ABU DHABI GLOBAL MARKET COURTS
محاكم سوق أبوظبي العالمي

COURT OF FIRST INSTANCE
CIVIL DIVISION

BETWEEN

A3
CLAIMANT

AND

B3
DEFENDANT

JUDGMENT OF JUSTICE SIR ANDREW SMITH

Neutral Citation:	[2019] ADGMCFI 0004
Before:	His Honour Justice Sir Andrew Smith
Decision Date:	4 July 2019
Decision:	1. There is a valid and binding arbitration agreement between the Claimant and the Defendant that disputes arising under a lease between them dated 25 October 2017 be subject to arbitration under the Rules of Arbitration of the International Chamber of Commerce and that the seat or legal place of arbitration is the Abu Dhabi Global Market. 2. The Claimant must not seek to enforce paragraph 1 of the Decision or seek to take any steps with regard to arbitral proceedings in reliance upon it before 14 days have elapsed after service of this Court's judgment and order on the Defendant.
Hearing Date(s):	27 June 2019
Date of Orders:	4 July 2019
Catchwords:	Contractual certainty. Option in arbitration agreement. Condition precedent to exercising option. Establishment of "arbitration centre". "Reasonable" changes to terms of arbitration agreement. Arbitration agreement "in writing".
Legislation Cited:	ADGM Court Procedure Rules 2016 ADGM Arbitration Regulations 2015 Law of Property (Miscellaneous Provisions) Act 1989
Cases Cited:	NB Three Shipping v Harebell Shipping [2004] EWHC 2001 (Comm) Law Debenture Trust Corp plc v Elektrim Finance BV [2005] EWHC 1412 (Ch) Swiss Bank Corpn v Novorossiysk Shipping Co (The 'Petr Schmidt'), [1995] 1 Lloyd's Rep 202 Hobbs Padgett & Co (Reinsurance) Ltd v J C Kirkland Ltd and Kirkland, [1969] 2 Lloyd's Rep 547 Pittalis v Sherefettin, [1988] 2 All ER 227 Schweppe v Harper, [2008] EWCA Civ 442 Baird Textile Holdings Ltd v Marks & Spencer plc, [2001] EWCA Civ 274 United Scientific Holdings Ltd v Burnley BC, [1978] AC 904 Alghussein Establishment v Eton College, [1988] 1 WLR Spiro v Glencrown Properties Ltd, [1991] Ch. 537
Case Number:	ADGMCFI-2019-007
Parties and Representation:	Norton Rose Fulbright for the Claimant

JUDGMENT:

1. By a claim form dated 16 May 2019 A3 ("A3") made a claim against B3 ("B3") for a declaration "that there is a valid and binding arbitration agreement providing that disputes arising under a Lease dated 25 October 2017 … be subject to arbitration in the ADGM Arbitration Centre under the ICC Arbitration Rules"; and, in the alternative, a declaration that "such disputes be referred to ad hoc arbitration in the ADGM Arbitration Centre". This being a claim to determine whether there is a valid arbitration agreement, A3 is making an arbitration claim within the meaning of rule 231 of the ADGM Court Procedure Rules, 2016 (the "2016 Rules").

2. The proceedings were duly filed with the ADGM Court Registry and served on B3 on 16 May 2019. Under rules 36 and 37 of the 2016 Rules, B3 was to file and serve on A3 an acknowledgement of service within 14 days after service of the claim form, that is to say by 30 May 2019. It did not do so. However, A3 could not obtain a default judgment under rule 39 without the permission of the Court because the proceedings are brought under ADGM Courts' alternative procedure in rule 30: see rule 30(4).

3. Against this background, A3 applies for judgment for a declaration, although in rather different terms from those pleaded: a declaration to the effect that there is a valid and binding arbitration agreement providing that disputes arising under the Lease are subject to arbitration under the Rules of Arbitration of the International Chamber of Commerce (the "ICC") with the seat or legal place of the arbitration being the Abu Dhabi Global Market**.** I held a hearing of the claim on 27 June 2019, at which A3 was represented by Mr Paul Stothard and Mr Ben Mellett of Norton Rose Fulbright (Middle East) LLC ("Norton Rose"). B3 has taken no part in the proceedings, and did not appear and was not represented at the hearing.

4. The details of the underlying dispute are not relevant for present purposes, and I mention them only briefly. A3 and B3 entered into a lease dated 25 October 2017 (the "Lease") whereby A3 demised to B3 for five years from 8 October 2017 a property on Al Maryah Island, Abu Dhabi. On 19 September 2018 B3 purposed to terminate the Lease, but A3 disputed its right to do so and that the Lease was thereby terminated. On 12 November 2018 A3 itself purported to terminate the Lease on the grounds that B3 was in breach of its terms. B3 did not respond.

