Five years of cases before the ADGM Courts

Peter Smith, Outer Temple Chambers

2021 saw the fifth anniversary of the first disputes registered before the Courts of the Abu Dhabi Global Market, and a good opportunity to consider the cases that the ADGM Courts have heard.

The Courts publish a searchable list of claims before them: the first claims were registered at the Courts in 2017, and the numbers of cases show a swift increase over the intervening five years from seven claims in 2017, 13 in 2018, eight in 2019, 53 in 2020 and to well over 100 in 2021. An early indication is that the Courts are highly likely to surpass the 2021 total in 2022.

Many, if not most, of the cases registered before the Courts relate to claims by banks against customers in breach of financing contracts, particularly credit card debts, and also to landlord-tenant disputes. None of these decisions have been reported.

Employment

The ADGM has its own Employment Regulations 2019 (amending the earlier 2015 Regulations), which set out a comprehensive employment regime. Most employment claims fall within the jurisdiction of the Employment Division that caters of relatively low-value disputes. There have been several reported employment claims in the CFI, including:

- *Karin Berardo v Stumpf Energy Limited [2018] ADGMCFI 1 (1 May 2018, Justice Sir Michael Burton):* parallel criminal and civil proceedings led to an adjournment of the latter (the case was then disposed of before trial).

- *Tetyana Glukhora v Espoir Flower Boutique Limited [2019] ADGMCFI 0001 (25 February 2019) and [2019] ADGMCFI 0002 (14 March 2019, costs*; both Justice Sir Michael Burton): a poorly pleaded claim for wrongful dismissal was largely struck out, with costs awarded to the defendant employer.

- *Erik Rubingh v Veloqx RSC Limited [2020] ADGMCFI 0005 (13 July 2020) and [2020] ADGMCFI 0006 (29 July 2020; costs);* Alvaro Garcia Torres v Veloqx RSC Limited [2020] ADGMCFI 0007 (21 September 2020; all, Justice Sir Michael Burton): successful summary judgments against a family office branch by two former employees. In Rubingh, the Court awarded over US$ 1 million in damages after considering inter alia the status of pre-contractual negotiations, the claimant's failure to plead the existence of a contract relied on in his claim, whether an enticement promised to the claimant was discretionary or not, and the proper construction of terms of the employment contract.

- *Samer Yasser Hilal v Haircare Ltd [2022] ADGMCFI 0001 (7 January 2022, Justice Sir Michael Burton):* the Court awarded nearly AED 150,000 for

wrongful termination of a fixed-term contract, accounting for the employee's entitlements for damages for failures to pay his salary, commission, money in lieu of annual leave, repatriation flight costs, end-of-service gratuity, medical insurance and wrongly deducted visa costs. There was no justification for the claimant's dismissal on the alleged grounds of gross misconduct.

Real Property

Some of the largest disputes before the Courts to date have involved real property located within the ADGM. In the Rosewood Hotel Abu Dhabi LLC v Skelmore Hospitality Group Limited litigation, the CFI handed down its first decision in a dispute over an alleged breach of contract and made several case management decisions that showed the Court was unafraid to forge its own path in the interpretation and application of its rules.

In the claim, the claimant alleged that the defendant had failed to pay sums of money said to be due and owing to the claimant under the terms of a lease of commercial premises at the Rosewood Hotel on Al Maryah Island, the location of the ADGM. The claim comprised six separate heads of claim, with the total amount claimed estimated to be around US$1.362m in damages for breach of contract, plus contractual interest and costs. The defendant disputed liability to pay any sum, putting the claimant to strict proof of its claims and arguing a lack of contractual consideration and waiver, denying the claim for liquidated damages as a genuine pre-estimate of loss, and pleading an allegation failure by the claimant to mitigate its loss.

In his decision on 27 May 2019 ([2019] ADGMCFI 0003), Justice William Stone declined the defendant's application to join a third party defendant to the proceedings on the basis that the third party had conducted the contractual negotiations between the claimant and the defendant on the claimant's behalf.

