ADGM COURTS
محاكم سوق أبوظبي العالمي

In the name of
His Highness Sheikh Khalifa 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

A5
Claimant

and

B5
First Defendant

C5
Second Defendant

JUDGMENT OF JUSTICE SIR ANDREW SMITH

Neutral Citation:	[2021] ADGMCFI 0007
Before:	Justice Sir Andrew Smith
Decision Date:	19 September 2021
Decision:	1. Claimant's application under the Arbitration Regulations 2015 for the recognition of an arbitration award issued on 5 April 2021 is granted. 2. Costs reserved.
Hearing Date(s):	7 September 2021
Date of Orders:	19 September 2021
Catchwords:	Recognition of arbitration award; challenge to Court's jurisdiction. Right under Arbitration Regulations to oppose application for recognition; whether challenge permitted under section 62(1)(c). Review by Court of tribunal's decision about jurisdiction; entitlement to full reconsideration on application for recognition. Whether arbitration agreement "in writing". Scope of arbitration agreement.
Legislation Cited:	Arbitration Regulations 2015, ss. 58, 62 Application of English Law Regulations 2015
Cases Cited:	*Dardana Ltd v Yukos Oil Co*, [2002] EWCA 543 *Dallah Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan,* [2010] UKSC 46 *Zambia Steel and Building Supplies Ltd v James Clark & Eater Ltd., [1986] 2 Lloyd's Rep 225* *Minmetals Germany GmlH v Ferco Steel Ltd., [1999] 1 AER 315*
Case Number:	ADGMCFI-2021-057
Parties and representation:	Mr Michael Patchett-Joyce of Counsel, instructed by Global Advocacy and Legal Counsel for the Claimant Mr Badi Moukarzel, legal representative of Al Huqooq Alqanoonyah Advocates and Consultation for the Defendants

JUDGMENT

Introduction

1. This is my judgment on an application by A5 ("**A5**"), a law firm with offices in Abu Dhabi, for the recognition of an arbitration award issued on 5 April 2021 (the "**Award**") against the Defendants, B5 ("**B5**") and C5 ("**C5**"), both of which are incorporated in Abu Dhabi. By the Award, Mr X as sole arbitrator awarded A5 AED120,000, together with: (i) US$40,000 in respect of his fees and expenses as arbitrator and the administrative expenses of the arbitration, and (ii) interest. He determined that he had jurisdiction to make the Award under an arbitration agreement (the "**Arbitration Agreement**") in a document that was headed "Acknowledgment and Undertaking" (the "**Undertaking**"), signed and sealed by the two Defendants and dated 2 November 2019. The Arbitration Agreement provided for certain disputes to be decided through arbitration in accordance with the arbitration rules and regulations of the International Chamber of

Commerce ("**ICC**") by a sole arbitrator, with the seat of the Arbitration being the Abu Dhabi Global Market ("**ADGM**"). A5's application is opposed by B5 and C5.

The Background Dispute

2. By an agreement dated 5 August 2021 (the "**Main Agreement**"), A5, which wished to construct, complete and maintain the interior design of new offices in Abu Dhabi, engaged B5 to carry out the works for a price of AED 1.2 million and M/s XX ("**XX**") to supervise them. The Main Agreement included the provisions that "*The total period of the contract: (3 months)"* at clause 6, and *"The completion period including mobilisation: 3 months*" at clause 7, but it did not stipulate when the three months' period should start to run: in the arbitration, A5's case was that completion was required by 30 November 2019. The Main Agreement also provided at clause 12 for a "Delay Penalty" in terms that, "*If [B5] delayed the handing over beyond the specified completion date, it shall pay (AED 2,000) Two Thousand Dirhams per day of delay to [A5] ...*" subject to a limit of 10% of the contract value on day penalties payable to A5 and XX.

3. In Section 4 of the Main Agreement, which contained "Conditions of Contract", there was a term at clause 3 under the heading "Assignment and Subcontracting", which provided that B5 might not assign any part of the contract without taking the written approval of XX, nor could the works or any part of them be subcontracted without its approval. Clause 3 went on to provide that XX had the right to dismiss any subcontractor in specified circumstances, and that B5 should dismiss a subcontractor after being notified by XX that it should do so. Clause 3.2 continued, "*[A5] shall have the right, for the interest of all parties, to terminate [B5] under a written letter along with paying all of the retained amounts up to date of the termination letter. Any of the parties shall have the right then to claim compensation for termination. In case of disagreement between [A5] and [B5] about the value of the compensation, the issue will be referred to the Local Courts, the Projects Department*".

