



ABU DHABI GLOBAL MARKET COURTS
محاكم سوق أبوظبي العالمي

COURT OF FIRST INSTANCE
CIVIL DIVISION

BETWEEN

A4

CLAIMANT

AND

B4

DEFENDANT

JUDGMENT OF JUSTICE SIR ANDREW SMITH



Neutral Citation:	[2019] ADGMCFI 0007
Before:	His Honour Justice Sir Andrew Smith
Decision Date:	8 October 2019
Decision:	Application for recognition and enforcement granted
Hearing Date(s):	23 September 2019
Date of Orders:	8 October 2019
Catchwords:	Recognition and enforcement of New York Convention arbitration award. Refusal on grounds that arbitration agreement not valid. Refusal on grounds of public policy of United Arab Emirates.
Legislation Cited:	Arbitration Regulations 2015 ADGM Procedure Rules 2016 ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 Abu Dhabi Law No (4) of 2013 Constitution of the United Arab Emirates
Cases Cited:	Tekdata Interconnections Ltd v Ampherol Ltd, [2009] EWCA Civ 1209 Minmetals Germany GmbH v Ferco Steel Ltd., [1999] 1 All E R 315 Joint Judicial Committee of Dubai: Assas Investments Ltd. v Fius Capital Ltd., Cassation No 6 of 2017
Case Number:	ADGMCFI-2019-008
Parties and representation:	Clyde & Co for the Claimant

JUDGMENT:

Introduction

1. A4 (“A4”), a company registered in Abu Dhabi, brought arbitration proceedings under the rules of the London Court of International Arbitration (“LCIA”) on 8 March 2018 against B4 (“B4”), who are also incorporated in Abu Dhabi. The claim was for sums that A4



alleged were due for services that they had provided to B4 in connection with the X Project, Abu Dhabi. There is no evidence that either A4 or B4 have any presence in the Abu Dhabi Global Market (“ADGM”), or that the services provided by A4 or the contracts under which they were provided had any connection with the ADGM.

2. On 3 August 2018 the LCIA, in accordance with its rules, appointed the Rt Hon. Lord Thomas of Cwmgiedd, to be the sole arbitrator. In an award made on 14 November 2018 (the “Award”) he decided that:
 - a) He had jurisdiction to make the Award;
 - b) B4 should pay A4 the sum of US\$522,782.48 (being the prices agreed for A4’s services and interest thereon from the dates when payment fell due to 14 November 2018), together with interest at the rate of 8.75% per annum from 14 November 2018 until payment;
 - c) B4 should pay £11,500 (being the amount that Lord Thomas determined that B4 should pay in respect of A4’s legal costs and expenses), together with interest at the rate of 8.5% per annum from 14 November 2018 until payment; and
 - d) B4 should bear the costs of the arbitration in the sum of £10,588.17, and that B4 should therefore reimburse A4 in respect of them if and in so far as they had been paid by A4, together with interest on the amount to be reimbursed at the rate of 8.5% per annum from when they were paid by A4 or on their behalf until A4 were reimbursed. I infer that A4 had paid the whole of the costs of £10,588.17: by letter dated 30 November 2018 their solicitors, Clyde & Co, wrote to B4 that B4 had been ordered in the Award to pay £10,588.17, and B4 have not disputed this.
3. The Award was made in England and Wales.

History of the Proceedings

4. By a claim form of 25 June 2019, A4 applied to this Court for orders under section 56 of the Arbitration Regulations, 2015 (the “Arbitration Regulations”) that the Award be recognised as binding and that it be enforced in the same manner as a judgment of this Court. They sought to have the Court make these orders without notice to B4, as is permitted under the ADGM Procedure Rules, 2016 (the “Procedure Rules”). However, by an order dated 4 July 2019, I directed that A4 serve the claim form on B4 in order to give them the opportunity to make representations on A4’s claim. By a certificate of service dated 16 July 2019, Clyde & Co on behalf of A4 certified that the claim form had been served on B4 on 14 July 2019.
5. Under rule 37 of the Procedure Rules, B4 had until 28 July 2019 to file and serve an acknowledgment of service. They did not do so, and on 20 August 2019 Clyde & Co wrote



to the Court that they understood that in these circumstances the Court would issue an order for recognition and enforcement, observing that B4 would have the right to apply to set the order aside within 14 days of being served with it. However, on the same day B4 also wrote to the Court enquiring about the “status” of the case, and stating that they had received “no further notification” about it from the Court. Moreover, the claim form that, according to A4, had been served on B4 omitted the page of the prescribed form that would have given notice about when an acknowledgment of service had to be filed and the consequences of not doing so. I therefore did not accede to Clyde & Co’s request to make an order for recognition and enforcement of the Award, but on 21 August 2019 I ordered that B4 were to file and serve an acknowledgment of service of the claim form within 14 days of service of my order upon them and directed that A4 serve the order on B4.

