

JUDGMENT SUMMARY

Neutral Citation	[2019] ADGMCFI 0004
Case Number	ADGMCFI-2019-007
Name of Case	A3 v B3
Judge	Justice Sir Andrew Smith
Date Issued	4 July 2019
Catchwords	Contractual certainty. Option in arbitration agreement. Condition precedent to exercising option. Establishment of “ <i>arbitration centre</i> ”. “ <i>Reasonable</i> ” changes to terms of arbitration agreement. Arbitration agreement “ <i>in writing</i> ”.
Cases Cited	<p>NB Three Shipping v Harebell Shipping [2004] EWHC 2001 (Comm)</p> <p>Law Debenture Trust Corp plc v Elektrim Finance BV [2005] EWHC 1412 (Ch)</p> <p>Swiss Bank Corpn v Novorossiysk Shipping Co (The ‘Petr Schmidt’) [1995] 1 Lloyd’s Rep 202</p> <p>Hobbs Padgett & Co (Reinsurance) Ltd v J C Kirkland Ltd and Kirkland [1969] 2 Lloyd’s Rep 547</p> <p>Pittalis v Sherefettin [1988] 2 All ER 227</p> <p>Schweppe v Harper [2008] EWCA Civ 442</p> <p>Baird Textile Holdings Ltd v Marks & Spencer plc [2001] EWCA Civ 274</p> <p>United Scientific Holdings Ltd v Burnley BC [1978] AC 904</p> <p>Alghussein Establishment v Eton College [1988] 1 WLR</p> <p>Spiro v Glencrown Properties Ltd [1991] Ch. 537</p>
Legislation and Authorities Cited	<p>ADGM Court Procedure Rules 2016 – Rules 30, 36, 37, 39 and 231</p> <p>ADGM Arbitration Regulations 2015 – Section 13</p> <p>UK Law of Property (Miscellaneous Provisions) Act 1989 – Section 2</p>

	<p>Rules of Arbitration of the International Chamber of Commerce – Articles 5(1), 6(3), 6(4) and 6(6)</p> <p>Chitty on Contracts, 33rd Ed. (2018), Vol 1– Paragraphs 2-124, 2-151 and 4-193</p> <p>Merkin, Arbitration Law (2018) – Paragraph 3.15</p>
<p>Executive Summary</p>	<p>This judgment considered the validity and binding nature of an arbitration agreement within a lease contract between the parties. The Claimant sought a declaration from the Court confirming the validity and binding nature of the arbitration agreement, following the Defendant's non-participation in arbitration proceedings initiated by the Claimant under the Rules of Arbitration of the International Chamber of Commerce. The judgment addressed several legal points, including contractual certainty, options within agreements, and the requirement for an arbitration agreement to be in writing. The Court ultimately concluded that a valid and binding arbitration agreement existed with the ADGM designated as the seat of arbitration.</p>
<p>Overall Summary</p>	<p>Background</p> <p>This Abu Dhabi Global Market (“ADGM”) Court of First Instance (Commercial & Civil Division) judgment concerns a claim brought by A3 against B3 seeking a declaration regarding the validity of an arbitration agreement between the parties. The dispute arises under a lease agreement dated 25 October 2017 (the “Lease”).</p> <p>The relevant part of the Lease is Clause 32.2, headed “<i>Arbitration</i>”. Initially, this Clause provided for disputes to be settled under the Arbitration Rules of the Abu Dhabi Commercial Conciliation and Arbitration Centre (“ADCCAC”) with the seat of arbitration in Abu Dhabi. Crucially, Clause 32.2.2 granted A3 a unilateral option to replace these provisions with “<i>reasonable alternative provisions</i>” should the ADGM establish an arbitration centre, to provide for jurisdiction by that new centre. B3 was obliged to sign documentation reasonably required to give effect to such alternative.</p> <p>On 25 November 2018, A3 sent a letter to B3 stating that the ADGM Arbitration Centre had been established (which occurred on 17 October 2018) (the “Exercise Letter”). A3 declared it was exercising its right under Clause 32.2.2 to replace the existing provisions. The specified changes included replacing the ADCCAC rules with the Rules of Arbitration of the International Chamber of Commerce (the “ICC”) and changing the seat of arbitration from Abu Dhabi to the ADGM. A3 requested B3 sign the Exercise Letter to confirm acceptance, but B3 did not respond and took no part in the subsequent ICC arbitration initiated by A3 or the court proceedings.</p> <p>The ICC Court decided that the arbitration could not proceed. Under the ICC Rules, A3 then had the right to ask a court whether a binding arbitration agreement existed. A3 filed this claim seeking a declaration of</p>

	<p>a valid and binding arbitration agreement subject to ICC Rules with an ADGM seat.</p> <p>Analysis and Conclusion</p> <p>The Court considered seven questions, including:</p> <ol style="list-style-type: none"> 1. whether Clause 32 was sufficiently certain – it was found to cover disputes under the Lease; 2. whether the unilateral option in Clause 32.2.2 was valid – such options are recognised in common law and do not require mutuality; 3. whether the term "<i>reasonable alternative provisions</i>" was sufficiently certain – the Court found an objective criterion in the requirement that changes provide for jurisdiction by the new centre; 4. whether the condition precedent (establishment of the ADGM arbitration centre) was met – it was, by 17 October 2018. The Court clarified that "<i>arbitration centre</i>" referred to an institution, not just a physical location; 5. whether A3 validly exercised the option unilaterally despite requesting B3's signature – the Court found that the Exercise Letter clearly made the changes effective immediately and that B3 was in breach of contract by not signing reasonably required documentation; 6. whether the replacement provisions were reasonable – changing to ICC Rules and an ADGM seat were deemed reasonable and incidental to providing for arbitration through the new ADGM centre; and 7. whether the agreement was "<i>in writing</i>" as required by Section 13 of the ADGM Arbitration Regulations 2015 – the Court held that it was, whether considered as the Lease alone or the Lease and the Exercise Letter together. <p>The Court concluded that A3 is entitled to a declaration. The Court declared that a valid and binding arbitration agreement exists between A3 and B3 for disputes under the Lease, requiring arbitration under the ICC Rules, with the seat or legal place of arbitration being the ADGM.</p> <p>The Court ordered that A3 must not seek to enforce this declaration or seek to take any steps with regard to arbitral proceedings in reliance upon it before 14 days have elapsed after service of the judgment and order on B3 in order to allow B3 time to apply if so advised within that period. The Court noted that this would properly and sufficiently protect B3.</p>
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