4. At clause 21 of Section 4 was a term under the heading "Settling Disputes by Arbitration", which provided as follows: "*Should any dispute or difference of any type arises (sic) between [A5] or [XX] and [B5] concerning the implementation of the contract or the execution of the works ..., the parties shall attempt to reach a settlement through [XX], who shall issue a written letter about his decision to [A5] and [B5]. The resolution of [XX] shall be binding to [A5] and [B5] regarding any issue stipulated therein until the completion of the works, and [B5] shall be obliged to execute such resolution with care*".

5. On about 20 October 2019 B5 told A5 that it was not authorised to undertake the works in Abu Dhabi, and it proposed that its subsidiary company, C5, complete the works. A5 accepted the proposal, on the basis, it says, that it was agreed that completion of the project would not be delayed. On 2 November 2019, B5 and C5 signed the Undertaking.

6. The Undertaking was in Arabic, but the English translation of it presented by A5 in its evidence was not disputed. It recited that A5 and B5 had entered into the Main Agreement and that B5 had "assigned" the works under it to C5 "*as per the agreed upon terms and conditions*", and that accordingly a building permit had been issued to C5. It then provided that C5 should undertake "*to perform the interior design contracting …. in accordance with the contract terms [of the Main Agreement]*" and other requirements. B5 "*declare[d] and undert[ook]*" that it would do so. The Undertaking continued at clause 5, "*Provided that obligation of both [B5] and [C5] shall be on a joint basis against [A5]* …".

7. The Arbitration Agreement was at clause 8 of the Undertaking, which was as follows:

> *"This acknowledgment and undertaking shall be subject to the Laws of the United Arab Emirates. If any dispute is arising out of executing, interpreting, cancelling, terminating, validating or invalidating this acknowledgment or undertaking or connected or is in any*

way connected therewith, shall be decided thereon through the arbitration in accordance with the arbitration regulations and of International Chamber of Commerce by a sole arbitrator to be appointed in accordance with the said rules. The arbitration language shall be English, and the seat of the arbitration shall be in Abu Dhabi Global Market".

8. The Acknowledgment ended by stating that it has been "*voluntarily executed with the parties' knowledge of its legal effects and consequences*". It was signed and sealed by B5 and C5. It was not signed by A5.

9. According to A5, the works were not completed within the contractual period and had still not been completed by 12 March 2020, when it obtained approval from the Government to occupy the offices despite outstanding work. This is apparently disputed: B5 and C5 have put before me an expert report of XXX dated 11 August 2021 made in proceedings brought by them on 12 January 2021 against A5 in the Courts of Abu Dhabi (case no ##). According to the report, the works "*recorded in the scope of works*" were completed, and XX "*issued an inspection report regarding the final handover on 02/03/2020. The handover was completed with comments that don't hinder use of the project. After ten days [A5] was handed over and occupied the project and started using it since 12/03/2020*".

The Arbitration and the Award

10. A5 brought the Arbitration by a Request dated 22 June 2020, of which the ICC Secretariat notified the Defendants on 26 June 2020. It described the dispute as arising out of "*the unreasonable delay to the completion of agreed works to be undertaken by [B5 and C5] for [its] new office premises in Abu Dhabi*". In the reference, it made claims for a declaration that B5 and C5 were in breach of the Main Agreement and the Undertaking, damages of AED 80,000 in respect of the costs of renting alternative accommodation, and a sum of AED 258,000 by way of delay penalty, calculated in according with the Main Agreement together with interest and costs.

11. B5 and C5 took little part in the arbitration. They did not file an Answer to the Request for Arbitration within the relevant time limit (or at all), and after the Arbitrator was appointed, they did not participate in the Case Management Conference that he held. However, on 30 November 2020 Mr XXXX, the Sales Director of B5, sent the Arbitrator and A5 a document entitled "*Statement of Jurisdictional Objection to the ICC*", which the Arbitrator understood to challenge his jurisdiction, although it was unclear to him on whose behalf Mr XXXX made the challenge, and in particular whether he made it on behalf of B5 or C5 or both. Following a request for clarification about this, Mr XXXX sent a Reply on Jurisdiction on 14 January 2021, but according to the Award, it did not specifically address the Arbitrator's questions. The Defendants did not further participate in the reference.

