

In the name of  
**His Highness Sheikh Mohamed 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  
BETWEEN**

**A24**  
Claimant

and

**B24**  
Defendant

**JUDGMENT OF JUSTICE PAUL HEATH KC**



<b>Neutral Citation:</b>	[2025] ADGMCFI 0019
<b>Before:</b>	Justice Paul Heath KC
<b>Decision Date:</b>	25 August 2025
<b>Decision:</b>	<ol style="list-style-type: none"> <li>1. The proceeding be stayed pursuant to section 16(2) of the Arbitration Regulations 2015.</li> <li>2. No order as to costs in relation to the Jurisdiction Application.</li> <li>3. Liberty to apply.</li> </ol>
<b>Hearing Date:</b>	On the papers
<b>Date of Order:</b>	25 August 2025
<b>Catchwords:</b>	Arbitration Agreement. Article 16 of Arbitration Regulations 2015. Whether arbitration agreement null and void, inoperative or incapable of being performed because of one party's failure to pay advance on costs. Stay of proceedings.
<b>Legislation Cited:</b>	<p>UAE Cabinet Decision No. (41) of 2023</p> <p>Abu Dhabi Law No. (4) of 2013 (as amended by Law No. (12) of 2020)</p> <p>ADGM Arbitration Regulations 2015</p> <p>ADGM Court Procedure Rules 2016</p> <p>Federal Law No. (5) of 1985 (Civil Transactions Law)</p> <p>Federal Decree Law No. (50) of 2022 (Commercial Transactions Law)</p> <p>Federal Decree Law No. (35) of 2022 (Law of Evidence in Civil and Commercial Transactions)</p> <p>Federal Decree Law No. (42) of 2022 (Civil Procedure Law)</p> <p>ADGM Application of English Law Regulations 2015</p> <p>Federal Law No. (6) of 2018 (Federal Arbitration Law)</p>
<b>Cases Cited:</b>	<p>Dubai Cassation Ruling in Appeal No. (3) for the year 2023 (Commercial), issued at the session of 26 July 2023</p> <p>Dubai Court of Cassation, Appeal No. (10) of 2023 – General Panel Decisions, 24 October 2023</p> <p>BDMS Ltd v Rafael Advanced Defence Systems [2014] EWHC 451 (Comm)</p> <p>Enka Insaat Ve Sanayi AS v OOO Insurance Co Chubb [2020] UKSC 38</p>



	UniCredit Bank GmbH v RusChemAlliance LLC [2024] UKSC 30. Union Properties PJSC and Anor v Trinkler & Partners Ltd and Ors [2025] ADGMCFI 0015.
<b>Case Number:</b>	ADGMCFI-2025-101
<b>Parties and representation:</b>	<p><b><i>Claimant</i></b></p> <p>Majed Al Dhaheri of Majed Bin Weqaish and Shoaib Al Awadhi Advocates and Legal Consultants L.L.C</p> <p><b><i>Defendant</i></b></p> <p>Wang Xianji of Winson Partners and Legal Consultants FZ-LCC</p>

## JUDGMENT

### Introduction

1. A24 holds a commercial licence, issued by the Abu Dhabi Department of Economic Development, to carry on business in the Emirate of Abu Dhabi (the “**Emirate**”). Its primary business activities include the provision of interior design services and installation works.
2. On 19 May 2020, A24 entered into a sub-contracting agreement (the “**Agreement**”) with B24 to supply and install gypsum walls and suspended ceilings for part of the XX development, on Al Reem Island. B24 was the head contractor for that project.
3. The XX development involved the construction of a seven-storey residential tower block, which was also to contain some commercial outlets. The contract price was AED 10,229,489, exclusive of Value Added Tax, with completion due on 1 July 2021. At the time that the Agreement was formed and the work contracted to be carried out, Al Reem Island was located onshore within the Emirate. Since 24 April 2023, Al Reem Island has been situated within the Abu Dhabi Global Market (“**ADGM**”).<sup>1</sup>
4. A24 alleges that there were delays in ensuring the site was ready for it to commence its work on the due date. It asserts that the site was not made available to it until 26 February 2021 and puts the blame for that delay on B24. By starting the work on 26 February 2021, A24 was left with little more than four months to complete the contract works. It was unable to do so within that time.
5. A24 has brought a claim in the ADGM Courts, in which it seeks damages against B24 for a sum of AED 4,662,835.48, together with interest and costs, to recover the loss that it asserts it has suffered.

