

Amendments to the ADGM Founding Law: an overview

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

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

Fawzi Mashal
f.mashal@tamimi.com - DIFC, Dubai, UAE

Introduction

On 23 December 2020, the Abu Dhabi Global Market ('ADGM') amended the 2015 Arbitration Regulations (the 'Arbitration Regulations'). These sweeping updates follow an extensive review and public consultation process, with the Amended Regulations intending to reflect international best practice and promote the use of technology to increase efficiency and reduce cost. This article provides a summary of these and other key aspects of the Amended Regulations.

Summary of key aspects of the Amended Regulations

The ADGM Consultation Paper stated that the (then proposed) amendments were intended to "make [the Arbitration Regulations] more contemporary and aligned to international best practice". These areas include:

A. Mandatory and non-mandatory provisions

Section 9 is a new section that identifies (by reference to Schedule 2) the mandatory provisions in the Amended Regulations. These include:

- Section 11: the waiver and loss of right to object;
- Section 12: the extent of court intervention;
- Section 14: the provisions governing the form and the enforceability of the arbitration agreement;
- Section 16: the stay of legal proceedings, where an arbitration agreement exists;
- Section 20: the grounds for challenging an arbitrator's appointment;
- Section 24: the liability of the arbitrator, arbitral institution, appointing authority, and others;
- Section 31: the power of the ADGM Court to order interim measures;
- Section 58: the waiver of the right to bring an action for setting aside;
- Section 61: the recognition and enforcement of awards; and
- Section 62: the grounds for refusing recognition or enforcement.

At the same time, section 9 confirms that parties are able to make their own arrangements in relation to any non-mandatory provisions, including by way of agreeing a set of institutional rules.

B. Arbitration agreements

Section 14(2) has been amended to clarify that an arbitration agreement can be in writing without it being recorded in writing by the parties themselves. Parties who do not record their agreements in writing, may now agree to be bound by the agreement orally or by conduct. This provision does not override the requirement that the arbitration agreement itself must be in writing, therefore avoiding any enforcement issues in jurisdictions such as the UAE where arbitration agreements are only valid if in writing.

C. Asymmetric arbitration clauses

Section 14(6) is a new provision that codifies the English common law position in relation to asymmetrical dispute resolution option clauses. It confirms that, as a matter of ADGM law, these clauses are enforceable.

This amendment follows the recent case of *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd [2017] SGCA 32*, in which the Singapore Court of Appeal determined that, it is “immaterial” that an arbitration clause is asymmetric and that the arbitration of a future dispute is entirely optional (instead of imposing on parties an immediate obligation to arbitrate) when establishing the validity of the arbitration agreement.

D. Power of the court to order interim measures

Section 31 broadens the ADGM court’s powers to grant interim measures in support of non-ADGM seated arbitrations and against non-parties to the arbitration agreement. This change follows the English Court of Appeal Case *A and B v C, D and E [2020] EWCA Civ 409*, in which it was held that the English courts, by virtue of section 44(2)(a) of the English Arbitration Act, have jurisdiction to compel a non-party to an arbitration agreement (in an arbitration seated inside or outside England and Wales) to give evidence in support of the arbitration proceedings.

In presuming jurisdiction to grant interim measures in support of non-ADGM seated arbitrations and against non-parties to the arbitration agreement, conflicts of jurisdiction at an intra-UAE level may arise (notwithstanding the careful drafting of section 31). It thus remains to be seen how the granting of interim measures from the ADGM court will interact with the granting of interim measures from onshore courts in respect of UAE onshore arbitrations.

E. Promoting the Use of Technology

With the enormous impact exerted by the pandemic, the permissible use of technology in arbitration predominates; many arbitration rules have been amended to expressly allow proceedings to be conducted virtually. For example, Article 19.2 of the 2021 Dubai International Financial Centre-London Court of International Arbitration Rules (“DIFC-LCIA Rules”) provides that, “*a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology...*”.

