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Arbitration in the Abu Dhabi Global Market: Ready, Steady, Go …!

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In a recent long-anticipated move, the Emirate of Abu Dhabi has finally expanded its own arbitration offering by adding a further arbitration facility in the Abu Dhabi Global Market (ADGM). More specifically, on 17 December 2015, the Board of Directors of the ADGM enacted the so-called ADGM Arbitration Regulations 2015, following an initial consultation process, which completed in December 2015 (see ADGM Consultation Paper No. 12 of 2015 dated 14 October 2015, available online at https://www.adgm.com/doing-business/adgm-legal-framework/public-consultations/2015/consultation-paper-no-12/). The Regulations are modeled on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the "UNCITRAL Model Law") and as such seek to implement best international arbitration practice and procedure. As a result, contracting parties may now choose to seat their arbitration in the ADGM and as such submit it to the ADGM Arbitration Regulations 2015 as the governing curial law. The ADGM is a free zone established by decree of the Ruler of Abu Dhabi in 2013 (see Abu Dhabi Law No. (4) of 2013 Concerning Abu Dhabi Global Market) and operates its own self-contained legal system. The ADGM legal system comprises two courts, the ADGM Court of First Instance and the ADGM Court of Appeal. Both are composed of an arbitration-friendly judiciary of common law provenance (including Lord Hope of Craighead KT as the Chief Justice; and Lord Saville of Newdigate PC, The Hon. Kenneth Hayne AC, Sir Peter Blanchard KZNM and William Stone SBS QC as judges). The ADGM Arbitration Regulations 2015 create an alternative to arbitrations seated in onshore or mainland Abu Dhabi, which are governed by Chapter 3 of Federal Law No. 11 of 1992 on Civil Procedures (the "UAE Arbitration Chapter"). Arbitration in mainland Abu Dhabi is frequently supervised by the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC), which introduced a new set of institutional rules modeled on the ICC and LCIA Rules of Arbitration in 2013 (see my previous reporting here).

By offering a choice of offshore arbitration under the ADGM Arbitration Regulations 2015, the ADGM enters into direct competition with the Dubai International Financial Centre (DIFC), the Dubai-based financial free zone, which has been promoting itself as a seat of arbitration for arbitral proceedings under the DIFC Arbitration Law (see DIFC Law No. 1 of 2008 as amended), equally based on the UNCITRAL Model Law, since 2008 and which hosts its own arbitration centre, the DIFC-LCIA, a sister organisation of the London-based London Court of International Arbitration. As most readers will be aware, the DIFC, like the more recent ADGM, boasts its own common law legal system and courts, both modeled on England and Wales, and allows parties to arbitrate in a common law environment, with the arbitration-friendly DIFC Courts assisting the arbitral process

in their capacity as curial and supervisory courts. Despite the conceptual similarities between the DIFC and the ADGM, the ADGM presently lacks an arbitration institution in its own right and whereas the DIFC has created its own separate body of substantive laws (English being only a default option in the event of conflict or deficiencies), the ADGM has adopted English common law and an entire list of English statutes by reference (essentially turning the ADGM into a little England and Wales nestled in the midst of the Middle East!) (see the Application of English Law Regulations 2015). For institutional arbitration in the ADGM, parties will have to contract into the application of an eligible set of institutional rules, whether of local (e.g., the ADCCAC Rules) or international (e.g. the ICC Rules) origin. Otherwise, the arbitral proceedings will be ad hoc but as such may, of course, benefit from the adoption of the UNCITRAL Rules of Arbitration on a case-by-case basis.