<sup>1</sup> Al Reem Island became part of the ADGM from 24 April 2023 pursuant to UAE Cabinet Decision No. (41) of 2023. By Article 13(7) of Abu Dhabi Law No. (4) of 2013 (as amended by Abu Dhabi Law No. (12) of 2020), the ADGM Court of First Instance has exclusive jurisdiction to determine disputes of this nature.



## The jurisdictional challenge

6. B24 has challenged this Court's jurisdiction to consider and determine A24's claim. It applies, under Rule 38(2) of the ADGM Court Procedure Rules 2016<sup>2</sup> (the "**Rules**") for a declaration that this Court "*has no jurisdiction or will not exercise its jurisdiction*". The objection is based on the presence of an arbitration clause within the Agreement (the "**Arbitration Agreement**"). While A24 had commenced an arbitration proceeding in 2024, it was dismissed "*without prejudice*" because B24 had not paid its share of the advance on costs fixed for the costs of the arbitration.<sup>3</sup>
7. There are two grounds on which B24 contends that this Court should either hold that it lacks jurisdiction or decline to exercise any jurisdiction that it may possess:
  - a. The first is to enable the dispute to be determined by arbitration. A24 rejects that contention. Its position is that either the Arbitration Agreement contained within the Agreement has been discharged by B24's breach or has become "*unenforceable*". If established, that would result in the Arbitration Agreement becoming "*null and void*", "*inoperative*" or "*incapable of being performed*" (to use the language in the controlling statutory provision section 16(2) of the Arbitration Regulations 2015) and would deprive B24 of its right to a declaration and any consequential stay.<sup>4</sup>
  - b. The second is that, if I were to find that the Arbitration Agreement was not an impediment to this Court's jurisdiction, I should decline, as a matter of discretion, to exercise jurisdiction. That submission is based on the proposition that the ADGM Courts, while having expertise in common law, are not a suitable forum to resolve questions arising under the law of the United Arab Emirates (the "**UAE**") (including onshore Abu Dhabi law) to determine the proceeding. UAE law is the governing law of the Agreement.

## The legislative scheme

8. A challenge to the jurisdiction of the ADGM Courts is governed by Rule 38 which, relevantly, provides:

**"38. Procedure for disputing the Court's jurisdiction**

...

- (2) *A defendant who wishes to dispute the Court's jurisdiction to try the claim, or who wishes to argue that the Court should not exercise its jurisdiction, may apply to the Court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.*

<sup>2</sup> Set out at paragraph 8 below.

<sup>3</sup> See paragraphs 12–22 below.

<sup>4</sup> Arbitration Regulations 2015, Section 16(2), set out at paragraph 9 below.



...

- (7) *An order containing a declaration that the Court has no jurisdiction or will not exercise its jurisdiction may make such further provision as to the future conduct of the proceedings or otherwise as the Court considers appropriate.*

...”

9. However, the question whether a stay should be ordered due to the existence of an arbitration agreement is governed by section 16 of the ADGM Arbitration Regulations 2015 (the “**Arbitration Regulations**”):

**“16. Stay of legal proceedings**

- (1) *A party to an arbitration agreement against whom legal proceedings in the Court are brought (whether by way of claim or counterclaim) in respect of a matter which is the subject of the arbitration agreement may (upon notice to the other parties to the proceedings) apply to the Court to stay the proceedings so far as they concern that matter.*

- (2) *On an application being made under subsection (1), the Court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.*

...

