

Dubai

Location of ICC Case Management Office held to determine the seat of arbitration in Abu Dhabi

Recent case law in Abu Dhabi has again underlined the importance of clear drafting in arbitration clauses in the UAE, particularly in relation to the choice of the seat of arbitration and arbitral institution.

The “seat” or “legal place” of an arbitration determines the “nationality” of the proceedings and any subsequent award arising from it. This can have important consequences: the seat determines the legal and procedural framework that will apply to the proceedings, which may be different from the parties’ choice of law governing the substantive issues in dispute, and also the courts that will have supervisory jurisdiction over the arbitration.

In most instances, what the parties intend to choose as the “seat” is clear. In the UAE, however, “Free Zones”, such as the Dubai International Financial Centre (DIFC) in Dubai and Abu Dhabi Global Market (ADGM) in Abu Dhabi, exist as common law jurisdictions alongside the civil law “onshore” system. Each has its own civil and commercial laws, including provisions relating to arbitration and its very own courts, which are independent to the onshore court system. Importantly, however, the ADGM and DIFC are still, geographically, within the Emirates of Abu Dhabi and Dubai, respectively.

Until recently, arbitrations seated “onshore” in the UAE (i.e. outside the DIFC or ADGM) would normally be subject to the UAE Federal Arbitration Law No. 6 of 2018 (the Arbitration Law)

and supervised by the onshore courts of the Emirate nominated as the seat of arbitration. Conversely, arbitrations seated in either the DIFC or ADGM would be subject to the procedural laws of those jurisdictions and under the supervisory jurisdiction of either the DIFC or ADGM courts, as applicable.

Recently, the Abu Dhabi Court of Cassation (Case No. 1045/2022) had to determine whether an ICC arbitration clause providing for “Abu Dhabi” as a seat granted territorial jurisdiction to hear and determine annulment proceedings to the onshore courts in Abu Dhabi or the ADGM Courts.

By way of background, two parties entered into a construction contract (the Contract), which provided that any disputes were ultimately to be resolved through arbitration under the ICC Rules of Arbitration (the ICC Rules). The seat of arbitration was stated to be “Abu Dhabi”.

Disputes arose between the parties and were referred to arbitration, resulting in a final award. One party (the Appellant) commenced proceedings in the onshore courts in Abu Dhabi, challenging and seeking an annulment of the award.

The Abu Dhabi Court of Appeal rejected the challenge on the basis that it did not have “territorial jurisdiction” to determine the issue. Instead, and notwithstanding the seat of arbitration being Abu Dhabi, the Court of Appeal held that the ADGM Courts had jurisdiction to hear and determine the Appellant’s challenge.

Relevantly, the Court of Appeal’s reasoning appeared to turn on the fact that the ICC had opened its Office in the ADGM in 2020. The Court of Appeal considered this sufficient to establish the ADGM as the seat of arbitration, meaning the ADGM Courts had jurisdiction to hear the challenge.

The Appellant appealed to the Abu Dhabi Court of Cassation, which ultimately confirmed the Abu Dhabi Court of Appeal decision. In doing so, the Court relied on the following reasoning:

1. The parties had agreed that the arbitration would be conducted under the ICC Rules.
2. The ICC opened its Office in the ADGM during the course of the arbitration process.
3. The definition of “Global Market Establishments” in Article 1 of ADGM Law No. 4 of 2013 (the ADGM Law) includes “any company, branch, representative office, institution entity, or project registered or licensed to operate or conduct any activity within the [ADGM]”.
4. The Office is therefore considered the ICC “representative office” under the ADGM Law.
5. By virtue of this, the Office was the “competent arbitration seat” under the ADGM Law.
6. Article 1 of the Arbitration Law states that the competent “Court” for the purposes of hearing cases relating to arbitration proceedings and awards is “The federal or local Court of Appeals agreed upon by the parties or in whose jurisdiction the arbitration is conducted”.
7. Both the onshore courts and the ADGM courts are “courts of the Emirate [of Abu Dhabi]”.
8. Article 13 of the ADGM Law provides that the ADGM Court of First Instance has jurisdiction over “Any request which the Global Market Courts has the jurisdiction to consider under the Global Market Regulations” (which would arguably include, under Article 13(6), “Civil or commercial cases and disputes involving the Global Market or any of the Global Market’s Authorities or any of the Global Market’s Establishments” (emphasis added)).
9. The ADGM Court of Appeal has jurisdiction to consider and decide on appeals made against the judgments and decisions issued by the ADGM Court of First Instance.
10. The consideration of any challenge to the award would therefore fall under the jurisdiction of the ADGM courts.

The judgment of the Abu Dhabi Court of Cassation is perhaps unexpected. It is likely to cause concern amongst award debtors in Abu Dhabi-seated ICC proceedings, who may view the ADGM courts as more “pro-enforcement” (and, conversely, be welcomed by their opposing parties).

While similar questions of jurisdiction arose in the Emirate of Dubai, following the establishment of the DIFC and its courts within Dubai’s geographical boundaries, this issue has largely been resolved through Decree 34 of 2021, which issued the “Statute of the Dubai International Arbitration Centre” (the Statute). Article 4(a) of the Statute confirms that:

1. where the parties choose “Dubai” as their seat of arbitration, the arbitration shall be conducted pursuant to the Arbitration Law, with the onshore Dubai Courts having supervisory jurisdiction; and
2. where the parties choose the DIFC as their seat of arbitration, the arbitration shall be conducted pursuant to DIFC’s arbitration law, with the DIFC Courts having supervisory jurisdiction.

Whether or not this judgment will prompt similar clarification in Abu Dhabi remains to be seen. In the meantime, however, parties unwilling to cede supervisory jurisdiction over their

arbitrations to the ADGM courts should consider carefully the wording of the arbitration clauses. In particular, parties should consider carefully:

1. the potential risks of specifying “Abu Dhabi” as a seat of arbitration without further clarification, which may bring their arbitration under the supervisory jurisdiction of the ADGM Courts; and
2. the location of any proposed arbitral institution (and its branch offices) when considering which institutional rules to apply.

In conclusion, this case once again highlights the complex jurisdictional landscape for arbitration in the UAE and emphasises the necessity for parties to draft arbitration clauses carefully to avoid risk of challenges to jurisdiction and enforcement.

For any further practical support in relation to arbitrations in the Middle East, please contact:

- **Beau McLaren**, Beau.McLaren@simmons-simmons.com
- **Harriet Jenkins**, Harriet.Jenkins@simmons-simmons.com

This content does not constitute legal advice. Professional legal advice should be obtained before taking or refraining from any action as a result of the contents of this email.



Follow us



[Manage my preferences](#) | [unsubscribe](#) | [legal & regulatory](#) | [privacy policy](#) | [contact us](#)

© Simmons & Simmons LLP and its licensors. All rights asserted and reserved. Simmons & Simmons will use your personal information as described in our privacy policy.