This being said, the ADGM Arbitration Regulations 2015 on their own may well operate to the satisfaction of the arbitrating parties given that they contain sufficient procedural detail to avoid any major difficulties in commencing the arbitration process and any irretrievable breakdown once that process is afoot. Further reassurance is provided by English being the official drafting and prevailing interpretive language of the Regulations. Any future users may wish to note the following main features of the ADGM Arbitration Regulations (the bracketed references being to articles of the ADGM Arbitration Regulations 2015):

• The Regulations recognise the consensual foundation of arbitration and hence give full force to the concept of party autonomy by leaving it to the contracting parties to determine the course of the arbitral process; the parties are hence free to agree upon e.g. (i) the constitution of the tribunal (see Arts 17 et seq.); (ii) the procedure for challenging an arbitrator (see Art. 20); (iii) the seat and language of the arbitration (see Arts 33 and 37); the determination of the rules of procedure (see Art. 32); and (iv) the choice of the governing law on the merits (see Art. 44).

• Curial court intervention is kept to a minimum, supporting the unobstructed course of the arbitral process and facilitating the enforcement of a resultant award (see Arts 11-12), including in particular (i) the default-appointment of the tribunal and/or a substitute arbitrator (see Arts 18 et seq.); (ii) the determination of a preliminary point of jurisdiction (see Art. 26); (iii) a power to order interim measures in support of the arbitration (see Art. 29); and (iv) assistance in taking evidence (see Art. 43). Given the pro-arbitration origin of the ADGM judiciary, it is to be expected that the ADGM courts' supportive and supervisory powers will be exercised in favorem arbitrandi.

• The Regulations accept the admissibility of both contractual and tortious claims to arbitration (see Art. 13(1)); to some extent, this answers in the affirmative the controversial questions around the arbitrability of tortious claims under the UAE Arbitration Chapter.

• The in-writing requirement of an arbitration agreement within the meaning of the Regulations is satisfied by (i) an electronic exchange of correspondence (see Art. 13(2)-(3)); (ii) an exchange of a statement of claim and a statement of defense in the absence of any jurisdictional objections from either claimant or defendant as to the existence of an arbitration agreement (see Art. 13(4)); or through (iii) incorporation by reference (see Art. 13(5)).

• The Regulations recognise the separability of the arbitration agreement (see Art. 14) and the *kompetenz-kompetenz* of the arbitration tribunal, i.e. the tribunal's power to determine its proper constitution and its own jurisdiction (see Arts 24 et seq.).

• The Regulations provide for detailed procedural rules that will ensure the timely constitution of the arbitration tribunal in the event that the parties fail to agree (see Arts 17 et seq.).

• The Regulations exempt the main stakeholders, including the arbitrator, from liability for any act or omission except where shown to have committed the act or omission *"by conscious or deliberate wrongdoing"* (see Art. 23).

• The Regulations confer a power upon the tribunal to award interim measures (essentially on a balance of convenience test) (see Art. 27).

• The Regulations stipulate the strict privacy and confidentiality of the arbitral proceedings from start to finish, including the resultant award (bar the usual exception on grounds of mandatory legal requirements etc.) (see Arts 30 and 40).

• The Regulations contain specific provisions on the potential consolidation of parallel arbitral proceedings and the joinder of additional parties (see Arts 35-36).

• Default of a party, e.g. failure to attend a hearing or make a (timely or any) submission, will not stall the arbitration proceedings and/or prevent the issuance of an award (see Art. 41).

• The Regulations empower the tribunal (i) to determine the substantive law applicable to the dispute where the parties do not agree, always *"tak[ing] account of trade usages"* (see Art. 44), and (ii) to award any remedies available under the governing law on the merits (unless otherwise agreed by the parties), including the power to order specific performance (see Art. 46). The tribunal also has the power (iii) to award interest (both simple and compound) (see Art. 47), thus removing any concerns over the availability of compound interest under e.g. UAE law, and (iv) to award party costs in the arbitration, thus addressing concerns that under a number of local arbitration rules (e.g. the DIAC Rules), party costs may not be awarded without a specific power expressly conferred by the parties to that effect (see Art. 50(5); and my previous reporting on the irrecoverability of party costs under the DIAC Rules here).