The defendant sought permission to appeal this decision to the Court of Appeal, consisting of the Chief Justice, Lord David Hope, His Honour Justice Sir Peter Blanchard and His Honour Justice Kenneth Hayne, who dismissed the application on 1 September 2019 ([2019] ADGMCFI 0005). In its reasoning, the Court of Appeal considered that Rule 56 of the ADGM CPR differed from Rule 19.5 of the English Civil Procedure Rules (and also rule 20.28 of the Rules of the DIFC Courts) in that there was no requirement for the addition of a party to be "necessary" and demonstrating that the Courts would, as justice dictated, shape its own procedural rules.

After striking out parts of the witness evidence made in support of the defendant's case (4 November 2019), the Court found at trial in the claimant's favour and awarded it over US$1.6m for outstanding debts (16 December 2019). The defendant failed to attend trial, having changed legal representation the night before it was due to begin and after unsuccessfully applying to adjourn the hearing.

The claimant as judgment creditor applied to the Courts for an order under Rule 253 of the ADGM CPR 2016 compelling a director of the defendant as judgment debtor to attend Court to provide information about the defendant's means and for the purposes of enforcing the substantive judgment. On 6 February 2020 ([2020] ADGMCFI 0003), Justice Stone considered the territoriality of the Courts' power to make an order under Rule 253 in face of the defendant's objection that the Court had no extra-territorial power to grant the application as the Court was not permitted to order the attendance of a director of a judgment debtor company who was outside the jurisdiction of the ADGM (the judgment debtor company was registered in the DIFC, the summonsed director resided in Dubai and was not present in the ADGM when the Rule 253 application against him was made). The defendant relied on decision of the House of Lords in Masri v Consolidated Contractors International Co SAL and others [2009] UKHL 43, where Lord Mance had made statements about the analogous English provision (Part 71 CPR), concluding that the CPR "does not contemplate an application and order in relation to an officer outside the jurisdiction" (quoted at para. 12).

The judge rejected the judgment debtor's contentions: the summonsed director was its "directing mind" and could "credibly…be regarded as the Defendant's alter ego, such that he can be assimilated to the judgment debtor for the purposes of an order under Rule 253, and thus (as was recognised in Masri) that in such circumstances an order may be made against him as if it were made

against the judgment debtor itself" (para. 20). Nothing in Rule 253 could be construed as restricting its ambit to only directors within the ADGM when its true reach was across the UAE and when (unlike in Masri) a director in the ADGM would otherwise only need to drive out of the free zone to escape its jurisdiction, an extremely likely situation given the very limited numbers of people ordinarily resident there.

There have been four judgments of the ADGM Courts of Appeal as of February 2022, all of which have been in the Rosewood litigation. A renewed application for permission to appeal to the Court of Appeal, following the judge's refusal to grant permission to appeal his 27 May 2019 decision on the joinder of a third party, also failed, with the applicant narrowly avoiding an award of indemnity costs against it (1 September 2019). The costs of the permission application were assessed on 26 January 2020. The judgment debtor then failed to persuade the Court of Appeal that the trial judge was wrong not to adjourn the trial (12 February 2020), awarding costs to the respondent (31 March 2020).

An interim third party debt order was made over a restaurant in the ADGM, which was a sister company to the judgment debtor in the same group of companies but, upon further enquiry into the nature of the debt allegedly owed, the Court discharged the interim order and refused to make a final third party debt order (4 June 2020).

Commercial Disputes

The CFI has made several judgments in straightforward commercial matters which have given rise to some interesting decisions on procedural and enforcement issues.