The amended Regulations provide welcome clarification of, and indeed promote, the use of technology in arbitration in multiple circumstances. First, section 34(5) promotes the use of technology wherever possible to enhance the efficient and expeditious conduct of the arbitration. Seven technology-related solutions are included in section 34(5) which the arbitral tribunal shall consider using in appropriate cases; there is also an eighth catch-all category which relates to “*any other communication technology*” under section 43 of the Arbitration Regulations, as amended.

Second, section 35(5) permits meetings or hearings to take place in person or remotely using

communications technology in one or more geographical locations.

Third, section 55(4) has confirmed that an award signed by electronic means shall have the same legal validity and enforceability as an award that has been signed manually.

F. Disclosure of third party funding

The emergence of third party funding of international arbitration in the region has prompted the ADGM to regulate this area. Section 37(1) aims at ensuring the efficient and expeditious conduct of the arbitration by avoiding any conflicts of interests by requiring parties to notify the arbitral tribunal and all other parties to the proceedings of the existence of any third-party funding agreement and the identity of the funder.

G. Summary disposal of claims, counterclaims and defences

Unless otherwise agreed, a party may now apply to the arbitral tribunal in writing for the summary disposal of a part or the whole of a claim, counterclaim or defence on the basis that any other party has no real prospect of success in respect of the respective part or whole of the claim, counterclaim or defence. The arbitral tribunal shall, in its full discretion, decide whether to allow the application to proceed.

A similar approach has been adopted by many arbitral institutions such as, the Singapore International Arbitration Centre ('SIAC') (Rule 29 of the SIAC Rules 2016) and the Stockholm Chamber of Commerce ('SCC') (Rule 39 of the SCC Arbitration Rules of 2017). In its guidance note, the International Chamber of Commerce ('ICC') has also stated that Rule 22(1) of the 2017 ICC Rules (which is identical to Rule 22(1) of the 2021 ICC Rules) offers the same effect in regards to 'early dismissal' of claims.

H. Promoting fairness and transparency

The amended Regulations promote procedural fairness between the parties by setting out the expected standards of good conduct of party representatives (section 44). For example, representatives shall "*not engage in activities intended to obstruct or delay the arbitral proceedings, jeopardise the integrity of the proceedings or the finality of any award*" (section 44(1)(a)).

In tandem with the above, in an effort to remove any uncertainty regarding the definition of "costs", section 55(6) of the amended Regulations expressly includes the costs of party-appointed experts and technology solutions in the definition of "costs" to remove any doubt about these items. Further, the overriding principles of reasonableness and proportionality in relation to costs are now acknowledged.

I. ADGM is not a "conduit" jurisdiction

The amended Regulations confirm that the ADGM cannot be used as a 'conduit route' for the enforcement of non-ADGM judgments and awards rendered in other jurisdictions (save for judgments rendered by other courts in the Emirate of Abu Dhabi) (section 61(5)).

In essence, this amendment prevents parties using the ADGM Courts to bypass the enforcement procedures of other jurisdictions in which enforcement ought properly to be sought.

J. Confirmation of ADGM as an 'opt-in' jurisdiction

The amended Regulations confirm the self-evident position of the ADGM as an 'opt-in' jurisdiction for arbitration; parties need only to agree in writing, either before (i.e. in their arbitration agreement) or after the dispute has arisen.

K. Determination of procedure

The amended Regulations also clarify that parties can adopt the ADGM Arbitration Centre Guidelines ('ADGM Guidelines') to their proceedings under section 34(2). This instils confidence that the ADGM Guidelines, operate, and not compete, alongside any applicable arbitration laws or institutional rules.

Conclusion

The amended Regulations have brought welcome clarity to several aspects of ADGM's dispute resolution framework, including the scope of arbitration agreements in writing, promoting the use of technology in real terms to enhance the efficient and expeditious conduct of the arbitration and the ADGM Court's power to grant interim measures in support of non-ADGM seated arbitrations and against non-parties to the arbitration agreement.

The amendments will provide clarity and certainty to legal practitioners and parties wishing to resolve their disputes in the ADGM. Indeed, the amendments allow the ADGM to take the lead in enacting one of the most modern and progressive arbitration laws in the Middle East, and to reinforce its position as a leading arbitral centre in the region.

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