12. The Arbitrator decided that the Defendants were party to the Arbitration Agreement, but that, on the proper interpretation of it, his jurisdiction extended to determining only whether there had been breaches of the Undertaking and did not extend to whether there had been "*separate and free-standing breaches of the Main Contract*". Accordingly, in the Award he decided that he had no jurisdiction to make a declaration that B5 and C5 were in breach of the Main Agreement, but that otherwise he had jurisdiction to determine the claims. He made a declaration that B5 and C5 had breached the Undertaking, and specifically that they had "*breached clause 6 of the Main [Agreement] as incorporated by reference into the Undertaking*". He rejected the claim for damages by way of the cost of renting alternative accommodation because he considered that it duplicated the claim for contractual delay penalties. He awarded only AED 120,000 in respect of delay penalties in view of the contractual limit of 10% of contract value, together with interest on the award of AED 120,000 and costs.

History of the Proceedings

13. A5 brought its claim for recognition of the Award by proceedings issued on 20 May 2021. It is supported by a witness statement of A5's Senior Partner and the Managing Partner of its Abu Dhabi Office, Mr XXXXX. On 15 June 2021, rather than proceeding on an ex parte basis, I ordered that A5 serve the claim on the Defendants by sending it to specified email addresses, allowing the Defendants to serve any response to it within 14 days of service.

14. On 1 July 2021 the Defendants filed with the Court a witness statement of Mr XXXX. With regard to the Arbitrator's decision that he had jurisdiction to make the Award, he observed that the decision was based on clause 8 of the Undertaking, and said that the clause was *"limited to disputes arising from the interpretation or execution of the Undertaking itself and cannot supersede the dispute clause*" of the Main Agreement at section 4, clause 21.

15. Mr XXXX also referred to proceedings brought in the Court of Abu Dhabi (case no ##), and a decision of that Court of 16 June 2021 to appoint an engineering expert to look into the dispute between the parties. He continued, "*we reiterate the Respondents' objection on the Final Award for being issued from ICC Arbitration Court which had no jurisdiction to review the case since the exclusive jurisdiction is to be granted to the Abu Dhabi Court where the case has been submitted by the Respondents and is currently under the review of the said Court*". At the end of the witness statement, Mr XXXX said this: "*we urge the ICC Arbitration Court to suspend any further proceedings of the matter until the said matter is being stated definitely by the Abu Dhabi Court, including the recognition of the Final Award. Knowing that ICC Arbitration Court is an ad hoc jurisdiction and should abide by any decision or procedure undertaken before the regular courts of Abu Dhabi which is the one competent to review the said matter as stated before*". I understand the term "ICC Arbitration Court" to refer to this Court, the supervising Court for the ICC arbitration since the seat is the ADGM.

16. At a Case Management Conference on 26 July 2021, I directed that any further evidence be filed by 9 August 2021 and that there be an oral hearing of A5's application in the week of 5 September 2021.

17. No further evidence was served by 9 August 2021. However, on 29 August 2021 the Defendants filed: (i) the Expert Report dated 11 August 2021 to which I have referred, and (ii) a witness statement of a Mr XXXXXX, a Project Manager with B5. Mr XXX stated in the Expert Report that A5 is still required to pay AED 470,991.82 for the work. Mr XXXXXX exhibited to his statement various emails about the works and also documents relating to proceedings in the Abu Dhabi Courts, to which I refer below.

18. On 7 September 2021 I heard argument on A5's claim at a virtual hearing. A5 was represented by Mr Michael Patchett-Joyce, and the Defendants by Mr Badih Moukarzel of Al Huqooq Legal Practice. I am grateful to both advocates for their clear and focused submissions. I reserved my judgment.

The Defendants' Evidence

19. At the hearing on 7 September 2021, Mr Moukarzel explained that evidence was filed after 9 August 2021 because Mr XXXXXX was travelling and not available to make his statement. A5 submitted that the late evidence should not be admitted. Self-evidently the report of Mr XXX would not have been available on 9 August 2021, although it would better have been filed before 25 August 2021. Mr Patchett-Joyce contended that the explanation for Mr XXXXXX's statement being late was inadequate, and that in any case the evidence was irrelevant to the issues that the Court has to decide and so is inadmissible. I see force in the latter argument, and agree that the additional information is not of central relevance to the issues before me. However, it was not said that the late filing of the evidence has prejudiced A5, and I admit it in order to have a fuller picture of the matters in dispute between the parties.