In AEFO Technical Services LLC v Aquarius Global Limited [2021] ADGMCFI 0003 (7 April 2021, Justice William Stone), the defendant had paid less than half of a AED 21 million interim payment order made against it. The Court declined to make a penalty order (consisting of a referral to the Attorney General of Abu Dhabi or a fine of US$ 10,000 plus costs) against the defendant's sole director by way of contempt of court. The judge, after surveying the changing landscape for contempt in England, concluded that the English position was "difficult [to] accept", as it drew a distinction between breach of an order for the payment (into court) of money by way of security, which was capable of attracting a contempt order, and breach of an order of payment of money direct to another party, which was not so capable. The judge considered rejecting this "dichotomy, and on this basis alone would have been minded to reject the present application as being unjustified as a matter of principle" (para. 28). However, he accepted that this was the English position and stressed that "on the assumed basis that a like view should prevail in the ADGM courts" (para. 29), proceeded to find that the exercise of his discretion mitigated against an order for contempt being made. First, an unless order made by the Court, which resulted in the striking out of the defence, was enough sanction for the non-payment, and the non-payment was not in itself serious enough to warrant additional punishment: it did not amount to the "type of contumelious conduct associated with the sanction of contempt". Second, the failure to pay into court was not "unequivocal conduct", i.e., conduct that appeared to be deliberate and wilful by the defendant, but was rather because the defendant simply did not yet have the funds. The criminal burden of proof applied to application, which the claimant had not satisfied. Finally, the relevant order to pay did not contain a penal notice, which it was "generally accepted" was necessary as a matter of practice.

In Abu Dhabi Commercial Bank PJSC v KBBOBRS Investments Holdings Limited & Anor [2021] ADGMCFI 0002 (28 March 2021, Justice William Stone), the CFI granted the claimant lender an order for possession and sale of a commercial property within the ADGM, which was subject to a registered mortgage between the claimant and the defendants, one of which was owned by Dr B R Shetty, and the order for possession and sale was part of the enforcement against security for a loan made to Dr Shetty and another (who owned the first defendant) under a shariah-compliant Murabaha agreement, a type of Islamic financing structure. The dispute took place against the backdrop of the collapse of the NMC group of companies (see below). The claimant had a contractual right under mortgage to sell the property in the event of a default under the Murabaha, with an additional right to apply to the ADGM Courts for "permission or authority to do so"; it accordingly brought proceedings. The Court found it had legal jurisdiction to order the sale under Rule 184 of the

ADGM CPR amongst other provisions. Questions arose about the lender's rights to market and sell the property, for which it had instructed a well-known property company.

Firstly, there was an issue between the parties as to the minimum sale price that the Court should order, and the first defendant contended that there were "real concerns" of the property being sold at an undervalue (para. 32). The Court was mildly critical that the claim had been brought under Rule 30 of the ADGM CPR, the equivalent of a proceeding under Part 8 of the English CPR and which did not anticipate a "substantial dispute of fact", and no directions had been sought for the adducing of expert evidence by either side which may have helped to ascertain the minimum sale price. Although evidence from valuers had been put before the Court, its "content, on the present state of play, [could not] properly be tested" (para. 35). The Court was reluctant to err on the side of caution and agree with the first defendant's lower valuation (which, along with all the valuations and the minimum sale price itself, was not placed in the public domain in advance of the marketing process), noting the receding of the Covid-19 pandemic and a predicted general improvement in the particular economy of the ADGM was likely.

Second, there was an issue on whether the claimant should have permission itself to bid for the property. The first defendant opposed this: the bank had a duty to obtain the best price reasonably obtainable and to act fairly towards the borrower; if the bank were permitted to bid, it risked undermining these duties and creating a conflict between the wish to secure the best deal for itself and the obligation to secure the best deal for the borrower. The Court permitted the bank to bid for the property on the basis that no sale to it be concluded without approval of the Court.

