

Kluwer Arbitration Blog

Amendment No. 1 of 2020: The 2015 ADGM Arbitration Regulations in Focus

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The 2015 Arbitration Regulations of the Abu Dhabi Global Market (“**ADGM**”), the Abu Dhabi-based financial free zone, (the “**2015 ADGM Arbitration Regulations**”) (consolidated text The Amendment focuses on a number of areas to enhance the efficient operation of the 2015 ADGM Arbitration Regulations, including in particular a clarification of the scope of an arbitration agreement under the Regulations, the ADGM Courts’ powers to grant interim measures, the pervasive use of technology throughout the arbitration process, the summary disposal of claims, counterclaims and defenses, the imposition of certain disclosure requirements with respect to third-party funding, and the regulation of party and party representative conduct.

In the following, this blog addresses each of these and other amendments together with their respective objectives in an attempt to provide some initial guidance. In doing so, it takes account of [Consultation Paper No. 8 of 2020](#) – Proposed Amendments to the ADGM Arbitration Regulations 2015, dated 25 November 2020 (the “**Consultation Paper**”), which was circulated to inform and assist the public consultation process initiated by the ADGM before adoption of the amended Regulations. The Consultation Paper explains the rationale behind a number of the proposals that were ultimately adopted through the Amendment.

The scope of the arbitration agreement

Inspired by Section 5 of the 1996 English Arbitration Act, Section 14(2) of the Regulations as amended. allows arbitration agreements to qualify as having been made in writing if their recording in written form is by a(n) (authorised) third party as opposed to the contracting party that is subject to the obligation to arbitrate itself. As a corollary, Section 14(2) also expressly recognises the formation of arbitration agreements that are in writing but have not been signed orally or by conduct. This is intended to facilitate the conclusion of binding arbitration obligations arising from bills of lading that provide for arbitration or from articles of association that provide for arbitration in shareholder disputes (see Consultation Paper, at para. 12).

A new Section 14(6) expressly recognizes the enforceability of unilateral arbitration options under the Regulations as amended: “*An arbitration agreement giving any party a unilateral or asymmetrical right to refer a dispute either to an arbitral tribunal or a court does not contravene these Regulations and shall not be rendered invalid for that reason.*” This helpfully clarifies the

position under the Regulations on a subject that remains unclear in onshore UAE arbitration albeit that unilateral options to resort to court rather than arbitration have been found enforceable onshore (see Case No. 116/2018, ruling of the Dubai Court of Cassation of 16 September 2018).

The ADGM Courts' powers to grant interim measures

A new Section 29 confers upon the ADGM Courts the power to order a claimant to provide security for the costs of the arbitration irrespective of the claimant's place of residency or incorporation, even if outside the ADGM.

Amended Section 31 has been significantly broadened in its application and now empowers the ADGM Courts to adopt "*any interim measure in relation to arbitration proceedings as [they] ha[ve] in relation to proceedings in the Court*" (see Section 31(2), amended Regulations), reflecting corresponding powers of the DIFC Courts in DIFC-seated arbitrations under the 2008 DIFC Arbitration Law. In addition, Section 31(3) now relieves the ADGM Courts' power to award interim relief from any geographic nexus to the ADGM in circumstances where the seat of arbitration is outside the ADGM (other than the location of the subject of the relief being in the ADGM). In addition, it expressly empowers the ADGM Courts to adopt interim measures against third parties, i.e., non-parties to the underlying arbitration agreement. This will facilitate the Courts' role in providing interim relief outside a strictly curial context and – taking guidance from recent case law precedent of the English Court of Appeal in *A v. C.* [2020] EWCA Civ. 409 (see Consultation Paper, at para. 16) – the production of third-party witness evidence by non-parties in an ADGM-seated arbitration. *Ex parte* applications for interim relief by parties and non-parties alike are permissible in cases of urgency only (see Regulations as amended, Section 31(4) and (5)).

Finally, an amended Section 48(1) now provides for a non-exhaustive list of self-explanatory measures that may be adopted by the ADGM Courts to lend assistance in the taking of evidence:

- the examination of witnesses, either orally or in writing;
- the production of documents;
- the inspection, photographing, recording, preservation, custody or detention of any property; and
- the taking of samples of any property and the carrying out of any experiment on or with any property.

Procedural rules

In an endeavour to assist in the fair and efficient procedural conduct of the arbitration, a new Section 34(2) expressly authorises the adoption – in whole or in part – of the [ADGM Arbitration Centre Arbitration Guidelines](#). These entered into force in September 2019 with the objective to "*provide parties and tribunals with a set of innovative best practice procedures to assist in bringing greater certainty and efficiency to the arbitral process, while ensuring fairness, equality and due process*" (see Introduction to the Guidelines).

The use of technology

A new Section 34(5) introduces seven “*technology-related solutions*” (see Consultation Paper, at para. 19) that facilitate the remote procedural conduct of an ADGM-seated arbitration:

- the submission, exchange or communication of documents by electronic means;
- the use of electronic signatures for documents submitted, exchanged or communicated;
- documents being provided in electronic searchable form;
- the use of an electronic document review system for disclosure or document production;
- the use of an electronic document management system for hearings;
- the use of an online case management platform; and
- conducting hearings, in whole or in part, by video conference, telephone or other communication technology;

Section 34(5) also offers a residual solution which leaves it to an ADGM tribunal to identify any other suitable technological measures for the expeditious and efficient conduct of the arbitration. Helpful guidance is also provided by the Consultation Paper, which states that “*the technology-related solutions set out in section 34(5) are not mandatory as the tribunal retains a broad discretion as to whether they are appropriate to use in any particular case*” and that “[t]he seven solutions are also not exclusive, as there is an eighth catch-all category which relates to any other technology that will enhance the efficient and expeditious conduct of the arbitration” (see Consultation Paper, at para. 21).

