (d) any other ADGM enactment*”, and the Arbitration Regulations are an “*ADGM enactment*” within the definition at Article 227.
6. Thus, this Court has jurisdiction to make orders under the Arbitration Regulations. Section 61 in Part 4 of the Arbitration Regulations provides for the recognition and enforcement of “*award[s] within the meaning of subsection 60(1)*”. Section 60(1) provides as follows:

“This Part 4 applies to:

 - (a) arbitral awards made in arbitrations where the seat of the arbitration is the Abu Dhabi Global Market;*
 - (b) New York Convention Awards; and*
 - (c) 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”.*
7. In his witness statement in support of the Claim, Mr Abuwasel said that A15 relied on subsection 60(1)(a). In submissions in opposition to the Jurisdiction Application exhibited to a further witness statement of Mr Abuwasel dated 19 June 2024, A15 relied on subsections 60(1)(a) and 60(1)(c). It does not rely on subsection 60(1)(b).
8. Section 62 of the Arbitration Regulations sets out circumstances in which the Court may refuse recognition or enforcement of an Award covered by subsection 60(1). Unless one of the specified exceptions applies, recognition and enforcement of the award is mandatory: the Court has not residuary discretion to refuse recognition and enforcement. However, section 62(2) provides that:

“If an application for the setting aside or suspension of an award has been made to a court referred to in subsection (1), the Court may, if it considers it proper, adjourn its decision and may also, on the



application of the party seeking recognition or enforcement of the award, order the other party to provide appropriate security”.

9. The term “*court referred to in subsection (1)*” is a reference to section 60 (1)(a)(vi), which provides that recognition and enforcement may be refused if “*the award ... has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made*”. This is clear from Article VI of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (the “**New York Convention**”), on which section 62(2) is based.
10. I should also refer to Articles 13.13 and 13.14 of the Founding Law. Article 13.13 provides that, “*Judgments and orders rendered by the Global Market’s Courts and arbitral awards recognised by the Global Market’s Courts shall be enforced by the competent entities outside the Global Market in accordance with the procedures and rules adopted by such entities, as well as any memoranda of understanding between the Board of Directors or the Global Market’s Courts and those entities*”. However, Article 13.14 provides that this does not apply to judgments and orders for the recognition or enforcement of judgments and orders issued by a Court outside Abu Dhabi nor to “*any arbitral award rendered by a tribunal where the seat is outside the Global Market*”. As was explained by Justice William Stone SBS KC in *A8 v B8 [2023] ADGMCFI 0015*, the Court therefore will not affix the so-called executory formula to orders for the enforcement of awards by a tribunal in such cases, the purpose of the executory formula (“*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*”) being to facilitate the enforcement in other Courts of the UAE.
11. CPR r.38(2) provides that “*A defendant who wishes to dispute the Court’s jurisdiction to try the claim, or who wishes to argue that the Court should not exercise its jurisdiction, may apply to the Court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have*”.

The Arbitration Agreement and the Award

12. The dispute between A15, a company registered under the laws of the Republic of Korea, and B15, a state-owned company incorporated under the laws of the People’s Republic of China, arose under a subcontract for marine work dated 25 March 2020 (the “**Subcontract**”), which provided for A15 to carry out certain works for the development of a XX plant in XX in the United Arab Emirates (“**UAE**”). The Subcontract expressly provides that “*The Contract shall be construed according to the laws in force in the UAE*” (clause 23). Clause 18 provides that the “*ruling language of the Contract shall be English*”, that correspondence and other documents should be in English and that A15’s relevant personnel should be fluent in English.
13. Clause 17 is headed “*Settlement of Disputes*”:
 - “*17.1 The Parties shall make a good faith effort to seek amicably any dispute [sic] which may arise among them under this Contract.*
 - “*17.2 In the event that the two Parties fail to resolve any dispute amicably, then such dispute shall be submitted to International Court of Arbitration of ICC for Arbitration in accordance with the Rules of Conciliation and Arbitration of International Chamber of Commerce. The place of arbitration shall be U.A.E. and the language of arbitration shall be English.*
 - “*17.3 The two Parties shall further agree that any arbitration award shall be final and binding upon the two Parties.*”
14. On 31 December 2021, A15 commenced a reference by submitting a request to the Secretariat of the International Chamber of Commerce (“**ICC**”). In April 2021, the ICC opened a case management office in the ADGM, and it was open and operational throughout the arbitral proceedings. It is not in dispute that the reference was to be conducted in accordance with the Rules of Arbitration of the ICC, 2021 (the “**ICC**”).



Rules”). On 10 March 2024 B15 brought a counterclaim in the reference. Article 23 of the ICC Rules requires the Tribunal to draw up a document defining its terms of reference, including the “*place of the arbitration*”, and Terms of Reference dated 22 July 2022 were drawn up, and signed by the parties and the arbitrators. The hearing took place from 21 to 25 September 2023 in the ADGM.

