

The ADGMAC Arbitration Guidelines: An Overview

John Gaffney - Senior Counsel - Arbitration / Competition
- Abu Dhabi

Malak Nasreddine
m.nasreddine@tamimi.com - Abu Dhabi, UAE



Introduction

The Abu Dhabi Global Market Arbitration Centre ('ADGMAC') published its Arbitration Guidelines (the 'Guidelines') in September 2019. The Guidelines comprise a series of 'Modules', which offer a set of procedures that parties may utilise in ad hoc or institutional arbitral proceedings, in whole or in part (due to their modular nature), at any stage, and in any seat (subject to any local mandatory rules, of course). In this article, we review key aspects of each of the Modules.

Module 1: Written Submissions, Issues and Applications

The purpose of Module 1 is to ensure that the tribunal, the parties to the arbitration, and their counsel conduct the arbitration in an efficient and cost-effective manner. In summary, Module 1 provides that:

- parties should submit their written submissions in electronic format only;
- pleadings should be limited to a statement of claim, statement of defence and counterclaim, and reply to the statement of defence and counterclaim;
- reply submissions are to be limited to responding to points raised in the submission to which it responds – no new issues may be raised, unless the parties agree otherwise or with leave from the tribunal; and
- the tribunal may impose page limits on written submissions.

In addition, Module 1:

- encourages parties to agree on the list of issues (of fact and law) after the exchange of pleadings;
- enables the tribunal to bifurcate the arbitral proceedings where it considers that it is appropriate to do so, taking into consideration the circumstances of the dispute and potential cost and time saved; and
- sets out the procedure under which a party may request an order or direction from the tribunal at any stage of the arbitral proceedings.

Module 2: Fact Witness Evidence

The purpose of Module 2 is to provide tribunals, the parties to the arbitration, and their counsel with practical guidance relating to the submission of fact witness evidence in the arbitral proceeding, with a view to avoiding the wasted time and costs associated with the unnecessarily voluminous submission of factual evidence in arbitral proceedings.

Module 2:

- enables the tribunal to adopt procedural measures relating to fact witness evidence, as it considers appropriate, including whether it is necessary to give directions as to which issues should be dealt with by fact witness statements;
- requires each of the parties to identify the number of fact witnesses it intends to rely on, to itemise the specific issues that will be raised by the fact witnesses, to explain how the fact witnesses will materially assist the tribunal's adjudication of the dispute, and to provide an estimated page count of each fact witness statement;
- limits the parties' replies to fact witness statements only to responding to points raised in the fact witness statement to which it responds – no new issues may be raised, unless the parties agree otherwise or with express leave from the tribunal; and
- does not permit the parties to submit any further fact witness statements after the replies have been submitted, except in exceptional circumstances and only with the permission of the tribunal or by agreement of the parties.

In addition, Module 2:

- empowers the tribunal to exclude any fact witness from testifying at the evidentiary hearing on the basis that the testimony would not materially assist its determination of the specific issues under consideration at the evidentiary hearing to which the fact witness's evidence is said to be relevant; and
- enables the tribunal to decide whether it will take into account or give weight to the evidence of any fact witness who has submitted a witness statement but failed to testify at the evidentiary hearing.

Module 3: Expert Witness Evidence

The purpose of Module 3 is to provide tribunals, the parties to the arbitration, and their counsel with practical guidance relating to the submission of expert witness evidence, which aims to avoid the wasted time and costs associated with the unnecessarily voluminous submission of expert evidence in arbitral proceedings.

Module 3:

- enables the tribunal to adopt procedural measures relating to expert witness evidence, as it considers appropriate, including whether it is necessary to give directions as to which issues should be dealt with by expert witness statements;
- requires each party to identify the number of expert witnesses it intends to rely on, to itemise the specific issues that will be raised by the expert witnesses, to explain how the expert witnesses will

- materially assist the tribunal's adjudication of the dispute, and to provide an estimated page count of the expert witness statement;
- limits the parties' replies to the expert witness statements only to responding to points raised in the expert witness statement to which it responds – no new issues can be raised, unless with leave from the tribunal or by agreement of the parties; and
- does not permit the parties to submit any further expert witness statements after the replies have been submitted, except in exceptional circumstances and only with the permission of the tribunal or agreement of the parties.

In addition, Module 3 enables the tribunal to:

- set a time limit for the parties' respective experts to produce a joint statement setting out the areas of agreement and disagreement for each of the issues on which they have been instructed;
- order further expert joint statements where it considers that the submission of which would materially assist its cost-effective and timely adjudication of a claim or counterclaim, or defence thereto;
- appoint an independent expert to report to it on specific issues that are of a technical nature, in appropriate circumstances, and only after consultation with the parties;
- exclude any expert witness from testifying at the evidentiary hearing on the basis that the testimony would not materially assist its adjudication of specific issues; and/or
- decide whether it will take into account or give weight to the evidence of any expert witness who has submitted a witness statement but failed to testify at the evidentiary hearing.

Module 4: Documentary Evidence

The purpose of Module 4 is to provide the tribunal, the parties to the arbitration, and their counsel with practical guidance relating to the request and production of documents, with the aim of avoiding time-wasting and costs associated with the production of documents in arbitral proceedings. The Guidelines provide that document requests should be organised in a 'Redfern Schedule' format.