The proceedings in the Abu Dhabi Courts

20. As I understand the position from the evidence and submissions before me, the Defendants have brought two cases before the Abu Dhabi Courts. First, in case no ## B5 claimed against A5 monies that it alleged were payable under the Main Agreements and other sums. The Court ordered an expert report and Mr XXX reported accordingly. On 15 September 2021, the Abu Dhabi Commercial Court, First Instance, handed down its judgment whereby A5 was ordered to pay B5 AED 470,991.82 as monies due under the Main Agreement, together with interest, AED 40,000 as compensation and costs.

21. It is recorded in the judgment that A5 had sought to rely on the Arbitration Agreement to dispute the Abu Dhabi Court's jurisdiction to determine B5's claims, or to have the proceedings stayed or dismissed. Its submission in that regard was rejected by the Court.

22. It is, of course, entirely a matter for the Abu Dhabi Court (and not for this Court) whether A5 could rely on the Arbitration Agreement or the Award to answer the claims in the proceedings: I say nothing about that. However, I see nothing inconsistent between the decision of the Abu Dhabi Court that monies were payable and overdue under the Main Agreement and the decision in the Award that the Defendants were late in completing the Works and accordingly A5 was entitled to delay penalty.

23. Secondly, in case no ###, B5 brought a challenge to the Award. That challenge was rejected by the Abu Dhabi Appeal Court, 6th Commercial Appeals Chamber in a decision of 30 June 2021, whereby it was determined that the Abu Dhabi Court had no jurisdiction to hear the case because (in the words of the translation of the judgment that is before me) "*the arbitration authority that issued the contested judgment in the arbitration case is the International Court of Arbitration, based in the Abu Dhabi Global Market, being one of the local courts of the Emirate of Abu Dhabi …. and hence it alone and exclusively has the jurisdiction to consider the present case of invalidity as it has exclusive jurisdiction pursuant to the law, therefore the jurisdiction of the Abu Dhabi Court of Appeal ceased and is granted to the courts of the Abu Dhabi Global Market*".

24. As I have said, in Mr XXXX's statement of 1 July 2021 the Defendants contended that the ADGM Courts have no jurisdiction to "*review*" the Award, and that the Abu Dhabi Courts have exclusive jurisdiction to do so. I cannot accept that submission: on the contrary, since the ADGM is the seat of the arbitration, the ADGM Courts have exclusive jurisdiction in this regard. This was clearly explained by the Abu Dhabi Appeal Court, with whose judgment I respectfully agree.

The Arbitration Regulations 2015

25. The Defendants seek to resist recognition of the Award on the grounds that the Arbitrator was wrong to conclude that he had jurisdiction to make it. Part 4 of the Arbitration Regulations 2015 as amended (the "**Arbitration Regulations**") provides that (inter alia) awards made in arbitrations where the seat is the ADGM (and also New York Convention Awards, as defined in Schedule 1 to the Arbitration Regulations, and all other arbitral awards which are sought to be recognised and enforced in the ADGM irrespective of the State or jurisdiction in which they are made) shall be recognised as binding within the ADGM on the persons between whom it was made. Section 62 is headed "*Grounds for refusing recognition or enforcement*". I set it out in full:

    (1) 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) a party to the arbitration agreement was, under the law applicable to it, under some incapacity;

(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) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(iv) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(vi) the award has not yet become binding on the parties, or 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.

(b) the Court finds that:

(i) the subject-matter of the difference is not capable of settlement by arbitration under the laws of the Abu Dhabi Global Market; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of the UAE.

(2) 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.

(3) Any party seeking recourse against an arbitral award made in the seat of the Abu Dhabi Global Market shall not be permitted to make an application under subsection (1) if it has made or could have made an application under section 58 of these Regulations.

26. The language of section 62(1) is that of 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". Although it refers to when recognition "may be refused", as Mance LJ explained in *Dardana Ltd v Yukos Oil Co*, [2002] EWCA 543 at para 8, these words do not introduce an "*open discretion*" to recognise an award notwithstanding that one of the specified conditions is satisfied, and "[*t]he use of the word 'may' must have been intended to cater for the possibility that, despite the existence of one or more*

of the listed circumstances, the right to rely on them had been lost by, for example, another agreement or estoppel".