15. On 14 February 2024, by its Final Award, the Tribunal determined that it had jurisdiction to decide the claims before it, and that B15 should pay A15 US\$ 9,674,258.38 in respect of its claim, US\$ 1,599,888.86 in respect of A15’s legal costs and US\$ 204,750.00 in respect of ICC costs. It dismissed other claims and B15’s counterclaim. At paragraph 18 of the Award, the Tribunal said that the parties had “*agreed Dubai, United Arab Emirates as the place of the arbitration pursuant to Article 18(1) of the Rules*”, and at paragraph 19, it said that the parties had agreed that “*the evidentiary hearing should take place in the ADGM in Abu Dhabi*”.
16. On 11 and 12 March 2024, the parties submitted applications to the Tribunal under Article 36 of the ICC Rules for corrections to the Award. In his witness statement in support of A15’s application, Mr Abuwasel said that, “*pending the arbitral tribunal’s conclusion*” on B15’s application for corrections, A15 sought to have recognised and enforced part of the Award in the amount of US\$ 7,783,806.95 in respect of its claims and the sums awarded in respect of its costs and the ICC costs.
17. On 29 May 2024, by an Addendum to the Award and in response to B15’s application, the Tribunal reduced the sum awarded in respect of A15’s claims for so-called “*Suspension Costs*” by US\$ 1,471,693.69, and so reduced the amount awarded for A15’s claims to US\$ 8,202,562.69.

The decision of the Umm Al Quwain Court and Article 18 of the UAE Federal Arbitration Law

18. Pending resolution of the dispute in the arbitration, A15 applied to the Courts of Umm Al Quwain for a precautionary attachment against B15’s assets. By a judgment dated XX 2023, the Court refused the application. It referred to the UAE Federal Arbitration Law, 6/2018 (the “**Federal Arbitration Law**”) and said this:

“The import of ... Article 18 of the Arbitration Law is that the law - as a general rule - grants the territorial jurisdiction to consider matters related to taking provisional or precautionary measures on a dispute related to a contract that contains an arbitration clause, to the Chief Justice of the Court – which is, according to the definition, the federal or local Court of Appeal that the parties agreed upon or in whose jurisdiction the arbitration is conducted. It shall, exclusively, have jurisdiction until the conclusion of all arbitral proceedings. Based on the foregoing, and whereas [A15] and [B15] have agreed, under the Contract, that the Emirate of Dubai shall be the seat of arbitrator, under the arbitration terms of reference signed by them in Arbitration Claim No MDY/26800. In light of and based on the foregoing, and whereas it is established that the expressly-agreed-on seat is the Emirate of Dubai. Hence, the Chief Justice of the Court of Appeal in Dubai is competent to issuing the order to take any provisional or precautionary measure thereon, as the said Court is the one in whose jurisdiction the arbitration is conducted. It shall exercise exclusive jurisdiction until the conclusion of all arbitral proceedings”.

19. Article 18(2) of the Federal Arbitration Law provides that “*The President of the Court may order, upon request of a party or upon request of the Arbitral Tribunal, interim or precautionary measures, as he may deem necessary, for the current or future arbitration proceedings, whether before or in the course of the arbitration proceedings*”. Article 1 defines “*Court*” as “*The federal or local Appeal Court agreed by all Parties or which the Arbitration is carried out within its area of jurisdiction*”.
20. As I understand it, Article 1 provides that, when the term “*Court*” is used in the Federal Arbitration Law, it means a court upon which the parties to the arbitration have agreed, and if (and only if) there has been no agreement, then “*Court*” means that the Court with the territorial jurisdiction over where the arbitration is carried out. This interpretation would reflect the internationally recognised principle of arbitration law that



effect is to be given to the parties' agreement, and it is supported by a decision of the *Dubai Court of Cassation Case No. 508/2022*, which A15 cited. That case concerned an award issued by the Emirates Sports Arbitration Centre ("**ESAC**"), the main headquarters of which were in Abu Dhabi but which might have branches in other Emirates, as permitted by its President. The award was challenged in the Dubai Courts, which declined jurisdiction on the basis that the arbitration was not conducted within their territorial jurisdiction. The Court referred to Article 53 of the Federal Arbitration Law, which provides for challenges before the "*Court*", as defined in Article 1, and said that, according to those articles, "*if the arbitration parties do not agree on the court that will decide the nullity of the arbitration award, the jurisdiction will be with the court of the place where the arbitration was held, meaning the court within whose jurisdiction the arbitration sessions were conducted*". Accordingly, it declined jurisdiction because "*none of the parties objected to [ESAC's] jurisdiction over the dispute*", and the evidence "*did not specify that the place of arbitration would be in a branch of [ESAC] or in the Emirate of Dubai*": thus, the Court determined that the Courts of Dubai had jurisdiction to annul the award because the parties had not agreed upon a seat and the arbitration had been conducted in Dubai. I do not understand A15 to dispute that this is the proper interpretation of Article 1 of the Federal Arbitration Law: Mr Russell submitted that the question in this case is one of "*construction of the Arbitration Agreement against the background of decisions of the Courts of Abu Dhabi and Dubai*".