5. The Lease expressly provides (at clause 33) that it is governed by and construed in accordance with Applicable Law, which is defined to mean "any Abu Dhabi Global Market enactment and Applicable Abu Dhabi Law (as amended and updated from time to time) for the time being". Section 13 of the Abu Dhabi Global Market Arbitration Regulations, 2015 (the "Arbitration Regulations") provides as follows:

> "(1) An arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

> (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.
>
> (3) For the purposes of subsection (2), the requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; .. .".

6. Clause 32 of the Lease is headed "Dispute Resolution". Clause 32.1 provides that In the event of "any dispute or difference arising between the [A3 and B3] out of or relating to the Lease or any breach of the Lease (a "Dispute"), one of the Parties shall serve notice of such dispute on the other Party (a "Dispute Notice"), and the Parties shall endeavour to settle such Dispute. To this effect they shall consult and negotiate with each other, in good faith and understanding of their mutual interests, to reach a just and equitable solution satisfactory to both Parties".

7. Clause 32.2 is headed "Arbitration". By clause 32.2.1 A3 and B3 agree that "to the extent permitted by Applicable Law, they [should] adopt the dispute resolution procedures set out in [the other provisions of clause 32.2]; however, otherwise, they [should] accede to the dispute resolution forum with competent jurisdiction".

8. Clause 32.2 continues with this provision at clause 32.2.2: "[A3 and B3] further agree that should Abu Dhabi Global Market establish an arbitration centre, in advance of the formal commencement of any relevant proceedings, [A3] may notify [B3] that the arbitration provisions set out in this clause 32 shall be replaced by reasonable alternative provisions in order to provide for jurisdiction by such newly established centre within Abu Dhabi Global Market and B3 shall sign such documentation as may reasonably be required by [A3] to give effect to such alternative".

9. Clause 32.2 then sets out with other terms to provide for arbitration of disputes. Clause 32.2.3 provides that, if the parties do not reach a solution as provided for in clause 32.1 within twenty days of the date of the Dispute Notice, the dispute should be "finally settled under the Arbitration Rules set out in the Proceedings Regulation of the Abu Dhabi Commercial Conciliation and Arbitration Centre". Clause 32.3.4 provides that the Arbitral Tribunal should comprise three arbitrators, and for the nomination of two arbitrators by the parties and of a third arbitrator by the first two. Clause 32.2.5 makes provision for the appointment of the third arbitrator by the Director General of the Abu Dhabi Commercial Conciliation and Arbitration Centre if the other arbitrators fail to agree upon a nomination, and provide that if one of the parties does not nominate an arbitrator, the person nominated by the other party should have power to arbitrate and determine the dispute as if a sole arbitrator appointed by both. Clause 32.2.6 provides for the seat or legal place of the arbitration to be Abu Dhabi, and the language of the proceeding and award to be English. Clause 32.2.7 provides that all awards should be final and not subject to appeal. Clause 32.2.8 makes provision about the payment of any award and about costs and interest. Clause 32.2.9 is about execution of a judgment on an award. Clause 32.2.10 provides that an award should be the sole and exclusive remedy between the parties regarding any dispute referred to arbitration. Finally,

clause 32.2.11 places an obligation on the parties to keep awards and other documents confidential.

10. In a letter to B3 dated 25 November 2018, A3 wrote that the Abu Dhabi Global Market Arbitration Centre had been established and had become fully operational on 17 October 2018. The letter continued, "Accordingly, by this letter to you, we are exercising our right under clause 32.2.2 to replace the existing arbitration provisions. In order to reflect the new provisions, the following changes are hereby made to Lease with effect from the date of this letter". The letter then said that clause 32.2.2 was deleted; that clause 32.2.3 was deleted and replaced with a provision that if the parties do not reach a solution as provided for in clause 32.1 within twenty days of the date of the Dispute Notice, then "the Dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce". Clause 32.2.5 was to be amended to replace the reference to the Director General of the Abu Dhabi Commercial Conciliation and Arbitration Centre with a reference to the International Court of Arbitration; and clause 32.2.6 was amended to change the seat or legal place of the arbitration from Abu Dhabi to the Abu Dhabi Global Market. It requested that B3 sign and return "a copy of the letter … to confirm your acceptance of and agreement to its terms". B3 did not raise any objection to this notice, but it did not return a signed copy of the letter or respond in any way.