27. In this case, the Defendants rely on section 62(1)(ii), contending that there was not a valid arbitration agreement, and section 62(1)(iv), contending that the Award deals with matters that were not contemplated by and not falling within the terms of the submission to arbitration in the Arbitration Agreement.

Are the Defendants permitted to resist recognition of the Award?

28. The first response of A5 to the Defendants' contentions is to invoke section 62(3). It is submitted that the Defendants should not be permitted to resist recognition of the Award because they could have made an application under section 58 of the Arbitration Regulations, they did not do so and the time in which such an application may be made had now expired.

29. By section 58 in Part 3, it is provided that recourse against an award made in the ADGM may be made only by an application to set it aside, and that it may be set aside only if the party seeking recourse furnishes proof of one or more of five matters in section 58(2): those five matters are stated in the same terms as section 62(1)(i) to (v). Section 58(2)(c) provides (as far as is material) that "An application for setting aside may not be made after three (3) months have elapsed since the date on which the party making that application had received the award …".

30. There is no direct evidence about when the Defendants received the award, but I infer that they received it shortly after it was issued on 5 April 2021 and that the three months' period elapsed in the first half of July 2021. Neither Defendant made an application under section 58 within that period. Their only engagement with this Court during the period was by way of the filing and service of the witness statement of 1 July 2021 of Mr XXXX.

31. Mr Moukarzel sought to overcome this difficulty by referring to section 58(2)(a)(ii) of the Arbitration Regulations, which provides that an arbitral award may be set aside by the Court if the party making the application furnishes proof that "*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 [ADGM]*". He submitted that that is the objection that was raised in the document of 1 July 2021.

32. I accept that the document raised points that might have been the basis of an application under section 58 to set aside the Award had they been so deployed. However, even on the most generous interpretation of the document, it cannot be interpreted or treated as amounting to an application to this Court to set aside the Award. On the contrary, in it the Defendants urged this Court to suspend all further proceedings relating to the dispute pending the determination of the Abu Dhabi Courts.

33. In my judgment, this is fatal to the Defendants resisting recognition of the Award or applying for recognition to be refused under section 62(1) of the Arbitration Regulations. However, the parties made full submissions about the Defendants' contention that the Arbitrator did not have jurisdiction to make the Award, and I shall go on to consider its merits.

The Arbitrator's decision about his Jurisdiction

34. Mr Patchett-Joyce submitted that, since the Arbitrator determined that he had jurisdiction (and had done so with "*care, attentive analysis and judgment*"), the question for this Court is not whether his decision was right or wrong, but whether there is a proper basis to interfere with it. He contended that, since "*matters of jurisdictional competence are within the competence of the arbitrator (kompetenz-kompetenz)*", the Court will not interfere with his decision unless it is

"*obviously wrong*": it is not, it was submitted, for the Court "*to review the merits of the Arbitrator's decision of his jurisdictional competence nor otherwise second-guess that determination*".

35. I cannot accept that submission: it is inconsistent with the decision of the United Kingdom Supreme Court in *Dallah Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan,* [2010] UKSC 46. While no doubt, as Lord Mance said in his judgment in that case at para 31, the Court will "*examine, both carefully and with interest, the reasoning and conclusion of an arbitral tribunal which has undertaken a similar examination*", that is only because the Court welcomes useful assistance. An award is not in any way binding upon a Court with regard to a tribunal's decision as to its jurisdiction when an application for recognition or enforcement is resisted on the basis that the tribunal lacked jurisdiction. Thus, Merkel, Arbitration Law refers, at para 5.10, to "*the principle … of kompetenz-kompetenz, under which arbitrators are entitled to decide for themselves whether they have jurisdiction to determine the validity and applicability of an arbitration clause, although their decision is provisional in the sense that either party has the right to apply to the court to have the jurisdictional matter reopened and reconsidered in full*".

36. The decision of the Arbitrator as to his jurisdiction is therefore not binding upon me. I must decide questions as to his jurisdiction afresh. There are two:

    a. Whether there was an arbitration agreement falling within the relevant Arbitration Regulations?

    b. Whether the Award dealt with matters not contemplated by or falling within the terms of the Arbitration Agreement?

Was there an arbitration agreement falling within the relevant Arbitration Regulations?