Module 4:

- enables the tribunal to adopt proportionate and cost-effective procedural measures relating to documentary evidence, as it considers appropriate, including whether or not to permit parties to submit document requests;
- permits the parties to apply to the tribunal for a direction permitting the service of document requests within a reasonable time after the service of the opposing party's written submission;
- in exceptional circumstances, also permits the parties to apply to the tribunal for permission to serve further document requests at a later stage of the proceedings; and/or
- obliges the party (to whom the document request is addressed) to produce all documents that are in its control, custody or possession, failing which the tribunal may impose appropriate sanctions.

Significantly, Module 4 does not allow parties to use the document requests' process as a method to point out evidentiary gaps in the other party's claim.

Module 5: Hearings

The purpose of Module 5 is to provide the tribunal, the parties to the arbitration, and their counsel with practical guidance relating to the procedural and evidentiary hearings in the arbitral proceeding, with the aim of ensuring that the hearings are conducted in a fair, efficient and cost-effective manner, having

regard to the complexity, value and significance of the issues in dispute.

Module 5:

- enables the tribunal to convene hearings for the purpose of: (a) determining procedural and organisational matters, i.e., case management conferences; and (b) hearing fact and expert witness evidence and oral submissions relating to the merits of the dispute or any jurisdictional challenges, i.e., merits or jurisdictional hearings;
- requires the tribunal to organise all case management conferences and merits hearings in a fair, efficient and cost-effective manner, having regard to the complexity, value and significance of the issues in dispute;
- encourages parties to convene case management conferences by telephone or by video-conference, unless the parties agree otherwise or the tribunal is reasonably satisfied that it is necessary and cost-effective for the parties to meet in person; and
- allows parties to apply to the tribunal for one or more of its fact or expert witnesses to attend a merits hearing by videoconference or telephone.

In addition, Module 5 stipulates:

- stringent timelines relating to the parties' preparations in advance of case management conferences;
- stringent timelines relating to the parties' preparations in advance of the merits' hearings;
- that all case management conferences and merits hearings are to be held in private.

Module 5 also encourages the parties to make use of an electronic document management system for merits' hearings, and minimise the use of hard-copy document bundles.

Finally, Module 5 provides that all documents, recordings, transcripts and other records of case management conferences and merits hearings are confidential.

Module 6: Counsel Conduct

The purpose of Module 6 is to promote procedural fairness between the parties by setting out the expected standards of the conduct of party representatives. Module 6 defines 'party representatives' as

"any person, including an employee of a party, who appears in an arbitration on behalf of a party and makes submissions, arguments or representations to the Tribunal on behalf of such Party (other than as a witness or expert), whether or not they hold a legal qualification or are admitted to practice law in any jurisdiction".

Module 6 prohibits party representatives from:

- communicating with the tribunal without communicating the same to every other party to the proceedings before or at the same time as the communication to the tribunal;
- knowingly or recklessly, making a false statement to the tribunal;
- knowingly assisting in the preparation of, or submitting, or making submissions based upon, any factual witness or expert evidence which the party representative knows is, or believes might be, false; or
- knowingly concealing, or advising a party to conceal, documents that the tribunal has ordered to be produced.

Where the party representative becomes aware of a document that should have been produced, but was not, the party representative must advise that party of its duty to produce that document and the

consequences of failing to do so. And where the party representative becomes aware that a document that should have been produced was destroyed, the party representative should inform the opposing party and the tribunal as soon as practicable explaining the circumstances of the document's destruction.

Module 6 sets out the process of complaints for a party representatives' breach of Module 6. A party, or the tribunal on its own initiative, may file a complaint against a party representative. The complaint must be accompanied by the proposed consequences of the breach. Where the tribunal decides to uphold a complaint, the Guidelines empower the tribunal to order any one or more sanctions including; (a) a written reprimand to the party representative; (b) a written caution as to the party representative's future conduct in the arbitration; (c) adverse inferences may be drawn when assessing the evidence relied upon, or legal submissions made, by the party representative; (d) an award of costs in relation to the conduct the subject of party representative's breach, against the party instructing the party representative; or (e) any other appropriate measure the tribunal considers necessary to preserve the fairness and integrity of the proceedings. The submission of an unwarranted complaint may itself constitute a breach of the Guidelines.

Commentary

As can be seen, the Guidelines provide parties and tribunals with a set of innovative best practice procedures to assist in bringing greater efficiency to the arbitral process, while endeavouring to ensure fairness, equality and due process. The Guidelines allow the parties and tribunals to adopt all, or some of the provisions in the Modules, in order to give greater structure to certain aspects of the arbitral process and better control time and costs of the proceedings. The Guidelines also have built-in flexibility and procedural safeguards, which enables parties to adapt the Guidelines to the unique circumstances of their dispute.

Al Tamimi & Company's Arbitration team regularly advises on arbitration-related matters. For further information, please contact [John Gaffney \(j.gaffney@tamimi.com\)](mailto:j.gaffney@tamimi.com).