11. On 9 December 2018 A3 submitted a request for arbitration to the ICC, seeking relief (inter alia) by way of declarations that B3 was in breach of the Lease and that it (A3) had validly terminated it, together with monetary relief, and A3 nominated its arbitrator. The ICC accepted that service had been validly effected, and that B3 received the request on 29 January 2019. Under article 5(1) of the ICC rules, B3 was to submit an Answer within 30 days of receipt of the request, that is by 28 February 2019, but B3 did not do so and did not participate in the reference.

13. The ICC rules at article 6.3 provide that, where a respondent to a reference does not submit an answer, "… the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court [sc. the International Court of Arbitration] for decision pursuant to Article 6(4)". Article 6(4) provides that when there is such a reference, "the Court shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that the Court is *prima facie* satisfied that an arbitration agreement under the Rules may exist".

14. By letter dated 19 March 2019 the ICC informed A3 and B3 inter alia that the Secretary General had decided to refer the matter to the ICC Court and that the ICC Court would examine whether and to what extent it would proceed. A3, through its solicitors, Norton Rose, made submissions dated 25 March 2019 in response. B3 did not respond. On 18 April 2019 the Court decided that "this arbitration will not proceed", and the ICC wrote to the parties accordingly.

15. Article 6(6) of the ICC rules provides that, "Where the parties are notified of the Court's decision pursuant to Article 6(4) that the arbitration cannot proceed in respect of some or all of [the claims], any party retains the right to ask any court having jurisdiction whether or not,

and in respect of which of them, there is a binding arbitration agreement". This question is a civil or commercial case or dispute involving the Abu Dhabi Global Market, and the Courts of the Abu Dhabi Global Market have, and in particular this Court of First Instance of the Abu Dhabi Global Markets Courts has, jurisdiction to decide whether or not there is a binding arbitration agreement in respect of the claims made by A3.

16. A3's argument is straightforward: that under clause 32.2.2 of the Lease, it enjoyed a unilateral option to amend the original arbitration clause with alternative provisions; that it exercised its option by its letter of 25 November 2018; that therefore the clause of the Lease and the letter constitute an agreement in writing for the purposes of the Arbitration Regulations; and that therefore there is a binding arbitration agreement in respect of disputes such as those which give rise to its claims against B3.

17. B3, having not participated in these proceedings or in the reference to the ICC, has not advanced contrary arguments. The ICC Court did not give reasons for its decision that the reference should not proceed, as, I believe, is conventional. However, I must be satisfied that A3's contention justifies the declaration that it seeks. I have been assisted in this by Norton Rose, who, as is proper in these circumstances, drew to my attention matters that B3 might have raised had it sought to oppose the application. I am grateful to them.

18. To my mind, there are seven questions worthy of consideration. The first is about whether clause 32.2 as a whole is sufficiently certain to have legal effect. It purports to provide for arbitration but does not say what disputes the parties agreed should be arbitrated. I cannot accept that this prevents the clause from having binding contractual effect. An arbitration agreement can be valid without expressly identifying the disputes that it covers: for example, a clause stating "arbitration in London" was upheld in Swiss Bank Corpn v Novorossiysk Shipping Co (The 'Petr Schmidt'), [1995] 1 Lloyd's Rep 202, and indeed it has been said that the simple word "arbitration" would be sufficient: per Salmon LJ in Hobbs Padgett & Co (Reinsurance) Ltd v J C Kirkland Ltd and Kirkland, [1969] 2 Lloyd's Rep 547, 549. When clause 32 is read as a whole, it is clear in my judgment that the provisions of clause 32.2 were intended to apply to the disputes covered by clause 32.1, that is to say to "disputes and differences arising between [A3 and B3] out of or relating to the Lease or any breach of the Lease". This is confirmed by the reference in clause 32.2.3 to the "Dispute Notice" for which clause 32.1 provides.