- (6) *This section 16 shall also apply where the arbitration is not seated in the Abu Dhabi Global Market, and where no seat has been designated or determined.”*

(Emphasis added)

10. In the Jurisdiction Application, B24 relies on section 16(2) of the Arbitration Regulations to support its contention that this Court does not have jurisdiction in relation to the dispute. However, a stay of proceedings under section 16(2) does not equate to a declaration that the Court does not have jurisdiction. If there were such equivalence, the proceedings would be dismissed rather than stayed. As section 16(2) makes clear, if the Court is satisfied that there is a valid arbitration agreement in place (namely, one that is not null and void, inoperative, or incapable of being performed) the proceedings are to be stayed. By respecting the need for the parties to arbitrate, the Court upholds the principle of *pacta sunt servanda* (agreements must be kept).

**The issues**

11. In my view, the Jurisdiction Application can be determined by reference to the following issues:



- a. The first is to determine what law governs the Arbitration Agreement for the purpose of ascertaining whether that agreement is (legally or practically) at an end. That governing law determines the question whether, for the purposes of Section 16(2) of the Arbitration Regulations, the Arbitration Agreement is null and void, inoperative, or incapable of being performed.<sup>5</sup>
- b. The second is whether (under that governing law), the Arbitration Agreement has been discharged by breach, as a result of B24's failure to pay its share of the advance on costs.

## Analysis

### (a) The arbitration

12. The starting point is the Arbitration Agreement itself. Clause 36 of the Agreement states:

*"Any dispute or difference arising out of or in connection with this Sub-Contract Agreement, including any question regarding its existence, validity or termination, shall be firstly settled amicably within 14 days from the date of the dispute being notified in writing by either party to the other party, unless settled amicably, the dispute shall be finally resolved by arbitration under the Arbitration Rules of the Abu Dhabi Commission for Arbitration, United Arab Emirates, which rules are deemed to be incorporated by reference into this clause. The number of arbitrator shall be one. The arbitral tribunal shall be a sole arbitrator, the arbitrator to be mutually agreed upon between both parties if not , then each party will appoint one arbitrator and both arbitrators will appoint the chairman of the tribunal. The language to be used in the arbitration shall be English."*

(Emphasis added)

13. There are two aspects of the Arbitration Agreement that are relevant to the question of whether it has been breached in a manner that renders it null and void, inoperative, or incapable of being performed. They are:
  - a. The parties agreed that "any dispute or difference arising out of or in connection with" the Agreement must be determined by arbitration, if not settled amicably beforehand.
  - b. Both parties accept that the arbitral institution referred to in the Arbitration Agreement is to be construed as the Abu Dhabi International Arbitration Centre (known as arbitrateAD)<sup>6</sup>. By agreeing to adopt the Arbitration Rules of arbitrateAD (the "**arbitrateAD Rules**"), the parties have bound themselves to those provisions of the arbitrateAD Rules which deal with the consequences of non-payment by a party of its share of the advance on costs fixed as security for the costs of arbitration.

<sup>5</sup> Section 16(2) of the Arbitration Regulations 2015 is set out at paragraph 9 above.

<sup>6</sup> For convenience, (even though the Centre had a different name when the Agreement was executed) I refer, in the balance of this judgment, to the Rules of arbitrateAD.



14. After an unsuccessful attempt at “*amicable resolution*” of the dispute, A24 sought to commence an arbitration on 12 August 2024 by submitting a Request for Arbitration to arbitrateAD.
15. Immediately upon receipt of the Request for Arbitration on 12 August 2024, arbitrateAD wrote to A24 confirming that arbitration case no. XX had been assigned to the case. In the same letter, arbitrate AD informed A24’s legal representatives that the Request for Arbitration failed to comply substantially with the arbitrateAD Rules. A24’s legal representatives were asked to submit, on or before 16 August 2024, a “*Request*” addressed to arbitrateAD, and to provide comments as to the seat of the arbitration and applicable rules of law of the arbitration.
16. The information requested was provided. At some stage between 16 August and 18 November 2024, each of A24 and B24 appointed a co-arbitrator. On 18 November 2024, arbitrateAD wrote to both parties confirming that the co-arbitrators had nominated a president of the arbitral tribunal, and that he had been appointed by its Court of Arbitration. The letter fixed the advance on costs in the sum of AED 461,788.01 and set out the amounts payable by A24 (AED 220,394) and B24 (AED 230,894.01) respectively, taking into account a filing fee that A24 had already paid (AED 10,500). The parties were requested to pay their respective shares by 27 November 2024. The parties were advised that the case file would not be transmitted to the arbitral tribunal until the advance on costs fixed for the costs of arbitration had been paid.
17. B24 failed to pay its one-half share. On 16 December 2024, the legal representatives of A24 wrote to arbitrateAD in the form of a submission that B24’s failure to pay its share of the arbitration costs constituted “*an express and irrevocable waiver of the arbitration clause in the contract*” with the consequence that A24 was “*entitled to seek legal recourse before the Abu Dhabi Courts, which have the natural (inherent) jurisdiction to hear such disputes*”. In their letter, reliance was placed on a ruling given on 26 July 2023 by the Dubai Court of Cassation (the “**July 2023 decision**”) to that effect.<sup>7</sup>
18. A24’s submission to arbitrateAD of 16 December 2024, ended with the following request:

*“Therefore*

*[A24] requests [arbitrateAD] to adjudicate and rightly:*

*First: Originally:*

*Continuing to proceed with the arbitration proceedings while postponing the payment of the defendant's (the Respondent's) share until the final judgment is issued in the case.*

*Second: Precautionary:*

<sup>7</sup> Dubai Cassation Ruling in Appeal No. (3) for the year 2023 (Commercial), issued at the session of 26 July 2023.



*(1) Rejecting the arbitration assignment and withdrawing and closing the case file due to the defendant's (the Respondent's) failure to pay her share of the fees, which constitutes an explicit waiver of the arbitration clause.*

*(2) Refund the amount paid by the Plaintiff (the Claimant) amounting to (AED 230,398)."*

19. On 17 December 2024, arbitrateAD replied to counsel for A24 on the topic raised in the 16 December 2024 submission. That letter was copied to B24. The letter stated:

***"Case No. XX, A24 (Previously known as XX) v B24***

*The Case Management Office acknowledges receipt of [A24's] letter dated 16 December 2024.*

*It is noted that [A24] mistakenly refers to Article 39 of the ADCCAC Procedural Regulations. Kindly be advised that the arbitrateAD Arbitration Rules apply to all cases filed as of 1 February 2024, and not the ADCCAC Procedural Regulations.*

*Under Article 51(4) of the arbitrateAD Rules, if any party fails to pay its share of the advance on costs, the Case Management Office shall give the other party an opportunity to do so within a specified period of time. If the payment is not made within that time, the Case Management Office shall dismiss the case in whole or in part.*

*Additionally, please note that under Article 18 of the arbitrateAD Rules, the case file shall only be transmitted to the Arbitral Tribunal upon receipt of the advance on costs. Therefore, as the parties have not paid the advance on costs in full, the file will not be transmitted to the Arbitral Tribunal.*

*Finally, the Case Management Office notes [A24's] request: "rejecting the arbitration assignment and withdrawing and closing the case file due to [B24's] failure to pay her share of the fees, which constitutes an explicit waiver of the arbitration clause."*

*In the absence of payment of the advance on costs by 18 December 2024, the case will be dismissed in accordance with Article 51(4) of the Rules."*

*(Emphasis added)*

20. B24 did not pay its share of the advance on costs. arbitrateAD sent a further letter to the parties on 19 December 2024. By that letter the claim was formally dismissed. The relevant parts of that letter stated:

***"Case No. XX, A24 (Previously known as XX) v B24***

***1. Dismissal***





Reference is made to the Case Management Office's letters dated 18 November 2024, 6 December 2024, and 11 December 2024 requesting the parties to pay the advance on costs and granting an extension until 18 December 2024, as well as to [A24's] letter dated 16 December 2024. The Case Management Office notes that no such payment was received.

Pursuant to Article 51(4) of the Rules, Case No. XX is hereby dismissed without prejudice to [A24's] right to recommence the arbitration in accordance with Article 6 of the Rules.

...

### 3. Access to the case file

*The Parties will continue to have access to the case file on docketAD for one year following termination of the proceedings."*

(Emphasis added)

21. Article 51(4) of the arbitrateAD Rules states:

#### **"Article 51 - Advance on Costs**

"...