6. On 9 September 2019 Clyde & Co filed a certificate that they had served the order on 22 August 2019. However, on 4 September 2019 B4 had written to the Court that they had not been served by A4 with the order. In view of this conflicting information, and again in order to ensure that B4 had every opportunity to make representations about the application for recognition and enforcement of the Award, I ordered and directed that:
 - a) If the order of 21 August 2019 had not been served, then service be dispensed with.
 - b) B4 had until 18 September 2019 to acknowledge service of the claim form.
 - c) There be a hearing on 23 September 2019 to hear and determine A4’s claim for recognition and enforcement of the Award or to give directions for determination of their claim.
7. B4 did not file an acknowledgment of service by 18 September 2019 or at any time. They did not attend the hearing on 23 September 2019 and they were not represented at it. A4 were represented by Ms Heather Nevin of Clyde & Co, and I am grateful for her assistance.

Jurisdiction

8. Section 16 of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations, 2015 provides that this Court has jurisdiction (inter alia) such as is conferred on it by those Regulations and by “any other ADGM enactment”. The expression “ADGM enactment” is defined at section 227 to mean “ADGM regulations and any rules made under ADGM regulations, including court procedure rules”. Section 227 also defines “ADGM regulations” as “regulations enacted by the Board [sc. the Board of Directors of the ADGM] under article 6(1) of the ADGM Founding Law”, Law No (4) of 2013 whereby ADGM was established as a Financial Free Zone in accordance with Article 121 of the Constitution of the United Arab Emirates.



9. On 17 December 2015, the Board so enacted the Arbitration Regulations. Part 4 of them concerns the regulation and enforcements of awards, and it applies inter alia to “New York Convention Awards”, that is to say awards made in pursuance of an arbitration agreement in the territory of a state, other than the United Arab Emirates (“UAE”), which is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958 (the “New York Convention”). The United Kingdom is such a state, and the Award is an award to which Part 4 of the Arbitration Regulations applies.
10. Subsection 56(1) of the Arbitration Regulations provides that an award covered by Part 4:
- a) “shall be recognised as binding within the Abu Dhabi Global Market on the persons between whom it was made and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in the Abu Dhabi Global Market”; and
 - b) “shall be enforced within the Abu Dhabi Global Market as if it were a judgment of the Court [of First Instance of ADGM] and all of the Court’s powers in respect of the enforcement of judgments shall apply to the enforcement of arbitral awards in the manner prescribed in this Part 4 and any rules made for that purpose”.
11. By subsection 56(3) of the Arbitration Regulation, it is provided that, “Where, upon the application of a party for recognition of an arbitral award, the Court decides that the award shall be recognised, it shall issue an order to that effect”. By subsection 56(5), it is provided that, “Awards recognised by the Court may be enforced outside the Abu Dhabi Global Market in accordance with the applicable legislation in force and recognition under these Regulations includes ratification for the purposes of any such applicable legislation”.
12. The Court therefore has jurisdiction to recognise and order the enforcement of the Award. Indeed, section 56 being in mandatory terms, the Court is required to do so unless one of the grounds for refusing recognition or enforcement stated in section 57 of the Arbitration Regulations is satisfied.

The Arbitration Agreements

13. In their request for arbitration dated 8 May 2018, A4’s case was that they provided services to B4 under five contracts, all of which incorporated their “General Terms and Conditions of Sale – (Eastern Hemisphere)” (“A4’s T&C”), that provided at article 26 for English governing law and included an article (article 25) that, in the event of a dispute that was not resolved through other stipulated procedures, the matter would be “referred to binding arbitration in London under the auspices of, and pursuant to the rules of, the LCIA as then in effect, or such other procedures as the parties may agree to at the time ...”. A4’s T&C also provided that, subject to article 25, the contracts should be subject to the non-exclusive jurisdiction of the English courts.