The proceedings in the Dubai Court to annul the Award

21. By an application made on XX 2024, B15 applied to the Courts of Dubai to "*adjudicate the nullity*" of the Award on the grounds that it was not party to the Subcontract and that the conditions precedent to a reference to arbitration stipulated in the Arbitration Agreement were not met; and in the alternative, to annul the determination in the Award about some of A15's legal costs. A15 challenged the jurisdiction of the Dubai Courts to entertain the application on the grounds that it was "*agreed by the Parties that the arbitration proceedings shall be managed in the ICC headquarters in ADGM*".
22. By a judgment of 28 May 2024, the Dubai Court of Appeal rejected the challenge to its jurisdiction. It also dismissed the challenge to the Award, except that it annulled the order for payment of legal costs in so far as it related to A15's legal representatives' costs in the amount of US\$1,542,367. With regard to the challenge to the jurisdiction, the Court said this: "*A plea is made for the inadmissibility because the Court has no jurisdiction over the lawsuit, and the jurisdiction is held to the ADGM Courts. It is established in para 18 of the arbitration's proceeding record [sc., as I assume, the Final Award] regarding the arbitration seat that the Parties agree that the arbitration seat shall be in Dubai, according to Article 18.1 of the Arbitration Rules*". Having referred to other documents, the judgment continued, "*Moreover, it is established in the ... Terms of Reference, as agreed by the Parties, that Dubai is the arbitration seat. It is also established that the arbitration award is appended by a statement that the arbitral award was issued in the arbitration seat (Dubai)*".
23. Both parties have appealed against the decision. I was told that a decision on the appeals is expected later this year, after a further hearing scheduled for XX 2024. Article 56(1) of the Federal Arbitration Law provides that "*An action to set aside an arbitral award does not stay its enforcement*".

A15'S APPLICATION UNDER ARBITRATION REGULATIONS, SECTION 60(1)(A)

The "Seat" of an Arbitration

24. This Court has jurisdiction to recognise and enforce an award in an arbitration when its "*seat*" is the ADGM. The purpose of parties agreeing upon the seat, or as it is sometimes called "*legal place*", of an arbitration is to agree that the law and courts of a particular country will exercise control over an arbitration to the extent provided for by that country's law: see *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38* at para 68 per Lord Hamblen and Leggatt. The control is multi-faceted: by way of supporting the reference (for example, by preserving evidence or assets); by way of protecting the agreement to arbitrate by issuing injunctions to restrain proceedings brought in breach of it; by way of determining challenges to



an award; and by way of recognising and enforcing an award. The seat also almost invariably determines the *lex arbitri* (or curial law of the arbitration) which governs the manner in which the parties and the tribunal are required to conduct the reference: see *Enka Insaat* at para 1 (per Lords Hamblen and Leggatt) and at para 193(vi) (per Lord Burrows).

25. It follows that the seat of an arbitration refers to a system of law or jurisdiction, rather than a country or place: “*the seat of an arbitration is a legal concept rather than a physical one. A choice of a place as the seat does not dictate that hearings must be held, or that any award must actually be issued, in that place*”: *Enka Insaat* at para 68. It is perfectly usual for hearings to be held at places other than the seat, and for arbitrators to sign awards wherever is convenient to them. The ICC rules applicable in this case expressly provided (at article 18(2), cited below) for flexibility about where hearings and meeting might be held, and (at article 32(3)) that “[t]he award shall be deemed to be made at the place of the arbitration and on the date stated therein”.
26. These principles and this guidance are always subject to the particular terms agreed by the parties, as is illustrated by the case of *Braes Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] EWHC 426 (TCC), in which the parties had (strangely) made an agreement that “*the courts of England and Wales have exclusive jurisdiction to settle any dispute arising out of or in connection with the Contract*” and that “*This arbitration agreement is subject to English law and the seat of the arbitration shall be Glasgow, Scotland*”. In that case, Akenhead J construed the agreement by giving the agreement upon a “*seat*” an unusual meaning and narrow application, designating only the place where hearings were to take place. In so far as it might be said that this case is relevant to the usual meaning of “*seat*” or the connotations of agreement upon a seat, I agree with Deputy Chief Justice Michael Hwang in *Dihl v Waterfront Property Investment Ltd* [2009] DIFC CFI 011 that the decision “*should be confined to its exceptional facts*”, for the reasons that he explains (at para 97).