2021 saw the determination of the Court's biggest value claim to date in fully-opposed proceedings, in Global Private Investments RSC Limited v Global Aerospace Underwriting Managers Limited and others [2021] ADGMCFI 0008 (5 December 2021, Justice Sir Andrew Smith), a claim for over US$ 52.5 million by the owner of a Gulfstream jet against its insurers for an indemnity and other compensation arising from severe damage suffered by the jet in a hailstorm. Earlier in the litigation, the ADGM Courts made its first order for security for costs (2 May 2021, Justice Sir Andrew Smith), directing the claimant to pay US$ 650,000 by way of security. After a three-day hearing in November, Justice Sir Andrew Smith found the proper construction of the insurance policy (which was governed by ADGM law) in the insurers' favour. The parties have been granted permission to appeal and to cross-appeal respectively.

Company and Insolvency

In the very first reported judgment of the Court, Afkar Capital Limited v Saifallah Fikry [2017] ADGMCFI 1 (26 November 2017, Justice Sir Andrew Smith), it declined to make a number of declarations on an interim basis relating to the convening of a board meeting, various appointments and resolutions alleged by the claimant company to have been made at the meeting (including the removal of the defendant as senior executive officer), and the status of the minutes of the meeting as evidence of the proceeding.

There have been a number of insolvency matters in the Courts, including Mohammed Al Dahbashi Advocates & Legal Consultants v Gilligan Holdings Limited [2020] ADGMCFI 007 and the matters of Veloqx RSC Limited [2021] ADGMCFI 022), Dominion Fiduciary Services (Middle East) Limited [2021] ADGMCFI 039 and Elia Investments Limited [2021] ADGMCFI 040.

The *NMC* Litigation

Unquestionably the best-known and most important case before the ADGM Courts so far has been as the superintending court in the administration of the NMC group of companies ("NMC"), in which matter the CFI has rendered a number of decisions. NMC was and remains the largest provider of private healthcare in the UAE, operating more than 200 hospitals and medical facilities. Its CEO and founder, Dr Shetty, was widely feted in the Gulf as a pioneer of medical systems. By 2020, NMC had incurred very large debts of between USD 4.3 and 5.3 billion which, fraudulently, had not been disclosed in its financial statements. In April 2020, NMC's listed parent company was put into administration by the English High Court.

By order dated 27 September 2020 (and amended on 6 October), the CFI appointed administrators

over 36 NMC companies. Justice Sir Andrew Smith noted that the ADGM's insolvency regime was "in my ways, similar to the English regime" but with certain differences (e.g. the English regime does not include an equivalent to the priority funding provisions found in s. 109A of the Insolvency Regulations 2015).The 36 had originally been limited liability companies registered in the Emirates of Abu Dhabi, Sharjah and Dubai, and had no connection to the ADGM. However, the administrators (whose powers to act on behalf of the companies' were confirmed on 10 March 2021) took the companies out of the 'mainland' UAE legal framework and into the ADGM for the administration: they successfully applied to the ADGM Companies Registrar to register the companies in the ADGM with the consent of the management, owners and creditors of the companies. This re-domiciling of the companies into the ADGM allowed them to access its insolvency regime. The ADGM Courts were viewed as providing access to expert lawyers familiar with administrations, a new concept and one without a direct analogue under UAE civil law, and any judgment, order or decision of the ADGM Courts was viewed as more easily enforceable outside the UAE than one rendered by the Emirati or Federal courts. This strategy proved ultimately successful: by early 2022, NMC was reporting positive financial results and parts of the group had left administration and had been handed over to new owners.

Arbitration and the ADGM Courts

The Arbitration Regulations 2015 were initially speculated as requiring a connection between the underlying dispute and the ADGM but neither the Courts nor ADGM law have ever required a factual matrix between a dispute in arbitration and the ADGM, as a contractual 'opt in' is sufficient.

There have been a limited number of reported Court judgments focusing on arbitration. Decisions in two early arbitration cases, A1 v B1 (9 January 2018) and A2 v B2 (11 October 2018), are no longer publicly available, although it is known that one of these cases involved a pre-claim, ex parte application for interim relief.