14. In a response to A4's request for arbitration dated 5 June 2018 B4 challenged the "jurisdiction of LCIA since there is no Privity of agreement between the parties, as a result, an Arbitral Tribunal lacks jurisdiction to hear any disputes between [A4] and [B4] or any complaints which [A4] purports to have in relation to [B4]".
15. Thereafter B4 took no part in the reference and did not develop this contention. However, A4's request for arbitration gave rise to a question of what is sometimes called a "battle of forms", since, in exchanges before the five contracts were concluded, A4 referred to A4's T&C in proposals (or quotations), and in some cases they also referred to them in documents called "Comprehensive Order Acknowledgement Letters", while B4 referred in their Purchase Orders to "Terms & Conditions to be applied as per attached Annexure 1" (which terms and conditions are not in evidence, but which, as I infer, probably did not provide for LCIA arbitration). (I should add for completeness that, in the case of one of the five contracts, A4's T&C were referred by A4 in a letter whereby they confirmed acceptance of a variation of the contract. Further, the invoices sent by A4 to B4, which B4 stamped as received, also referred to A4's T&C, but they were presumably sent after the contracts to which they related had been concluded.)
16. Lord Thomas determined that each of the five contracts incorporated A4's T&C and therefore the arbitration agreement at Article 25. There might be scope for debate about whether this conclusion reflects the conventional approach of English law to so-called "battle of forms" cases, as explained by the Court of Appeal in *Tekdata Interconnections Ltd v Ampherol Ltd*, [2009] EWCA Civ 1209 and in *Chitty on Contracts* (33rd Ed.) at paras 2-036 and 2-037. However, that is not a question with which I need, or properly should, engage. Section 57(1) of the Arbitration Regulations, which defines the only circumstances in which the Court may refuse to recognise or enforce an arbitral award covered by Part 4 of the Regulations, provides as follows:
- "Recognition or enforcement of an arbitral award, irrespective of the State or jurisdiction in which it was made, may be refused by the Court only if:
- (a) the party making the application furnishes proof that:
 - (i) ...
 - (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
 - (iii) ...
 - (iv) ...
 - (v) ...



(vi) ...

(b) ...”.

17. Thus, the invalidity of an arbitration agreement affords grounds for refusing recognition or enforcement of an award only if proof is furnished by “the party making the application”. The section clearly supposes that the person against whom the award was made and against whom recognition or enforcement is (or both are) sought will have made an application that recognition and enforcement be refused. I acknowledge that the Arbitration Regulations do not expressly require such an application, but section 57(1) is clearly intended to reflect the New York Convention, which at article V.1 provides, “Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority proof that: (a) The parties to the agreement ... were, under the law applicable to them, under some incapacity, or the ... agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made ...”.

18. B4, although initially in the reference challenging the validity of the arbitration agreements under which the Award was made, did not pursue their contention in these court proceedings, and did not request, still less prove or seek to prove, that the arbitration agreements upheld by the arbitrator are not valid, or that the Award was not made under valid agreements. In these circumstances, this Court is not entitled to entertain any question about the validity of the arbitration agreements invoked by A4.

Public policy

19. Section 57(1) of the Arbitration Regulations also provides that recognition or enforcement of an arbitral award may be refused by the Court if it finds that “the recognition or enforcement of the award would be contrary to the public policy of the [UAE]”: section 57(1)(b)(ii). This reflects article V(2) of the New York Convention: “Recognition and enforcement of an arbitral award may ... be refused if the competent authority in the country where recognition and enforcement is sought finds that(b) The recognition or enforcement would be contrary to the public policy of that country”.

20. As I have said, B4 are an Abu Dhabi registered company, as indeed are A4. 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?



21. I would need little persuasion that it is desirable and, in a general sense, in the public interest that the different Courts of the UAE work together harmoniously and that there be an orderly distribution of jurisdiction between the Courts of Abu Dhabi and more generally of the UAE. There is, I think, more room for debate whether questions of this kind engage considerations of public interest within the meaning of the New York Convention and with regard to the recognition and enforcement of New York Convention awards. There is international debate about how the reference to “public policy of that country” in the New York Convention is to be interpreted. For example, Merkel, Arbitration Law puts it as follows (at para. 19.72):

“The scope of public policy exception is ... problematic, in that ‘[w]ithout a uniform system of international procedure rules of enforcement for foreign awards under the [New York] Convention, courts of different nations are free to establish their understanding of public policy defence, precisely or selfishly’ [Hong Xiao, Refusing Recognition and Enforcement of Foreign Arbitral Awards under Article V(2) of the New York Convention in China: from Judicial Experience of Europe and USA’, 2005 2(7) US-China Law Review 51 at p.51-52]. Thus, as far as the New York Convention and other international instruments are concerned, public policy is generally regarded as international rather than purely domestic, and in principle it would seem that a foreign award which merely offends a domestic law of the enforcing state should not be refused enforcement or recognition on that ground alone. The English approach, however, is that ‘an award, whether domestic or foreign, will not be enforced by an English court if enforcement would be contrary to public policy of [England]’ [Soleimany v Soleimany, [1999] QB 785, 798-799] and similar views have been expressed in other jurisdictions. However, other countries have confined their considerations to international policy”.