4. *If any party fails to pay its share of the advance on costs, the Case Management Office shall give the other party(ies) an opportunity to do so within a specified period of time. If the payment is not made within that time, the Case Management Office shall dismiss the case in whole or in part. If the file has been transmitted to the Tribunal, the Tribunal shall terminate the case in whole or in part.*

..."

(Emphasis added)

22. Article 6 of the arbitrateAD Rules makes it clear that a substantive re-commencement of the arbitration is envisaged. It is not a matter of reviving the first arbitration at the stage it had reached. Article 6 speaks of a claimant "*wishing to initiate an arbitration*" providing the details to which that article refers.

(b) *The competing contentions*

23. B24 contends that the Arbitration Agreement contained in Clause 36 of the Agreement<sup>8</sup> remains extant, notwithstanding arbitrateAD's decision to dismiss the case.<sup>9</sup> On the other hand, A24 repeats the "*precautionary*" point made in its submission of 16 December

<sup>8</sup> Set out at paragraph 12 above.

<sup>9</sup> See paragraph 20 above.



2024,<sup>10</sup> and asserts that, by failing to pay the advance on costs required to undertake the arbitration, B24 has waived the benefit of the Arbitration Agreement. As a result, A24 says it is entitled to proceed in a court with geographic jurisdiction, the ADGM Courts.

24. Before discussing the relevant authorities, I note the different language that has been employed by A24 to establish that the Arbitration Agreement is now null and void, inoperative or incapable of being performed.<sup>11</sup> While not all stated expressly, reliance is placed on the legal concepts of both repudiatory breach of contract and B24's "explicit" waiver of the benefit of the Arbitration Agreement. A24 supplemented its primary case with a submission that B24's conduct rendered the arbitration "*procedurally impossible*" and hence the arbitration agreement was incapable of being performed. Whatever wording is used it is necessary for A24 to show that the Arbitration Agreement is (legally or practically) at an end; otherwise, it could not properly be characterised as null and void, inoperative or incapable of being performed.
25. The parties have referred me to two lines of authority which, they contend, support their respective positions:
  - a. A24 relies on the July 2023 decision of the Dubai Court of Cassation,<sup>12</sup> which stands for the proposition that if an arbitration agreement cannot be executed it falls to a Court with geographic jurisdiction to determine the dispute.
  - b. B24 relies on a judgment of Hamblen J (as Lord Hamblen then was), sitting in the Commercial Court, in *BDMS Ltd v Rafael Advanced Defence Systems* ("**BDMS**").<sup>13</sup> The Judge considered the provisions of (the analogous) Article 30 of the Rules of the International Chamber of Commerce and their application to an arbitration governed by English law.

(c) *The Governing Law issue*

26. To address the competing contentions, it is necessary to determine the law that must be applied to decide whether a failure to pay its share of the advance on costs disentitles B24 from insisting on arbitration. This requires me to ascertain what law governs the Arbitration Agreement, as opposed to the Agreement itself.
27. The starting point is article 35.0 of the Agreement, which provides that "*the laws of the United Arab Emirates*" shall govern it. A24's claim refers to four sources of UAE law which they assert are relevant to the dispute. They are: (i) Federal Law No. (5) of 1985 (Civil Transactions Law); (ii) Federal Decree Law No. (50) of 2022 (Commercial Transactions Law); (iii) the "*UAE Law of Evidence*"<sup>14</sup>; and (iv) the "*UAE Procedure Law*"<sup>15</sup>.

<sup>10</sup> See paragraph 18 above.

<sup>11</sup> See section 16(2) of the Arbitration Regulations 2015, set out at paragraph 9 above.

<sup>12</sup> *Dubai Court of Cassation, Appeal No. (3) of 2023* (Commercial), issued at the session of 26 July 2023.

<sup>13</sup> *BDMS Ltd v Rafael Advanced Defence Systems* [2014] EWHC 451 (Comm).

<sup>14</sup> While no specific citation is provided by the Claimant, this appears to be a reference to Federal Decree Law No. (35) of 2022 (Law of Evidence in Civil and Commercial Transactions).

<sup>15</sup> While no specific citation is provided by the Claimant, this appears to be a reference to Federal Decree Law No. (42) of 2022 (Civil Procedure Law).