Further, a new Section 35(5) confirms that arbitration under the Regulations may be conducted at any venue by electronic means, “*in whole or in part, in person or by video conference, telephone or other communications technology (or any combination thereof) in one or more geographical places.*” This creates an opportunity for the remote hearing of the parties’ legal pleadings and for remote oral testimony tendered by both fact and expert witnesses (see Section 35(4), amended Regulations). In similar terms, Section 43, which deals with the conduct of hearings and the written proceedings in ADGM arbitration, has been amended to reflect the permitted use of technology throughout: hearings may hence be held “[...] *in whole or in part, in person, by video conference, telephone or other communication technology*” (see Regulations as amended, Section 43(2)), a party having liberty to apply for the hearing of expert or fact witnesses in the same manner (see Regulations as amended, Section 43(3)); legal pleadings together with evidence may be “*supplied or communicated electronically*” (see Regulations as amended, Section 43(6)).

Finally, the Regulations as amended provide that an award is deemed made at the seat of the arbitration even if “*signed by electronic means*” (see Regulations as amended, Section 55(3)) and that “[a]n award signed by electronic means shall have the same legal validity and enforceability and constitute the original award for the purposes of section 61(2)(a) of these Regulations [i.e., for enforcement purposes], as an award with manually executed signatures of arbitral tribunal” (see amended Section 55(4)), with a soft copy of the award being delivered to a party upon issuance, subject to delivery of an original hard copy upon party request (see amended Section 55(5)). Amended Section 55(6) also expressly includes within the term of (recoverable) “cost of the arbitration” “*other costs for the conduct of the arbitration, including those for [...] technological solutions such as electronic document management and virtual hearing platforms [...]*” (see amended Section 55(6)(e)).

To be sure, the pervasive use of technology throughout the arbitration process under the amended Regulations follows recent trends in favour of digitalization prompted by the currently pending pandemic across the arbitration industry. That said, it bears mentioning that the regime for the

treatment of electronic awards and the digitalization of the arbitration process is by far the most comprehensive and advanced in any arbitration law to date. As explained by the Consultation Paper, “*technology-related solutions are part of ADGM’s arbitration DNA*” (see Consultation Paper, at para. 20).

Seat of arbitration

Following the wording of Art. 14(b) of the ADGM Founding Law as amended (see <https://arbitrationblog.kluwerarbitration.com/2020/10/07/adgm-courts-not-open-for-business-as-a-conduit-jurisdiction/>), a new Section 35(2) disassociates the application of the Regulations from an ADGM-nexus requirement other than the seat of the arbitration being the ADGM. This finally settles the debate on the proper scope of application of the 2015 ADGM Arbitration Regulations in favour of their application absent any geographic nexus to the ADGM other than the seat of the arbitration (see my prior post on the topic [here](#)).

Disclosure and third-party funding

Following contemporary trends in international arbitration more generally, a new Section 37 requires a party to disclose to the tribunal and the other parties in the arbitration third-party funding arrangements and the identity of any third-party funder in order, inter alia, to avoid conflicts of interest.

Summary dismissal

A new Section 42 introduces a regime for the early summary disposal of claims, counterclaims and defence in whole or in part on the basis that there is “*no real prospect of success in respect of the relevant part or whole of the claim, counterclaim or defence*” (Section 42(1), amended Regulations). It bears mentioning that the Consultation Paper also expressly envisages a summary disposal on the basis that the tribunal “*manifestly*” lacks jurisdiction (referred to as the “jurisdiction limb”) in addition to the “merits limb” (see Consultation Paper, at para. 27) albeit that the jurisdictional limb is in any event dealt with in detail under Chapter 4 of the 2015 ADGM Arbitration Regulations (“*Jurisdiction of arbitral tribunal*”). Importantly, in order to preserve the efficiency of the arbitral process, the summary disposal procedure is at the tribunal’s “*full discretion*” following consultation with the parties albeit that the tribunal’s summary determination must be in the form of an award, thus making it enforceable before the competent courts (see Section 42(2) and (3), amended Regulations).

Tribunal-appointed expert

New Subsections 47(4) and (5) require the communication of a Tribunal-appointed expert report upon which tribunal relies in its decision to the parties but allows this to be done electronically unless otherwise agreed by the parties.

Party and party representative conduct

A new Section 44 regulates party and party representative conduct in the arbitration, providing for a sanctioning mechanism in the event of non-compliance. This regime is closely modeled on Module 6 of the ADGM Arbitration Centre Arbitration Guidelines.

Recognition and enforcement

Apart from the comments of relevance made with respect to the use of technology above, amended Section 61(2) dispenses with the requirement to submit an original or certified copy of the arbitration agreement in favour of a simple copy (to accommodate the unintended loss by a party of that agreement in its original). Amended Section 61(5) makes that Section expressly subject to Art. 13 of the ADGM Founding Law as amended, which in turn prohibits the operation of the ADGM Courts as a conduit (see more on this topic [here](#)).

Conclusion

The majority of the amendments introduced by Amendment No. 1 of 2020 aim at rendering arbitrations seated in the ADGM more efficient and effective. These will, no doubt, increase the attractiveness of ADGM-seated arbitrations amongst arbitration users both regionally and internationally and promote the use of free zone arbitration domestically and further afield.

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