• The Regulations finally contain detailed provisions on recourse against and the recognition and enforcement of a resultant award (see Arts 53 et seq.). The grounds for nullification and refusal to enforce essentially echo those of the New York Convention (on the recognition and enforcement of foreign arbitral awards 1958) and are thus restrictive in content and scope. Importantly, nullification or refusal to enforce on the basis of public policy is to be understood as public policy in the terms prevailing in the UAE (see Arts 53(2)(b)(ii) and 57(1)(b)(ii)). Under the Regulations, the parties may waive the right to bring a nullification action (see Art. 54).

It is to be hoped that the ADGM Arbitration Regulations 2015 will be warmly received by investors in the market. An initial review confirms that the Regulations promulgate best international standards and as such have a potential to become a leading arbitration law for application in the UAE and beyond. The Regulations are a strong and serious contender for the DIFC Arbitration Law and it remains to be seen which one of the two will ultimately emerge as the more successful. Suffice it to say that the DIFC legal system is presently better equipped than the ADGM to deal with e.g. the enforcement of international arbitral awards, benefitting in particular from the co-operation between the DIFC and Dubai courts, which is facilitated by the regime of mutual recognition in place between the two (see the Judicial Authority Law as amended). This being said, there can be little doubt that the ADGM (Courts) will seek to replicate whatever advantageous measures have been put in place by the DIFC (Courts) to succeed in the endeavour to

serve as an offshore jurisdiction within a civil law ocean (see in this context e.g. DIFC Court Practice Direction 2 of 2015 and my previous reporting here). This being said, initial impressions seem to indicate that the ADGM, its courts and the recent ADGM Arbitration Regulations 2015 have all been off to a good start!

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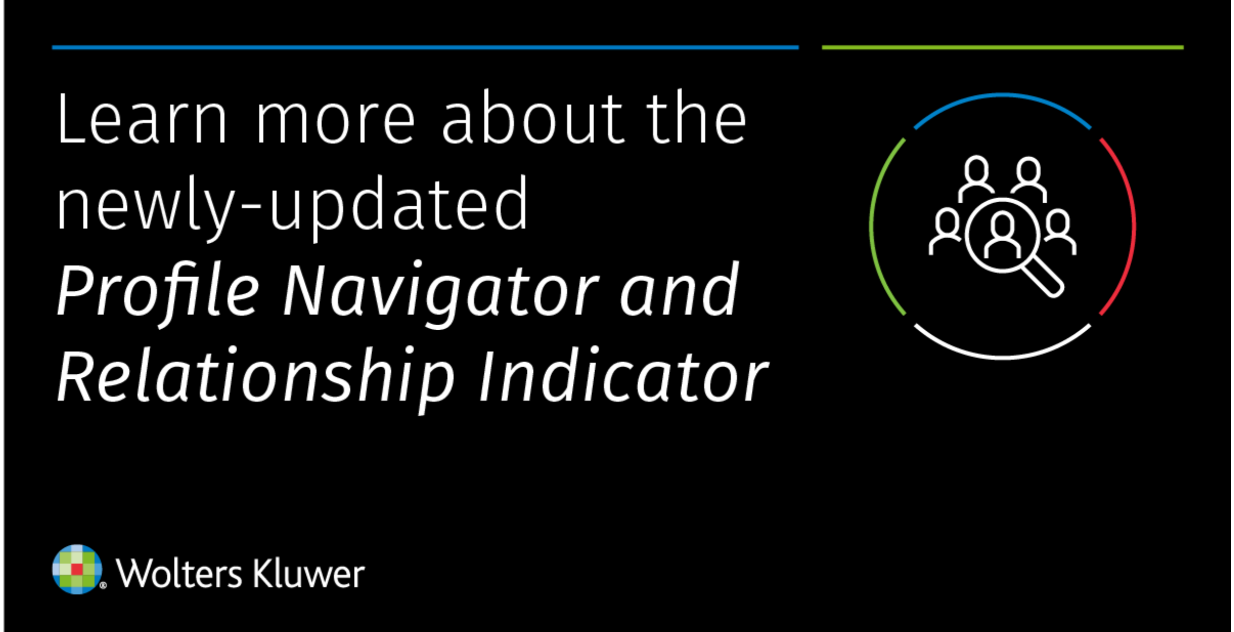

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