28. ADGM Courts are the supervisory court of the arbitration. That is because article 22(2) of the Arbitration Rules provide that ADGM is the presumptive seat of the arbitration if a seat has not previously been agreed (as is the case here). If a seat has not previously been agreed, that presumption is rebuttable if both parties subsequently agree to a different seat. In this case, notwithstanding Arbitration Rules' invitation for "*comments as to the Seat of the arbitration*", in its letter of 12 August 2024,<sup>16</sup> no agreement as to a different seat was reached.
29. While the ADGM Courts has jurisdiction to determine whether the Arbitration Agreement subsists, the question is whether that issue is determined by reference to ADGM law (as the seat of the arbitration) or UAE law (as the law governing the Agreement). The law governing the underlying contract between parties can differ from that which governs the validity or scope of an arbitration agreement.
30. In *Enka Insaat Ve Sanayi AS v OOO Insurance Co Chubb*,<sup>17</sup> the Supreme Court of the United Kingdom considered what law should govern an arbitration agreement where there was a conflict between that which governed the contractual arrangement and the seat of the arbitration. Delivering the judgment of a majority of the Supreme Court, Lord Hamblen and Lord Leggatt (with whom Lord Kerr agreed) held that, by applying English common law rules for resolving conflicts of laws, the law applicable to an arbitration agreement would be either the law expressly chosen by the parties to govern it or, in the absence of such a choice, "*the system of law with which the arbitration agreement is most closely connected*".<sup>18</sup> The same common law rules inform the approach which must be taken by the ADGM Courts.<sup>19</sup>
31. As part of their summary of relevant principles, Lord Hamblen and Lord Leggatt said:<sup>20</sup>

**"X Conclusions on applicable law**

"170. *It may be useful to summarise the principles which in our judgment govern the determination of the law applicable to the arbitration agreement in cases of this kind:*

...

(iii) *Whether the parties have agreed on a choice of law to govern the arbitration agreement is ascertained by construing the arbitration agreement and the contract containing it, as a whole, applying the rules of contractual interpretation of English law as the law of the forum.*

(iv) *Where the law applicable to the arbitration agreement is not specified, a choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract.*

<sup>16</sup> See paragraph 15 above.

<sup>17</sup> *Enka Insaat Ve Sanayi AS v OOO Insurance Co Chubb* [2020] UKSC 38.

<sup>18</sup> *Ibid*, at paragraph 170(i) and (ii).

<sup>19</sup> Application of English Law Regulations 2015, section 1(1).

<sup>20</sup> *Enka Insaat Ve Sanayi AS v OOO Insurance Co Chubb* [2020] UKSC 38, at paragraph 170(iii)–(ix).



- (v) *The choice of a different country as the seat of the arbitration is not, without more, sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement.*
- (vi) *Additional factors which may, however, negate such an inference and may in some cases imply that the arbitration agreement was intended to be governed by the law of the seat are: (a) any provision of the law of the seat which indicates that, where an arbitration is subject to that law, the arbitration agreement will also be treated as governed by that country's law; or (b) the existence of a serious risk that, if governed by the same law as the main contract, the arbitration agreement would be ineffective. Either factor may be reinforced by circumstances indicating that the seat was deliberately chosen as a neutral forum for the arbitration.*
- (vii) *Where there is no express choice of law to govern the contract, a clause providing for arbitration in a particular place will not by itself justify an inference that the contract (or the arbitration agreement) is intended to be governed by the law of that place.*
- (viii) *In the absence of any choice of law to govern the arbitration agreement, the arbitration agreement is governed by the law with which it is most closely connected. Where the parties have chosen a seat of arbitration, this will generally be the law of the seat, even if this differs from the law applicable to the parties' substantive contractual obligations.*
- (ix) *The fact that the contract requires the parties to attempt to resolve a dispute through good faith negotiation, mediation or any other procedure before referring it to arbitration will not generally provide a reason to displace the law of the seat of arbitration as the law applicable to the arbitration agreement by default in the absence of a choice of law to govern it."*

(Emphasis added)

32. Subsequently, in *UniCredit Bank GmbH v RusChemAlliance LLC*,<sup>21</sup> the Supreme Court retreated from what it had previously said in paragraph 170(vi)(a) of *Enka Insaat*.<sup>22</sup> After reviewing additional authority, Lord Leggatt said:<sup>23</sup>

*"37. The language used in para 170(vi)(a) of the judgment in Enka was permissive rather than prescriptive. All that was said was that a provision of the law of the seat of the kind described "may" (not "must" or "will") "in some cases imply that the arbitration agreement was intended to be governed by the law of the seat". No attempt was made to suggest when,*

<sup>21</sup> *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30.