22. To my mind, these contentious questions do not fall for determination in this case, and I shall not engage with them: they are better considered, if necessary, on the specific facts of other cases if and when they arise. Where a party wishes to rely on considerations of public policy to resist the recognition and enforcement of an arbitral award, the burden of making good the factual basis for the objection is upon that party: *Minmetals Germany GmbH v Ferco Steel Ltd.*, [1999] 1 All E R 315 per Colman J. Of course, it is always open to the court to take an illegality or other public policy point of its own volition, but it still requires a sound factual basis for doing so. Here, to my mind, there is none.

23. First, 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.

24. Further, there is no proper basis to think that there might be multiple proceedings about this matter here and in other Courts of the UAE. B4 have not brought proceedings to



challenge the Award, and there is no evidence that they intend to do so. A4, I understand, have not brought proceedings in other Courts of the UAE, and there is no evidence that they intend to do so. Even if it be supposed that A4 might do so, it would not in itself be objectionable or contrary to the public policy of the UAE to have parallel enforcement proceedings in different jurisdictions of the UAE: see the decision of the Joint Judicial Committee of Dubai in *Assas Investments Ltd. v Fius Capital Ltd.*, Cassation No 6 of 2017.

25. I add that there is no reason to think that B4 will or might suffer any unfairness or any detriment as a result of the Award being recognised and enforced by order of this Court rather than or in addition to by order of another Court or other Courts of the UAE.
26. In my judgment, there is no reason on the facts of this case to refuse the claim on grounds of the public policy of the UAE. B4 have had every opportunity to put forward evidence or make submissions in this regard, and they have not done so.

Conclusion

27. None of the grounds for refusing recognition and enforcement of the claim set out in section 57 of the Arbitration Regulations is satisfied. A4 are entitled under part 4 of the Arbitration Regulations to have the Award recognised and to an order for its enforcement.

The Terms of the Order

28. I come to the terms of the Order. Two points arise on the draft order submitted by A4. First, interest:
- a) A4 claim interest on the sum of US\$ 522,782.48 only from 14 November 2018, since that sum itself includes interest until 14 November 2018. A4 are entitled to interest on the sum of \$522,782.48 thereafter at the rate of 8.75% per annum, as provided for in the Award.
 - b) A4 also claim interest from 14 November 2018 on the £11,500 by way of legal costs and expenses at the rate of 8.5% per annum, and I also uphold that claim.
 - c) In their application A4 claimed interest on the sum of £10,588.17 awarded in respect of the costs of the arbitration from 19 July 2018, but there is no evidence as to when they paid the arbitration costs. I therefore shall award them interest on the sum at the rate of 8.5% per annum only from the date of the Award, 14 November 2018.
29. Secondly, the draft order served with A4's claim form provided that B4 should have the right to apply to the Court to set it aside within 14 days after it is served upon them. Ms Nevin invited me to dispense with this provision in view of the history to the proceedings, and I see force in that suggestion. However, since the application of which B4 have had notice includes this provision, I have concluded that it should be included in my order.



Costs

30. A4 have been successful in their application, and they are entitled to their costs of and incidental to it, assessed on the standard basis. I shall assess them summarily.
31. Clyde & Co have submitted a certified statement of costs in the sum of AED 119,385.70 (including disbursements of AED 11,504.70). I have to consider what costs are “proportionate to the matters in issue and are reasonably incurred and reasonable in amount”: see rule 198 of the Procedure Rules. Having examined the statement of costs, I see no reason to think that any of the fees or disbursements were not reasonably incurred, and I consider the level of fees charged and the hours for which costs are claimed to be reasonable. However, I must assess what costs are proportionate to the amount of the Award and the nature of the application before the Court. For this reason (and only for this reason), I shall not award the full amount of the costs sought, and limit the award of costs to AED 100,000.

Issued by:



Linda Fitz-Alan
Registrar, ADGM Courts
8 October 2019