

The Arbitral Jurisdiction of The ADGM: How Far Does It Reach ... Really?

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Introduction

There have, more recently, been a number of views on the proper scope of the jurisdiction of the Abu Dhabi Global Market (“**ADGM**”) as an arbitral seat. According to one view, there are no limitations to the scope of arbitration in the ADGM, according to another, more cautious view, arbitration in the ADGM requires an ADGM nexus. Ultimately, it will be for the legislature and/or the competent courts to determine the question of the true scope of the ADGM's arbitral jurisdiction. At the time of writing, there is no ADGM-specific case law precedent that would answer that question one way or the other, that would confirm a wide or a narrow reading of the scope of the ADGM's arbitral jurisdiction. To the contrary, existing legislation would suggest a narrower reading. That, of course, does not mean that a wider reading may not be ordained in further course, but for now, there are certain limitations to a wider reading that cannot be overcome by simple disregard.

The ADGM and the ADGM Arbitration Regulations

ADGM designates the financial free zone established by the Ruler of Abu Dhabi in 2013. The ADGM takes, to a considerable extent, after the earlier Dubai International Financial Centre (the “**DIFC**”), which is the financial free zone established by Ruler of Dubai in the Emirate of the Dubai in 2004. Like the DIFC, the ADGM is a judicial free zone, with its own, autonomous common law courts and a body of substantive laws that is adopted wholesale from English statute (albeit that the DIFC takes a more customized approach, having drafted its own body of substantive laws and relying on English law and the laws of other common law jurisdictions as a fallback only).

Importantly, both the ADGM and the DIFC have their own arbitration laws and as such each qualifies as a seat of arbitration in its own right. The ADGM more specifically has adopted the 2015 ADGM Arbitration Regulations (the “**ADGM Arbitration Regulations**”), which govern arbitrations seated in the ADGM. The ADGM Courts, in turn, serve as the curial courts in ADGM-seated arbitrations.

The ADGM Founding Law

The ADGM Arbitration Regulations operate within the legal framework of the ADGM, which, in turn, is

subject to its founding law, Law No. (4) of 2013 concerning Abu Dhabi Global Market (the “ADGM Founding Law”). Powers that are not enabled by the ADGM Founding Law cannot come to bear further down in the legislative hierarchy. Similarly, limitations on such powers carry through to the body of secondary legislation, of which the ADGM Arbitration Regulations form a part.

The ADGM Arbitration Regulations, based as they are on the UNCITRAL Model Law, might, on their face, support a wide reading of the scope of the ADGM’s arbitral jurisdiction. However, this does not mean that there might not be inherent limitations in the ADGM’s Founding Law that prevent the ADGM Arbitration Regulations from developing their full potential in establishing the ADGM as an unencumbered seat.

Articles 13(6)-(7) of the ADGM Founding Law

Such inherent limitations reside in Articles 13(6)-(7) of the ADGM Founding Law, which provide in pertinent part as follows:

“6. The [ADGM or Global Market] Court of First Instance shall **solely** consider and decide on matters relating to the activities of the Global Market according to the following:

- **Civil or commercial cases and disputes involving the Global Market or any of the Global Market’s Authorities or any of the Global Market’s Establishments;**
- **Lawsuits and civil or commercial disputes arising out of or relating to a contract or a transaction conducted in whole or in part in the Global Market or to an incident that occurred in the Global Market;**

• [...]

- Any request which the Global Market Courts has the jurisdiction to consider under the Global Market Regulations.

7. Notwithstanding the provisions of paragraph (6) of this Article, the parties in relation to the issues specified in the first and second paragraphs may agree in their commercial contracts and transactions to the jurisdiction of any court other than the Global Market Court of First Instance or agree to refer their disputes to arbitration.”
(my emphasis)

A plain reading of the preceding Articles suggests that under the ADGM Founding Law, arbitration in the ADGM is limited to disputes with an ADGM nexus. Article 13(7) makes strict reference to the first and second paragraphs of Article 13(6) as the limits within which parties may agree to resort to arbitration in the ADGM. More specifically, only the disputes that are listed at those paragraphs, each of which has a nexus with the ADGM, may be referred to arbitration. In other words, referrals to arbitration of disputes that fall outside this scope, *i.e.*, those without any ADGM nexus, will be unenforceable. Importantly, the fourth paragraph, which might have allowed for a wider reading, is excluded from the reference to arbitration under Article 13(7).