37. The Arbitrator concluded that the Arbitration Agreement in the Undertaking is binding on the parties, notwithstanding it was not signed by A5. His reasoning was that, the reference being seated in the ADGM, the question was whether there was an agreement that satisfies the requirements of section 14 of the Arbitration Regulations. He then referred to section 14(2): "*An arbitration agreement shall be in writing. This requirement shall be regarded as satisfied if the content of the arbitration agreement is recorded in any written form by one or more of the parties to it, or by a third party with the authority of the parties to the agreement. An arbitration agreement which is in writing but has not been signed (whether in hard copy or electronically) may be made binding orally or by conduct*". He went on to conclude that the arbitration provision in the Undertaking satisfied this requirement because it was signed by the Defendants and was binding on A5 through its conduct, most obviously in starting the arbitration proceedings and bringing claims for breach of the Undertaking.

38. I agree that A5 is to be taken to have accepted the terms of the Undertaking. It seems to me clear that the terms were intended to record an agreement between A5 and the Defendants: under the Undertaking, C5 accepted a joint obligation with B5 to A5, and it could only have done so by entering into a contract with A5. This being the parties' manifest intention, it is to be inferred that A5 agreed with the Defendants that B5 might have the works carried out by C5 and that C5 might carry out the works on the basis of the terms recorded in the Undertaking.

39. I also agree with the Arbitrator that the Arbitration Agreement in clause 8 of the Undertaking is an Arbitration Agreement to which the Arbitration Regulations apply, but I am unable to agree with the Arbitrator's reasons for reaching this conclusion. The wording of section 14(2) on which the Arbitrator relied was introduced into the Arbitration Regulations by an amendment that was enacted and came into force on 23 December 2020, that is to say after the arbitration was brought and the Arbitrator appointed. His jurisdiction and its validity are to be determined by reference to the unamended Arbitration Regulations (in force before 23 December 2020): I

cannot accept that in some way his jurisdiction could have been conferred (or expanded) from his initial appointment.

40. The corresponding provision of the unamended Arbitration Regulations was at section 13(2): "*An arbitration agreement shall be in writing. It can result from an exchange of written communications or be contained in a document to which reference is made in the main agreement*". There was no specific provision stating that an arbitration agreement may be made binding on a party by his conduct. However, in my judgment, the unamended requirement that an arbitration agreement is to be in writing is to be understood to cover such a case.

41. This Court will adopt the principles of interpretation of English law in deciding the proper meaning and application of the expression "in writing": see the *Application of English Law Regulations 2015*. It is a requirement of the Arbitration Regulations, and English law principles govern its meaning, notwithstanding the parties to the Undertaking chose the laws of the United Arab Emirates as its governing law. It has long been established in English law that a statutory requirement that an arbitration agreement is to be "written" or "in writing" is to be construed liberally. Merkel on Arbitration Law refers at paragraph 3.8 to "*the established English principle that an agreement in writing is binding whether or not the parties have signed it, as long as the intention to be bound by it can be ascertained from the surrounding circumstances*". In Mustill & Boyd, Commercial Arbitration, 2nd Ed. (1989), it is said, at p.55 fn12, "*All that is necessary [for an agreement to be regarded as being in writing or written] is that there shall be evidence which satisfies the Court that the written terms of the arbitration agreement form part of the agreement between the parties. The assent to the written agreement may itself be oral or inferred from the conduct of the parties* …". This is illustrated by the decision of the Court of Appeal in *Zambia Steel and Building Supplies Ltd v James Clark & Eater Ltd., [1986] 2 Lloyd's Rep 225:* English sellers had sent Zambian Buyers a quotation which was no more than an invitation to make an offer and which contained an arbitration clause. The contract was concluded orally in Zambia on the terms of the quotation. It was held that the buyers had orally assented to the terms, and therefore there was an agreement in writing to submit to arbitration, and the requirement of section 7 of the English Arbitration Act 1975, that the arbitration agreement be "*in writing*", was satisfied. I conclude that similarly in this case in circumstances in which A5 are to be taken to have accepted by its conduct the terms of the Undertaking, including the Arbitration Agreement, the Arbitration Agreement was "in writing" within the meaning of the unamended Arbitration Regulations.

Did the Award deal with matters not contemplated by or falling within the terms of the Arbitration Agreement?