In A3 v B3 [2019] ADGMCFI 0004 (4 July 2019, Justice Sir Andrew Smith), the Court found that there was a valid and binding arbitration agreement (although in unusual terms) between the parties that disputes arising under a lease between them should be subject to arbitration under ICC Rules with the arbitration seated in the ADGM. The parties had agreed to subject any dispute to arbitration under the rules of the Abu Dhabi Commercial Conciliation and Arbitration Centre ("ADCCAC") but further agreed that, if the ADGM should establish an arbitration centre in advance of any relevant proceedings, the claimant "may notify" the respondent that the arbitration would be under the rules of the new arbitration centre instead, and that the respondent was obliged to "sign such documentation as may reasonably be required…to give effect to such alternative". The ICC representative office was established after the agreement was formed, the claimant duly gave notice and sought to bring an arbitration under the ICC Rules, which the ICC Court had declined to allow proceed, prompting the application to the ADGM Courts.

In A4 v B4 [2019] ADGMCFI 008 (8 October 2019, Justice Sir Andrew Smith), the CFI considered an opposed application for the recognition and enforcement of a foreign arbitral award issued in an arbitration seated in England under the LCIA Arbitration Rules. The Court confirmed, first, that it had jurisdiction to recognize and order enforcement of the award: the Arbitration Regulations permit the recognition and enforcement of awards made under the New York Convention, which included the foreign arbitral award. As none of the grounds under the Arbitration Regulations for refusing recognition or enforcement was satisfied, the Court was required to enforce the foreign award. Second, whilst it was open to a respondent to challenge recognition and enforcement on the ground that the foreign award was based on an invalid arbitration agreement, the respondent did not raise that objection in this case.

In A4 v B4 the Court also rejected a hypothetical challenge that enforcement of the foreign award would be contrary to UAE public policy on the basis that the respondent and the applicant were incorporated in Abu Dhabi, outside the ADGM. The judge noted the risk that the applicant was seeking to enforce the foreign award without the respondent having assets in the ADGM but concluded that this question did not fall for determination: the burden of proof lay on the

respondent, who made no submissions on this point. Although the Court acknowledged it had the jurisdiction to rule on an illegality or other public policy issue on its own initiative, there was no factual basis to do so in this case. There was no evidence that the respondent did not have, or would not have, assets within the ADGM at present or in the near future and so no reason to suppose that the applicant sought recognition and enforcement in these proceedings simply as a conduit to execute against assets elsewhere in the UAE. There was also no evidence that there might be duplication between the proceedings in the ADGM and other courts of the UAE. The respondent had not brought proceedings to challenge the foreign award and there was no evidence that it intended to do so. There was also no evidence that the applicant had brought proceedings in other courts of the UAE, and there was no evidence that it intended to do so. Crucially, the Court considered that even if the applicant were to initiate similar proceedings before other courts of the UAE, the Court felt that 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. The Court also added that the Respondent would not suffer any unfairness or any detriment as a result of the Award being recognised and enforced by order of the Court rather than, or in addition to, by order of another court of the UAE. The Court thus concluded that there was no reason to refuse recognition and enforcement of the Award on the grounds of the public policy of the UAE.

Finally, in A5 v (1) B5 (2) C5 [2021] ADGMCFI 0007 (19 September 2021, Sir Andrew Smith), the Court upheld an application for the recognition of an arbitral award despite a challenge by the award debtors, who had failed to apply within time to set aside the award and who lacked any grounds for refusing recognition.

Dubai Islamic Bank and the interplay between litigation and arbitration

Not all NMC's creditors were happy with the ADGM Courts' management of the administration. In 2021, Dubai Islamic Bank sought to stay proceedings in the CFI by the joint administrators and the companies in administration. The bank argued that arbitration agreements in two Master Murabaha Agreements, under which it had loaned monies to NMC, should prevail and that specific court proceedings should be stayed in accordance with s.16 of the Arbitration Regulations 2015 which gives priority to arbitration and obliges a stay in any court proceedings whose subject is covered by the arbitration agreement unless satisfied the agreement is "null and void, inoperative, or incapable of being performed".