<sup>22</sup> The relevant passage is set out at paragraph 31 above.

<sup>23</sup> *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30, at paragraphs 37, 39 and 59.



*if at all, such an inference ought to be drawn. It was unnecessary to address that question on the facts of Enka.*

...

39. *The correct resolution, therefore, of the issue raised on this appeal does not lie in dissecting the particular verbal formulations used in the judgment in Enka but in examining the underlying reasoning. It is essential to understand, first of all, how the point reflected in the summary statement at para 170(vi)(a) of the judgment arose in the context of the arguments in that case.*

...

59. *... For the reasons given, even where the law of the seat contains a provision such as section 48 of the Swedish Arbitration Act, no inference can properly be drawn from a choice of seat that the arbitration agreement was intended to be governed by the law of the seat which is capable of displacing the general principles outlined in para 170(iv) and (v) of the judgment in Enka. What was said in para 170(vi)(a) should therefore in future be disregarded."*

(Emphasis added)

33. The upshot of the Supreme Court's reconsideration of the approach taken in paragraph 170(vi)(a) of the *Enka Insaat* judgment is that the principles set out in paragraph 170(iv) and (v) of *Enka Insaat* apply when determining the law of the arbitration agreement.<sup>24</sup> As a result, the choice of ADGM as the seat of the arbitration is not sufficient to displace the law governing the contract as the law of the Arbitration Agreement. Accordingly, the issue of whether or not the Arbitration Agreement was breached in a manner that renders it null and void, inoperative or incapable of being performed is to be determined by reference to the onshore law of the UAE. That removes the need in this case to consider the applicability or breadth of the principle discussed by Hamblen J in *BDMS*.<sup>25</sup>

(d) *Application of UAE law*

34. In its written submissions, A24 contended that the July 2023 decision of the Dubai Court of Cassation entitled it to proceed in a Court of competent jurisdiction if a party had not paid the requisite advance on costs. B24 disagreed with that approach and sought to rely on the decision of the General Panel of the Dubai Court of Cassation on 24 October 2023 ("the **October 2023 decision**")<sup>26</sup> which had been drawn to the parties' attention by the Court on 3 July 2025. Previously, B24 had advanced its case based on ADGM law.<sup>27</sup> The October 2023 decision overruled previous decisions of the onshore Court on this issue, including the July 2023 decision.

<sup>24</sup> Set out at paragraph 31 above.

<sup>25</sup> See paragraph 25.b above.

<sup>26</sup> *Dubai Court of Cassation, Appeal No. (10) of 2023 – General Panel Decisions*, 24 October 2023.

<sup>27</sup> See paragraph 25(b) above.



35. In its October 2023 decision, the General Panel of the Dubai Court of Cassation reviewed earlier decisions of the Court to determine whether, a “*decision of the Dubai International Arbitration Centre (DIAC) to close the case file due to non-payment of arbitration costs*” resulted in the lapse of the arbitration clause, on the grounds that the purpose of arbitration was deemed to have been extinguished due to the impossibility of proceeding with the arbitration.