The Limited Scope of ADGM Arbitration Agreements

It is against this background that I have repeatedly – and entirely correctly to my mind (subject to an unfortunate footnote correction in the terms set out below) – commented on the scope of arbitration in the ADGM in the following terms, distinguishing it from the wider scope of arbitration in the DIFC:

Importantly, the scope of arbitration in the ADGM is much more limited than arbitration in the DIFC. Unlike the case in the DIFC, future arbitrants cannot contract into the resolution by arbitration of any disputes in the ADGM: arbitrating in the ADGM requires a subject-matter nexus to the ADGM. This essentially means that arbitration in the ADGM is limited to (i) the resolution of civil or commercial disputes involving the ADGM or any ADGM stakeholders (i.e. ADGM authorities or establishments) or to (ii) the resolution of disputes arising out of a contract or a transaction conducted in whole or in part in the ADGM or out of an incident that occurred in the ADGM [fn: See Arts 6-7, Law No. (4) of 2013. [This footnote hereby stands corrected to make reference to Art. 13(6) – 13(7).]] As a consequence, DIFC arbitration remains an attractive option for all those that wish to arbitrate in a common law environment in the Middle East. That said, the scope of arbitration in the ADGM is likely to expand as the ADGM is settling in and establishing itself as a new jurisdiction within the UAE.

The footnoted reference to Articles 13(6) and 13(7) is, of course, key and imports the limitation of arbitration agreements in the terms set out at Article 13(7) read together with Article 13(6) of the ADGM Founding Law. It must not be forgotten that the ADGM Founding Law was adopted by the Ruler of Abu Dhabi and as such its provisions trump those of the ADGM Arbitration Regulations, which have been adopted by the ADGM Board of Directors. The ADGM Board of Directors derives its legislative powers from the ADGM Founding Law, Article 6(1) of which authorizes the Board of Directors to “issue the Global Market Regulations relating to the organization of its work and the achievement of its objectives”. The exercise of that power must be subject to any limitations imposed by the ADGM Founding Law, such as the limitation of arbitration agreements contained in Article 13(7).

That limitation is not lifted by the wide definition of “seat” in the terms of Article 33 of the ADGM Arbitration Regulations. This is because, as stated above, the ADGM Arbitration Regulations are, in terms of the legislative hierarchy, inferior to the ADGM Founding Law and as such subject to the limitations contained at Article 13(7). For the same reason, Article 32(3) of the ADGM Arbitration Regulations on the tribunal’s power to award security for costs cannot displace the limitation contained at Article 13(7). In any event, Article 32(3) can perfectly well find application in a situation where the respondent party does have an ADGM nexus (for the avoidance of doubt, the limitation under Article 13(7) does not require both parties to have an ADGM nexus: In actual fact, Article 13(7) would even be satisfied where the underlying transaction has an ADGM nexus albeit that both parties are from outside the ADGM). Finally, the widening of the jurisdiction of the ADGM Courts on the basis of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 as amended by Regulation No 1 of 2018 (the “**ADGM Court Regulations**”) is clearly limited to the ADGM Courts: Not only do the ADGM Court Regulations not refer to arbitration, but the Board of Directors is simply not empowered to go beyond the limits of Article 13(7) of the ADGM Founding Law. Hence, arbitration agreements are required to have an ADGM nexus in the terms of the first and second paragraphs of Article 13(6) of the ADGM Founding Law. For the avoidance of doubt, the fourth paragraph of Article 13(6) does open up the Board of Directors’ legislative power to widen the jurisdiction of the ADGM Court of First Instance through the adoption of Global Market Regulations, such as it did through the ADGM Court Regulations. No such power, however, is provided by in the ADGM Founding Law with respect to arbitration.

In addition, not to pay heed to the wording contained in Article 13(6) would simply deprive Article

13(7) of all meaning: Why would it otherwise make express reference to arbitration in the first place?

Conclusion

How far then does the arbitral jurisdiction of the ADGM really reach? Well, maybe not far enough, but it is what it is. To say the least, awards of tribunals that disregard the limitation to disputes with an ADGM-nexus might face challenges under the ADGM Arbitration Regulations, *e.g.* under Article 53(2)(ii) (the invalidity of the arbitration agreement).

In any event and for the avoidance of doubt, arbitration in the ADGM would certainly be off to a more promising start if it were not inherently limited by Article 13(7) the way it presently is. To remove this limitation, it will be necessary to call on the ADGM legislator, *i.e.*, the Ruler of Abu Dhabi, which will not necessary be a quick fix, but hopefully a fix after all.