42. The Arbitrator considered the extent of his remit under the Arbitration Agreement with some care. He concluded that he had jurisdiction to decide claims based on breaches of the Undertaking, including breaches of obligations in the Main Agreement that were "*incorporated by reference as obligations ... into the Undertaking, and so have become separate and free-standing obligations pursuant to the Undertaking*"; but that he did not have jurisdiction to deal with the claim for a declaration that the Defendants had breached the Main Agreement.

43. Mr Moukarzel disputed this reasoning, and argued that the Arbitrator had interpreted the scope of the Arbitration Agreement too widely. He submitted that the parties cannot have been taken to have intended by the Undertaking, a document to which A5 was not a party, to set aside or override the machinery agreed in the Main Agreement for settling disputes through XX, and to have replaced it by arbitration under section 8 of the Undertaking. He argued that this point is reinforced by the reference in section 4 clause 3 of the Main Agreement to issues being referred to the "*Local Courts*". The Arbitrator's interpretation of the Undertaking and the Arbitration Agreement would mean that the Main Agreement was being amended, and in particular the dispute resolution provisions replaced: it was contended that this would have required a specific

agreement to which A5, as well as the Defendants, was party: that, it is said, is not the nature of the Undertaking.

44. I see force in this submission, and I have not found it easy to discern how the parties intended, or are to be taken to have intended, the Main Agreement and the Undertaking to work together. However, in the end I am unable to accept Mr Moukarzel's argument. It is difficult to give any realistic effect to the Arbitration Agreement other than that given to it by the Arbitrator. I would reject the suggestion that it was designed only to cover disputes between B5 and C5: to my mind, it is improbable that the parties would have had in mind disputes between the two associated companies.

45. The fundamental difficulty in Mr Moukarzel's contention is that, as I have explained, the parties, when they arranged that C5 might carry out the works, must have intended that there should be a contractual nexus between A5 and C5: otherwise C5 would not be committed to the joint obligation to A5 to which clause 5 of the Undertaking refers. That joint obligation is recorded in the Undertaking, and, as I see it, C5 did not accept any obligation to A5 except through the Undertaking, which contained the Arbitration Agreement, accordingly, its obligation was always subject to the Arbitration Agreement. Further, C5' joint obligation under section 5 of the Undertaking was subject to the Arbitration Agreement, it must surely follow that the joint obligation of B5 was also subject to it.

46. I acknowledge that it might, on the face of it, be surprising if the Arbitration Agreement, contained as it is in a document to which A5 was not a signatory, displaces the role given in the Main Agreement to XX, but I am not persuaded that that is necessarily the consequence of accepting the Arbitrator's interpretation of the Arbitration Agreement. To my mind, it is at least arguable that the obligations and liabilities of the parties were always subject to the right of either party to have insisted on a determination by XX, and I express no view about whether and in what circumstances such an argument might succeed. I did not hear submissions on it, and it does not go to any question of the Arbitrator's jurisdiction.

47. Nor am I persuaded that the Arbitrator's decision on his jurisdiction is inconsistent with section 4, clause 3.2 of the Main Agreement or would displace the parties' agreement that a decision about the "*value of compensation*" on termination of the Main Agreement should be referred to the "*Local Courts, the Projects Department*". His decision recognised that he had no jurisdiction in respect of the Main Agreement, in contradistinction to the Undertaking including obligations thereunder arising from the Main Agreement only in as much as they had become what he called "separate and free-standing obligations" under it.

Conclusion

48. Therefore, even if the Defendants were not precluded by section 62(1)(c) from contending that the Award should not be recognised, I would not have accepted that there are grounds for refusing recognition.

49. I add for completeness that under section 62(1) recognition of an award may be refused if it would be contrary to the public policy of the United Arab Emirates to recognise it. Mr Moukarzel briefly alluded to this in his submissions. In my judgment there is no proper basis for refusing recognition of the Award for this reason. As I said in my judgment in this Court in *A4 v B4*, 8 October 2019 at para 23, where a party wishes to rely on considerations of public policy to resist recognition or enforcement of an arbitral award, the burden of making good the factual basis of the objection is upon that party: *Minmetals Germany GmlH v Ferco Steel Ltd., [1999] 1 AER 315* per Colman J. No such factual basis has been made good in this case.

50. A5 therefore succeeds in its application for recognition of the Award.

51. With regards to costs, I direct that the Parties' make written submissions in light of this judgment by 5.00pm on 3 October 2021. I propose to make my decision on paper, unless I am persuaded by the parties that there should be an oral hearing

Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
19 September 2021