36. In its July 2023 decision, the Dubai Court of Cassation had held:

*“It is established in this court’s jurisprudence that by agreeing to arbitration, the parties grant the arbitrator the authority to resolve the dispute instead of the competent court. The parties’ intent in an arbitration clause or agreement is limited to replacing the court with an arbitrator to adjudicate the dispute. Therefore, if the arbitration clause or agreement cannot be executed for any reason, the authority to rule on the dispute reverts to the competent court, as ordinary courts have general jurisdiction over all disputes. ... There is no obligation to submit the dispute again to the previous arbitrator or another arbitrator unless a new agreement is made.*

*Furthermore, it is also established that if the Dubai International Arbitration Centre issues a decision to close the arbitration case due to non-payment of arbitration costs, the arbitration clause is deemed void because the arbitration process becomes unfeasible. Consequently, the party has the right to resort to the court to pursue their claims.*

*...”*

37. In its October 2023 decision, the General Panel of the Court of Cassation undertook its reconsideration in light of the Federal Law No. (6) of 2018 (Federal Arbitration Law); particularly article 45, to which reference had not been made in the July 2023 decision. That provision stipulated that arbitration proceedings conclude with the issuance of a final award resolving the entire dispute. Further, as noted in the October 2023 decision, article 54(4) provides:

*“Unless the parties agree otherwise, the arbitration agreement remains valid in accordance with the provisions of this law even after the annulment of the arbitral award, unless the annulment is based on the absence of agreement itself, the expiration of its term, its invalidity, or its impossibility of enforcement”.*

38. Because the General Panel held the jurisdiction of competent courts was excluded even if the arbitral award was annulled, it concluded that its earlier decisions must be reversed. The Court concluded:

*“For these reasons, the General Panel of the Court of Cassation unanimously decided to overturn the previous judgments of the Court that held the arbitration clause lapses upon the issuance of DIAC’s decision to close the case file due to non-payment of arbitration costs. The Panel adopted the principle that the decision to cease proceedings and close the case file due to*





non-payment of arbitration costs, as long as no final arbitral award resolving the dispute has been issued, does not result in the lapse of the arbitration clause and does not imply a waiver of the arbitration clause. Consequently, neither party is prevented from re-submitting the case to DIAC, and either party may invoke the arbitration clause before the courts.”

(Emphasis added)

39. In my view, the October 2023 decision of the Court of Cassation in Dubai clarifies the way in which the jurisdictional question posed should be addressed under UAE law. I am persuaded that I should follow the October 2023 decision. As a result, the Jurisdiction Application (although not precisely framed) succeeds to the extent that B24 is entitled to an order that these proceedings be stayed pursuant to section 16(2) of the Arbitration Regulations.
40. Had it been necessary to consider B24’s alternative argument, that this Court, as a matter of discretion, should not exercise any jurisdiction, I would have rejected that contention. The argument was based on the false assumption that this Court should not exercise jurisdiction when a dispute involves questions of onshore law. There are two reasons why that proposition is flawed. First, as the published judgments of this Court confirm, the Court is well placed to determine disputes involving onshore law. Second, I agree with the conclusion reached by Justice Sir Andrew Smith in his judgment in *Union Properties PJSC and Anor v Trinkler & Partners Ltd and Ors* that the doctrine of *forum non conveniens* does not apply to a question about which Court within the UAE should determine a dispute<sup>28</sup>.

### Costs

41. Although B24 has partially succeeded on its application, I am not minded to award any costs in its favour. While it participated in the arbitration to the extent of appointing a co-arbitrator, it did not pay its share of the advance on the costs of arbitration and has offered no explanation as to why it took that stance. Nor has it given any assurance that, if the arbitration were recommenced, it would pay its share.

### Conclusion

42. For those reasons:
  - a. I declare and make an order that the proceedings be stayed pursuant to section 16(2) of the Arbitration Regulations.
  - b. I make no order as to costs in relation to the Jurisdiction Application.
  - c. Liberty to apply.
43. While the October 2023 decision of the Dubai Court of Cassation has persuaded me that the Jurisdiction Application succeeds to the extent that a stay is to be granted, that Court did not consider whether the position would be different if an arbitration were

<sup>28</sup> *Union Properties PJSC and Anor v Trinkler & Partners Ltd and Ors* [2025] ADGMCFI 0015, at paragraphs 19 and 20.



recommended and a defaulting party in the position of B24 persisted in its refusal to pay its share of the advance on costs. I express no view on that issue.



Issued by:

A handwritten signature in blue ink, appearing to read "Linda Fitz-Alan".

**Linda Fitz-Alan**  
**Registrar, ADGM Courts**  
**25 August 2025**