Agreement upon a Seat of the Arbitration

27. A15 contends that the seat of the Arbitration is the ADGM, and therefore the Court has jurisdiction to recognise and enforce the Award under the Arbitration Regulations section 60(1)(a). It does not dispute that the parties agreed in the Arbitration Agreement that “*place*” of arbitration should be “*Dubai*”, but submitted that it is a matter of interpretation of the Arbitration Agreement as a whole and in context whether the parties agreed upon a seat (or legal place) and if so, upon what seat. A15’s case was that no seat was designated by the parties, and that therefore the seat of the arbitration is the ADGM “[i]n light of the arbitration being conducted under the auspices of the ICC Rules of arbitration within the UAE”.
28. The Subcontract is, as I have said, to be interpreted according to the law of the UAE, and I take that to apply to the Arbitration Agreement as well as the other terms of the Subcontract: see *Enka Insaat* (cit sup). B15 does not dispute that the seat of the arbitration is to be determined according to UAE law. (As I understand it, this means that, unlike the position under English law, the Court may have regard to the parties’ post-contractual conduct if there is uncertainty about the meaning of the agreed terms. Mr Russell observed that some of B15’s arguments referred to the parties’ post-contractual conduct, but he did not, I think, submit that such conduct should be disregarded. However that may be, this is not important: my decision about what was agreed between A15 and B15 does not depend upon any post-contractual conduct.)
29. In the Arbitration Agreement itself it was agreed not only that the “*place*” of arbitration should be the UAE, but that the arbitration should be in accordance with the ICC rules. Article 18 of the ICC Rules, headed “*Place of Arbitration*”, provides that:

- “1) *The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties.*
- 2) *The arbitral tribunal may, after consulting the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties.*



3) *The arbitral tribunal may deliberate at any location it considers appropriate”.*

30. In my judgment, Article 18.1 of the ICC Rules is about the legal place or seat of the arbitration, and not about the physical place, as is clear from the separate provisions in Articles 18.2 and 18.3 about the physical place where hearings and meetings may be held and where the arbitrators might deliberate. It is also clear that the Arbitrators in this case understood Article 18.1 to refer to the seat of the reference.
31. B15 contends that the parties agreed that the seat of the arbitration should be Dubai. It relies both on exchanges when the reference was brought and Terms of Reference for the arbitration.
32. As for the exchanges, having referred to Article 18(1) of the ICC Rules, A15 said in its Request of 31 December 2021 that the *“parties agreed [in the Subcontract] to designate the UAE as the seat of arbitration. This shows that the parties intended to choose a seat of arbitration within the UAE. Dubai is a major city close to the project site, and a common seat of arbitration in the region.... A15 respectfully suggests that the Parties select Dubai as the seat of arbitration”* (at para 156). In its Answer of 10 March 2022, B15 referred to clause 17 of the Subcontract, and wrote *“Accordingly, the arbitration is to be governed by the procedural rules contained in the UAE Federal Arbitration Law 6 of 2018 which is administered by the UAE Federal Courts. As was confirmed to the ICC Secretariat by letter dated 30 January 2022, B15 has no objection to the clarification proposed by A15 that the seat of arbitration should be “Dubai, UAE”* (at paras 5.8, 5.9). (The letter of 30 January 2022 is not itself in evidence.) Thus, although clause 17 of the Subcontract referred to the *“place”* of any arbitration, both parties interpreted it as a reference to its seat, or legal place.
33. The Terms of Reference stated (at para 101), *“Place of arbitration: Dubai, United Arab Emirates”*. It gave an address for the Secretariat of the ICC administering the arbitration in the ADGM (para 16). Under the heading, *“The Procedure to Date”*, it stated that by a letter dated 11 January 2022 the Secretariat, notifying B15 of the request for arbitration, wrote that the Arbitration Agreement provided that *“the place of arbitration shall be UAE and that the place of arbitration must be a city”*, and that accordingly A15 had proposed Dubai and invited B15’s comments on the place of arbitration (para 33); and that in a response of 30 January 2022, B15 had said that it had no objection to A15’s proposal for the seat of arbitration to be Dubai (para 36). At paragraph 89 it said this: *“Any award or procedural decision shall be deemed to have been made at the legal place of the arbitration (i.e. Dubai, United Arab Emirates) even if any such award or decision has been signed elsewhere or by electronic means”*. Thus, on their face, the Terms of Reference both evidence the agreement of the parties that the seat of arbitration be Dubai, and confirm that agreement (or if there were no prior agreement, would themselves constitute such an agreement).
34. Mr Abuwasel argued that the parties did not agree upon the legal place, or seat, of the arbitration, and their agreement about Dubai was only as to the physical place of the arbitration, in the sense of the *“geographical location of the tribunal”*. I reject that argument: it is inconsistent both with the agreement in the correspondence when the reference was brought and with the Terms of Reference. As I have said, in its Request for Arbitration, A15 proposed Dubai expressly as the *“seat of arbitration”* and B15 accepted the proposal expressly by reference to the *“seat of arbitration”*. The Terms of Reference expressly referred to the *“legal place of the arbitration”*.