19. Secondly, I come more specifically to clause 32.2. There can be no doubt that options are recognised by the English common law (which, of course, applies and has legal force in, and forms part of the law of, the Abu Dhabi Global Market), although there is debate about how they are to be characterised as a matter of legal analysis: see Chitty on Contracts, 33rd Ed. (2018), Vol 1, para. 4-193 fn. 288. Clause 32.2.2 of the Lease is rather unusual, but there can be no objection in principle to an option of this kind. Certainly it imports an unilateral aspect and in that sense an element of imbalance into the dispute resolution provisions, but the notion, once current, that mutuality is a requirement of a valid arbitration agreement was rejected by the English Court of Appeal in Pittalis v Sherefettin, [1988] 2 All ER 227. As it is put in Merkin, Arbitration Law (2018) at para. 3.15, "Arbitration clauses typically impose on each party a duty to refer any dispute to arbitration. However, some clauses are unilateral in their operation". This is illustrated by such cases as NB Three Shipping Ltd v Harebell Shipping

Ltd, [2004] EWHC 2110 (Comm.) and Law Debenture Trust Corp plc v Elektrim Finance BV and ors, [2005] EWHC 1412 (Ch.), to both of which Norton Rose drew my attention.

20. Are the provisions of clause 32.2.2 sufficiently certain to give A3 a legally enforceable option? It provides that A3 may replace the initial terms of clause 32 with "reasonable alternative provisions", but there is no express guidance about how reasonableness is to be assessed. In some circumstances the courts will not enforce arrangements that are couched in terms of fairness or reasonableness without more: see Chitty (cit sup) at para. 2-151. These are typically cases where an important term is "too uncertain to be given any practical meaning" (see Schweppe v Harper, [2008] EWCA Civ 442 at para. 72) or where there are "no objective criteria by which the court could assess what would be reasonable", (see Baird Textile Holdings Ltd v Marks & Spencer plc, [2001] EWCA Civ 274 at para. 30). This case is different: clause 32.2.2 does not entitle A3 to replace the initial provisions with "reasonable" provisions of any kind, but only with reasonable provisions that are *alternative* to the initial terms. Further, it requires the purpose of changes be to provide for the jurisdiction of the newly established arbitration centre. The clear implication, as I see it, is that the replacement provisions are to be such as are reasonably incidental to that end. The clause provides an objective criterion against which to assess reasonableness. I do not need to consider whether an option to make reasonable changes simpliciter would be sufficiently certain to have legal effect: here the wording of clause 32.2.2 and the context provide sufficient guidance as to what provisions will satisfy the requirement.

21. This leads to the fourth question, whether the condition precedent for the exercise of the option was satisfied when A3 purported to exercise it. The law requires a condition precedent to the exercise of an option to be exactly met: United Scientific Holdings Ltd v Burnley BC, [1978] AC 904. Clause 32.2.2 operates only "should Abu Dhabi Global Market establish an arbitration centre, in advance of the formal commencement of any relevant proceedings", that is to say in this case before 9 December 2018. I consider it clear that the notion of an arbitral centre does not refer to a physical or geographical location, but an institution: this interpretation is dictated both by commercial sense and by the wording of the clause, which refers to "alternative provisions in order to provide for jurisdiction *by* such newly established centre" (emphasis added), not "*at* such newly established centre". The evidence before me makes clear that before 9 December 2018, on 17 October 2018, the Abu Dhabi Global Market Arbitration Centre was opened with the ICC operating a representative office there. I see no possible argument that the condition precedent for the exercise of the option was not satisfied.

22. The next question is whether A3's notice of 25 November 2018 purported to exercise the option without more. This question arises because in its letter A3 requested that B3 confirm its agreement to the terms of the notice by countersigning a copy of it. Whether or not under clause 32.2.2 A3 required the consent of B3 to the new terms, does the request mean that A3 was not purporting to exercise the option unilaterally? In my judgment, the answer to that question is "no". As it is put in Chitty on Contract, loc cit, at para. 2-124, "The effect of a stipulation that an agreement is to be embodied in a formal written document depends on its purpose", and one possibility is that "such a document is intended only as a solemn record of an already complete and binding agreement". In my judgment, this was the intended purpose of the request in the notice of 25 November 2018: A3 cannot reasonably be taken to have

compromised its right unilaterally to stipulate the replacement provisions, especially given that it was already in dispute with B3 about the termination of the Lease. This is put beyond doubt by the very wording of the letter: "the following changes are hereby made to the Lease with effect from the date of this letter".

23. There is another answer to this argument. B3 was obliged under the terms of clause 32.2.2 to sign such documentation as might be reasonably required by A3 to give effect to such alternative. In my judgment, in the circumstances of this case, a countersigned copy of the letter of 25 November 2018 was reasonably required by A3. B3 was in breach of its contractual obligation in not providing it, and, as was said by Lord Jauncey in Alghussein Establishment v Eton College, [1988] 1 WLR 587 at p.591D-E, "it is well established by a long line of authority that a contracting party will not in normal circumstances be entitled to take advantage of his own breach as against the other party".