In a judgment dated 24 May 2021, Justice Smith acknowledged that the "starting point for interpreting an arbitration agreement and determining its scope" was "not to focus on 'fussy distinctions'" about the exact terms used, but to construe it liberally, recognising that "generally rational businessmen entering into an arbitration agreement will intend that any dispute arising out of their relationship should be resolved by the same tribunal": Fiona Trust & Holding Corp v Privalov [2007] UKHL 40, [13], [26] and [27]. The judge noted that, in England, insolvency does not prevent a matter from being arbitrated even though the tribunal may not be able to make all the necessary orders, whereas Singaporean law construes an arbitration agreement as excluding insolvency disputes entirely. He concluded that the ADGM Courts will follow the approach of English law in accordance with the Application of English Law Regulations 2015 (para. 82). However, although the Arbitration Regulations 2015 differed from the English Arbitration Act 1996, which expressly preserved the operation of any rule of law on matters incapable of settlement by arbitration (s. 81(1)), the judge considered recent English authorities that supported narrow rather than wide rules on non-arbitrability, and concluded that the bank was entitled to have part of its claim determined in arbitration and stayed the CFI proceedings to the extent necessary to give effect to that right.

Costs

The ADGM Courts have comparatively fewer rules (at Part 24 of the ADGM CPR and Practice Direction 9) about the assessment of costs than contained in the English CPR, leaving decisions more open to the Courts' discretion. As well as the cases noted above, in Afkar Capital Limited v Saifallah Fikry [2018] ADGMCFI 2 (2 May 2018, Justice Sir Andrew Smith), the CFI noted how the framework of ADGM rules on costs reflected English law (paras. 46 and 63). The Court carried out a detailed analysis of costs principles and submissions inter alia covering the

costs sought by the successful claimant after trial in Rosewood Hotel Abu Dhabi LLC v Skelmore Hospitality Group Ltd [2020] ADGMCFI 0003 (16 March 2020, Justice William Stone). More typical of the Courts' orders is that of Justice Sir Michael Burton in Tetyana Glukhora v Espoir Flower Boutique Limited [2019] ADGMCFI 0002 (14 March 2019). In A3 v B3 [2019] ADGMCFI 0006 (25 August 2019, Justice Sir Andrew Smith) the Court again made reference to the English CPR and refused to award costs on an indemnity basis.

About Peter Smith

Peter Smith has acted in a number of disputes before the ADGM Courts, including in the winding-up of Veloqx RSC Limited, the security for costs application in Global Private Investments RSC Limited and the application to set aside default judgment in Laktineh & Co. Ltd. v (1) Ahmed Al Hatti and (2) Cayan Real Estate and Development LLC [2020] ADGMCFI 0001 (30 January 2020, Justice Lord McGhie). He was a drafter of the ADGM Pro Bono Scheme Rules and sits on the ADGM Rules Liaison Group.

Peter was recommended as a 'Rising Star' in the Legal 500 in both 2020 and 2021 and was "notable" in the Legal 500, 2019 (UAE Dispute Resolution: Arbitration and International Litigation). He has experience of a wide range of civil and commercial disputes and sectors. He is a door tenant at Outer Temple Chambers (London, Dubai and Abu Dhabi) and is a senior associate at Charles Russell Speechlys LLP, Dubai.

More Information

To read more about Outer Temple's International Commercial Litigation services or any of the barristers mentioned in this article please visit: https://www.outertemple.com/expertise/commercial-litigation/international-commercial-litigation/

Contact **Sam Carter** on +44 (0)203 989 6669 for more information.

Our experienced practice management team will be pleased to provide you with more details of our expertise in this area.