Agreement upon “Dubai”

35. This leads to a question whether, given that the parties agreed that the seat of the arbitration was to be *“Dubai”*, they intended to refer to the civil law jurisdiction (or *“on-shore”* jurisdiction) of Dubai or to the Dubai International Financial Centre (**“DIFC”**) jurisdiction, or whether the agreement was too uncertain to be given legal effect. Mr Russell argued that neither the choice of the UAE as the *“place”* of arbitration in the Subcontract, nor the later agreement upon Dubai as the *“place”* or *“seat”* or *“legal place”* of the arbitration



identified a single jurisdiction: that there are in Dubai both a civil law jurisdiction and, in the DIFC, a common law jurisdiction, and “*Dubai*” in itself does not identify either.

36. I reject that argument. To my mind, the natural and ordinary meaning of the parties’ agreement, both in the exchanges and in their agreement to the Terms of Reference is that it designated the civil law jurisdiction of Dubai as the seat. If there were any doubt about that, the intention is the clearer because they chose to have the arbitration governed by the procedural rules of the UAE.
37. I observe that apparently this view was shared by the Umm Al Quwain Court and the Dubai Court of Appeal. It is also consistent with decisions of the DIFC Courts to which Mr Speller drew my attention: *Ledger v Leeor* [2022] DIFC CA -13 and *Dhir v Waterfront Property Investment Ltd* (cit sup), in which Deputy Chief Justice Michael Hwang said “*The moral of the case is that, if parties want the DIFC Arbitration Law to apply and the DIFC Court to have jurisdiction over an arbitration, they should expressly select the DIFC as the seat of their arbitration agreement*” (at para 92).
38. Mr Abuwaseel referred to the arbitration hearing taking place in the ADGM. This is nothing in the point: as I have said, it is common for hearings to take place away from the seat of the arbitration, and the ICC Rules expressly allow this. Moreover, in an email of 21 July 2023 to the Arbitrators, copied to A15’s representatives, B15’s representatives made clear that the agreement to hold the hearing in the ADGM was not to affect the seat: “*For the avoidance of doubt, while the ‘place of arbitration’, as set out in ... the Terms of Reference ... remains Dubai, we consider that the ADGM (which is in Abu Dhabi) is the appropriate location for the conduct of the hearing as allowed for under ... the Terms of Reference*”.
39. A15 also relied on the parties’ choice of English as the language of the arbitration. I am not persuaded that this assists its argument. The ICC Rules expressly recognise at Article 20 that the parties may choose a language of the arbitration that is different from the seat, and that the language of the contract might inform the language for the arbitration: “*In the absence of an agreement by the parties, the arbitral tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract*”. Here, not only was the Subcontract in English but it required A15 personnel (potentially witnesses in an arbitration, it might be thought) to be fluent in English.

A15’s argument about the Agreement upon ICC Arbitration

40. Mr Russell’s submissions focused on another argument: that, where the parties’ agreement leaves the seat of an arbitration uncertain, UAE law resolves the uncertainty by attaching significance to the rules under which the parties have agreed to arbitrate: in this case, the ICC Rules. The ICC has its offices in Paris, New York, Sao Paolo, Singapore, the ADGM in Abu Dhabi, and Hong Kong, but the relevant office here is in the ADGM: it is the ICC’s only office in the UAE, and the address of this office was given in the Terms of Reference for the ICC Secretariat who were administering the arbitration. Further, Mr Russell argued that UAE law also attaches importance to where the arbitration was actually conducted.
41. It is admittedly counter-instinctive to lawyers in the common law tradition to attach such significance to an agreement to arbitrate in accordance with ICC Rules. At first sight, it appears to give little weight to the intentions of the parties to the arbitration agreement and undue weight to their choice of the rules of the ICC, which has been described as “*a quintessentially and deliberately international institution*”: (*Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2019] EWHC 3568 (Comm) at para 62 per Andrew Baker J, cited by Lords Hamblen and Leggatt at [2020] UKSC 38 para 115). However, Mr Russell was able to cite an impressive array of authorities from the UAE courts in support of his argument. Fundamentally, given that it is a question of UAE law, the focus of the issue is the proper meaning and application of the Federal Arbitration Law, and in particular Article 18.
42. I go first to two authorities on which Mr Russell placed particular weight in his oral submissions. The first was *Case No. 1132/2020 in the Dubai Court of Cassation*. It concerned a dispute arising from a subcontract



for underseas works, which included an arbitration agreement providing for arbitration according to the rules of the DIFC-London Court of International Arbitration ("**DIFC-LCIA Rules**"). A dispute arose, it went to arbitration accordingly and an award was issued. An application to annul the award was made to the Dubai Courts, but by a judgment of 7 October 2020, the Court of Appeal decided that it had no jurisdiction to hear the challenge. There was an appeal to the Court of Cassation. The argument of the appellant was that the arbitration agreement stated that the seat of the arbitration should be "*internally in Dubai*" according to the DIFC-LCIA Rules, which allowed the parties to agree upon the seat. The Court of Cassation rejected that argument: its reasoning was that the jurisdiction of the DIFC was established by *Federal Law No. (9) of 2004*, as amended by *Federal Law No. 7 of 2011*, and the legislation conferred on the DIFC Courts "*an independent judicial authority with specific functions as defined by law*". Those included matters where Article 5A of *Law No. (12) of 2004* conferred on the DIFC Court of First Instance exclusive jurisdiction to hear and determine, namely:

"(a) Civil or commercial claims and actions to which the DIFC or any DIFC Body, DIFC Establishment or Licensed DIFC Establishment is a party;

(b) Civil or commercial claims and actions arising out of or relating to a contract or promised contract, whether partly or wholly concluded, finalised or performed within DIFC or will be performed or is supposed to be performed within DIFC pursuant to express or implied terms stipulated in the contract;

(c) Civil or commercial claims and actions arising out of or relating to any incident or transaction which has been wholly or partly performed within DIFC and is related to DIFC activities;

(d) Appeals against decisions or procedures made by the DIFC Bodies where DIFC Laws and DIFC Regulations permit such appeals;

(e) Any claim or action over which the Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations".

43. The Court of Cassation said that, since the DIFC-LCIA Arbitration Centre had its main office in the DIFC, it was an institution of the DIFC, giving the Courts "*exclusive jurisdiction to hear appeals against its awards*", and therefore the Court of Appeal was right to conclude that the agreement of the parties that disputes should be resolved by arbitration under the DIFC-LCIA Rules "*means that the parties explicitly and in writing agreed on the DIFC's jurisdiction over disputes arising from the contract between them*". Accordingly, it concluded that "*the DIFC [was] the competent authority to consider the request to annul the award*", being the "*original jurisdiction authority to hear the dispute*" under the arbitration agreement, and therefore the Dubai Courts (that is to say, the civil law Courts or "on-shore" Courts) had no jurisdiction to hear the challenge to the award and the DIFC Courts had exclusive jurisdiction to do so.
44. The second case upon which Mr Russell particularly relied was a decision of the Abu Dhabi Court of Cassation in *Case No. 1045/2022*. This too was about an application to annul an award. The award was made in an arbitration pursuant to an agreement in a construction contract that included this arbitration clause: "*Disputes that may arise between both parties are finally settled by arbitration under the rules of arbitration of the International Chamber of Commerce. The arbitration proceedings are governed by the laws of United Arab Emirates and the arbitration proceedings take place in Abu Dhabi provided for arbitration of disputes according to the rules of the ICC and for the arbitration proceedings to take place in Abu Dhabi*". At the time of the agreement and when the arbitration was brought, the ICC had no branch in the ADGM: it was opened in the course of the arbitration and before the award was issued by the ICC.
45. The Court of Cassation upheld the decision of the Court of Appeal that the Courts of the Abu Dhabi Judicial Department had no jurisdiction over the challenge to the award. The Court referred to Article 18 of the Federal Arbitration Law and the definition of "*Court*" in Article 1, and to the Founding Law, specifically, to Article 13.7(d). Having done so, and having referred to the provisions of the arbitration agreement, it said



that the fifth branch of the ICC had opened “during the arbitration procedures”, the Court concluded that “that branch is considered a representative body of the [ICC] and is the seat of arbitration subject to the mentioned [ADGM] law, and hence jurisdiction to challenge it is established for [ADGM] Court”.