24. Sixthly, might it be argued that the replacement provisions were not within the limits of what was permitted under clause 32.2 because they were not reasonable? I consider that the replacement provisions satisfy the requirement of reasonableness. They serve the commercial purpose of the clause: in general terms, they were designed to provide for arbitration in the only arbitral centre or institution that has been established in the Abu Dhabi Global Market, a centre that is a highly reputable and was established in conjunction with the ICC opening a representative office in the Abu Dhabi Global Market.

25. All of the individual charges served this purpose and were properly incidental to it. I recognise that the alternative provisions that A3 required by the letter of 25 November 2018 not only provided for arbitration through the newly established arbitration centre, but also provided for the seat or legal place of the arbitration to be Abu Dhabi Global Market rather than Abu Dhabi. This change was not necessary in order to have arbitration by the new centre, but in my judgment it was reasonably incidental to the other changes, and within the scope of the power of A3 to require reasonable alternative provisions.

26. Finally, I should consider whether the arbitration agreement for which A3 contends is "in writing" within the meaning of section 13 of the Arbitration Regulations (cit sup). I consider that it is. A3's pleaded case is that clause 32.2.2 of the Lease and the letter of 25 November 2018 together constitute an agreement in writing. (The pleading refers to "the Defendant's letter dated 25 November 2018", but that is clearly a slip and the intention is to refer to A3's letter.) It might be that the better analysis is that the arbitration agreement for which A3 contends is, notwithstanding the changes, contained simply in the Lease. This view is supported by the judgment of Hoffmann J in Spiro v Glencrown Properties Ltd, [1991] Ch. 537. This case concerned the provision of section 2 of the Law of Property (Miscellaneous Provisions) Act, 1989 that a contract for the sale or other disposition of an interest in land can only be made in writing, and the document incorporating the terms, or, where contracts are exchanged, one of the documents incorporating them must be signed by or on behalf of each party to the contract; and how this requirement applies in the case of an option to buy an interest in land. The option in the Spiro case was granted in a written agreement signed by both contracting parties, but, unsurprisingly, the notice exercising the option was signed by only one of them. Hoffmann J held that the agreement for the sale was the contract granting the option, and the requirement of section 2 was satisfied: he rejected the argument that the

grant of an option constituted an offer that was accepted so as to become a contract for the sale of an interest in land only when the option was exercised. When an option had been described in earlier cases as an offer, he said, "Offer is not used in its primary sense, but by way of a metaphor or an analogy" (loc cit at p.543B).

27. However that might be, and even if, contrary to Hoffmann J's view, the proper legal analysis is that an option constitutes an offer to enter into a contract, which may be accepted by exercising the option, here the option was exercised in writing. Unlike the statutory provision that Hoffmann J was considering, here the applicable law does not require that each party to the agreement sign a document containing its terms. On any view the arbitration agreement for which A3 contends was in writing, whether the writing be only the Lease or the Lease and the letter of 25 November 2018 taken together.

28. I therefore conclude that A3 is entitled to a declaration, and I come to consider its precise terms. There are two points: firstly, A3 seeks a declaration that there is a valid and binding agreement providing that disputes *arising under the Lease* be subject to arbitration. As I have said, I consider that clause 32.2 is about all disputes arising between the parties *out of or relating to the Lease or to any breach of the Lease*. The wording is wider than that in the proposed declaration, but that does not seem to me a reason to refuse permission for a declaration with the narrower wording as sought by A3. The greater includes the lesser.

29. Secondly, the wording of the declaration that A3 now seeks is in different terms from the relief pleaded in the claim form. I have power to make a declaration in the form now sought, but B3 has not had notice of it. Given its failure to engage in the proceedings in any way, and indeed its failure to engage in the ICC arbitration proceedings, it might seem improbable that it might be concerned about the precise terms of the declaration that I make, or would wish to make representations about them. That said, I must have regard to its interests. I shall therefore make the order essentially to the effect sought by A3, namely that "There is a valid and binding arbitration agreement between the Claimant and the Defendant that disputes arising under a lease between them dated 25 October 2017 be subject to arbitration under the Rules of Arbitration of the International Chamber of Commerce and that the seat or legal place of arbitration is the Abu Dhabi Global Market". However, I shall direct that A3 must not seek to enforce the declaration or seek to take any steps with regard to arbitral proceedings in reliance upon it before 14 days have elapsed after service of my order and this judgment on B3. B3 may apply to me, if so advised, within that period. To my mind, this will properly and sufficiently protect B3.

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Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
4 July 2019