46. I observe that in both of these cases, the Court was considering an arbitration agreement which referred to an Emirate as the “seat” of the arbitration (in the Dubai case) or where the arbitration proceedings should “take place” (in the Abu Dhabi case). Both the Emirates have two separate jurisdictions: a civil law jurisdiction and a common law jurisdiction. The agreements, although referring to the Emirates, did not expressly state which of the jurisdictions within the Emirates was meant, and to that extent might be considered ambiguous. So viewed, the decisions did not involve overriding the parties’ agreement about the seat of the arbitration, but refined their choice to a single jurisdiction. In this case, while the parties’ agreement did not expressly identify which jurisdiction in Dubai should be the “seat” of the arbitration, it would override the parties’ agreement to determine that the seat is the ADGM.
47. Mr Russell cited six other decisions of the Courts of Abu Dhabi and a further judgment of the Dubai Court of Cassation, but they do not engage with the position where it would be inconsistent with the parties’ agreement for the Court with territorial jurisdiction where the arbitration took place to assume jurisdiction over an arbitration matter. The *Dubai Court of Cassation Case No. 460/2023* concerned another award by ESAC, and the Court determined that it had jurisdiction because the award was issued by the Dubai Branch of the Centre. Three of the Abu Dhabi cases, the *Abu Dhabi Appeal Court Case Nos. 81/2022 and 57/2023* and the *Court of Cassation Case No. 635/2022* were cases where the parties had agreed upon arbitration of disputes under the ICC Rules and had agreed either that they should be resolved “through arbitration in Abu Dhabi” or “through arbitration in the Emirate of Abu Dhabi” or that “the seat of the arbitration shall be Abu Dhabi”. All the remaining cases, decisions of the Abu Dhabi Appeal Court in *Case Nos. 101/2022, 87/2022 and 53/2021*, all concerned arbitrations under the ICC Rules where the parties had not, as far as the reports indicate, made any agreement about the seat or place of arbitration, and the Courts determined that ADGM, and not they, had jurisdiction to deal with challenges.
48. I am therefore not persuaded that these authorities support A15’s argument that, under UAE law, the seat of the arbitration would be the ADGM. The task of this Court when deciding questions of UAE law is to determine how a UAE Court would decide the question: see *NMC Healthcare Ltd v Dubai Islamic Bank PJSC [2023] ADGM CFI 0017* at para 24 and the authorities there cited. In this case, the best evidence of that is the judgments of the Umm Al Quwain Court on A15’s precautionary attachment application and the decision on the Dubai Court of Appeal on A15’s application to nullify the Award. I reject the argument that the seat of the arbitration is the ADGM.

Estoppel

49. B15 had another argument: that the judgment and decision of the Court of Umm Al Quwain, which determined that the seat of the arbitration is the civil law jurisdiction of Dubai, and this gives rise to an issue estoppel that precludes Mereine from making the contradictory assertion that the seat is the ADGM. The approach of English law, and therefore of ADGM law, about when a foreign judgment (and for this purpose the judgment of the Umm Al Quwain Court would be considered a foreign judgment) gives rise to *res judicata* on an issue is summarised by Clarke LJ in *Good Challenger Navigante SA v Metalexportimport SA [2003] EWCA Civ 1668* as follows (at para 54):

“The authorities establish that there must be “a full contestation and a clear decision” on the issue in question. ... The cases also underline four further important features of the approach of the courts to issue estoppel, They are as follows:

- i) It is irrelevant that the English court may form the view that the decision of the foreign court was wrong either on the facts or as a matter of English law.*



ii) *The courts must be cautious before concluding that the foreign court made a clear decision on the relevant issue because the procedures of the court may be different and it may not be easy to determine the precise identity of the issues being determined.*

iii) *The decision of the court must be necessary for its decision.*

iv) *The application of the principles of issue estoppel is subject to the overriding consideration that it must work justice and not injustice”.*

50. Applying these criteria, I reject the contention that there is an estoppel or *res judicata* in this case. The relevant issue for this Court is whether the seat of the arbitration is the ADGM. Nothing has been put before me to suggest that there was any argument before the Umm Al Quwain Court about the seat of the arbitration, still less that anyone suggested that the ADGM might be the seat, still less that there was “a *full contestation*” about ADGM being the seat. Even had there been, the fundamental issue was whether the Umm Al Quwain Court was the seat: no other decision about jurisdiction was necessary for the Umm Al Quwain Court.

51. For completeness, I should mention that Mr Russell cited authorities from the *Dubai Court of Cassation (307/2015 and 143/2016)* and the *Ras Al Khaimah Court of Cassation (8/2019)* in support of A15’s contention that a judgment on an application for a precautionary attachment, being temporary orders, cannot found *res judicata* under UAE law. Since the parties were in agreement that before this Court the question is governed by ADGM law, I need not engage further with that argument.

A15’S APPLICATION UNDER ARBITRATION REGULATIONS, SECTION 60(1)(C)

52. I come to A15’s alternative contention that the Court has power to recognise and enforce the Award under section 60(1)(c) of the Arbitration Regulations. It accepted that, if it succeeds on this basis, the Court’s order should not have an executory formula affixed. Further, if the case is one under section 60(1)(c), it would also mean that the Court would have the power under Arbitration Regulations 62(2) to adjourn its decision whether to order recognition and enforcement.

53. A15’s claim form does not specify the subsection of Section 60(1) on which it relied, but the witness statement of Mr Abuwasel accompanying the claim form in accordance with Practice Direction 10.2 relied only on Arbitration Regulations section 60(1)(a). However, as I have said, his second witness statement dated 19 June 2024, served well before the hearing, made clear that A15 would also rely on section 60(1)(c).

54. B15 submitted that it is not open to A15 to advance this argument because it is not pleaded. It relied on CPR r.52 and r.53, which apply to amendments to statements of case, but here there is no statement of case (as defined in r.3(1)(mm)) that requires amendment. I see nothing in B15’s objection to A15 putting its case on the basis of Arbitration Regulations section 60(1)(c) and no reason that it requires the Court’s permission to do so. If permission were required, I would unhesitatingly give it: B15 did not suggest that it has suffered any prejudice because the claim was not put on this basis in Mr Abuwasel’s first witness statement.

55. B15 also disputed that the Award is one which is “*sought to be recognised and enforced*” within the meaning of section 60(1)(c): B15 said that there is no evidence that A15 is genuinely seeking recognition and enforcement of the Award. In support of this argument, it said that there is no evidence that it has assets within the ADGM against which the Award might be enforced. I am not impressed by that argument. It is not a requirement for an order for recognition or enforcement of an award under section 60(1)(c) that there be assets within the jurisdiction against which the award might be enforced, not least because assets might be brought into the jurisdiction after an order is made: I agree with the judgment of Judge Stone in *A8 v B8* (cit sup) at paras 32ff, and would respectfully adopt his reasoning. Nor do I consider that a claimant in a



case such as this need put before the Court a witness statement that he seeks recognition and enforcement: claimants are taken by the Court to be seeking the relief that they claim in the proceedings.

56. In its skeleton argument, B15 made another point, which was based upon provisions of the Federal Arbitration Law. Article 18 provides that the “*competent Court*”, as defined by Article 1, has “*exclusive jurisdiction until the conclusion of the arbitral proceedings*” to “*examine arbitration matters*”. Further, Article 52 provides that “*The arbitral award issued according to the provisions of the present Law shall be binding to the Parties and have the force of res judicata and same enforceability as if it is a Court judgment, provided that a decision recognised by the Court is obtained for its enforcement*”. A15 has not, it appears, obtained from the Dubai Court an order recognising or confirming the Award. B15 submits that, under UAE law, the Award is not enforceable in the ADGM without one. This is not an argument that this Court has no jurisdiction over A15’s claim: it is an argument that it should not exercise its jurisdiction.
57. Before I return to this point, I shall refer to section 62(2) of the Arbitration Regulations, which allows the Court to adjourn an application for recognition or enforcement of an award covered by section 60(1)(c). In *Kebab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2021] UKSC 48*, Lords Hamblen and Leggatt said that, where an award is being challenged by an application to annul it or to set it aside in the courts of its seat, “*then, ordinarily, an English court is likely to grant an adjournment because it is sensible to have the foreign court determine the issue of foreign law and to avoid the potential for conflicting judgments on the same issue*” (at para 87). Of course, the Court has a discretion whether or not to adjourn an application for recognition or enforcement in such circumstances: the considerations that might be relevant to the exercise of the discretion were reviewed in *AIC Limited v The Federal Aviation Authority of Nigeria [2019] EWHC 2212 (TCC)* and the earlier authorities cited in it. It suffices to say that there appears no reason in this case not to follow the usual course of adjourning A15’s application until the Dubai Court of Cassation has ruled upon the challenges to the Award.
58. In these circumstances, I shall not rule upon B15’s argument that the Award is not enforceable in the ADGM unless and until A15 obtains an order from the Dubai Court. The question is a difficult one on which the Judges of the Joint Judicial Committee for the Dubai Courts and the DIFC Courts have held different views: see *Daman Real Capital Partners Co LLC v Oger Dubai LLC, Cassation No 1/2016 (JT)* and *Dubai Water Front LLC v Chenshan Liu, Cassation No 2.2016 (JT)*. At the hearing on 26 July 2024, I heard little oral argument on the question, which deserves full and detailed submissions. I need not engage with it further now: it is better considered if, after the Dubai Court of Cassation has ruled upon the pending appeals, A15 restores its application without first obtaining an order or decision from the Dubai Court such as is contemplated by article 52 of the Federal Arbitration Law.

CONCLUSION

59. I therefore determine that the Award is not one within the Arbitration Regulations section 60(1)(a) but is an award within Section 60(1)(c).
60. I shall adjourn A15’s application for recognition and enforcement under section 62(2) of the Arbitration Regulations.
61. What order should I make upon the Jurisdiction Application? The application notice itself sought relief only on the basis that the Court has no jurisdiction, and I have concluded that the Court has jurisdiction because the Award is within Section 60(1)(c). It might be said that, therefore, the Jurisdiction Application should be refused. However, a defendant may also apply for relief under CPR r.38(2) for an order that the Court should not exercise any jurisdiction which it may have, and Mr Raymont’s second witness statement said that the application was also put on that basis. A15 raised no objection to him doing so. In these circumstances, I shall also adjourn the Jurisdiction Application to be heard together with A15’s claim in order to give B15 an



opportunity, if so advised, to apply for permission to amend the Jurisdiction Application and pursue the argument based on the Federal Arbitration Law summarised at paragraph 56 above

62. I am provisionally minded to reserve the costs of and associated with the Jurisdiction Application. If either party wishes to apply for some other order about costs, it should make an application by 5.00 pm on 19 August 2024.

Re-Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
8 August 2024