

Kluwer Arbitration Blog

Arbitrating in the ADGM: Some further thoughts and considerations

Gordon Blanke (Blanke Arbitration LLC) · Thursday, March 10th, 2016

In a blog earlier this year (see [here](#)), I reported on the emergence of the Abu Dhabi Global Market, in shorthand ADGM, as a free zone seat of arbitration in its own right, offering a viable alternative to seating an arbitration in the Dubai International Financial Centre (DIFC). To recap, choice of the ADGM as a seat of arbitration will prompt the application of the ADGM Arbitration Regulations 2015 as the procedural law of the arbitration and trigger the role of the ADGM Courts as the curial courts, choice of the DIFC, by contrast, will prompt curial assistance from the DIFC Courts and invite the application of the DIFC Arbitration Law. To the extent that both the DIFC and the ADGM are based on the common law tradition, taking inspiration from the English legal system, and possess stand-alone arbitration laws that are both modeled on the UNCITRAL Model Law (on International Commercial Arbitration), the differences to arbitrate in one or the other may appear comparatively insignificant at first sight. The proverbial appearances may, however, be deceiving: what at first sight may seem to amount to no more than a duplication of identical legal systems in two different locations (read: Emirates) in one and the same jurisdiction (read: UAE) reveals, on closer inspection, more incisive and possibly divisive differences that will give one competitive advantages as an arbitral seat over the other. These differences are of conceptual significance.

Most 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 (see Arts 6-7, Law No. (4) of 2013 Concerning Abu Dhabi Global Market). As a consequence, DIFC arbitration remains an attractive option to all those that wish to arbitrate in a common law environment in the Middle East. This being 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.

There are other conceptual uncertainties that require clarification through further implementing legislation or practice directions from the ADGM Courts. Amongst these are the proposition that the judges of the ADGM Courts are empowered to serve as arbitrators under the ADGM Arbitration Regulations 2015 (see “ADGM Courts – Frequently asked questions”, available online at <https://www.adgm.com/doing-business/adgm-courts/frequently-asked-questions/>). This

proposition appears to originate in Art. 47 of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 (the “ADGM Courts Regulations”), which confers a “[s]pecific power of arbitrator exercisable by the [ADGM] Court of First Instance”. In the words of that Article, “[i]n any cause or matter proceeding in the [ADGM] Court of First Instance in connection with any contract incorporating an arbitration agreement which confers specific powers upon the arbitrator, the Court of First Instance may, if all parties to the agreement agree, exercise any such power.”

As regards the enforcement of both domestic and foreign arbitral awards, it would appear that provided there is an ADGM nexus in the terms indicated above, the ADGM Courts are competent to serve as a “host” or “conduit” jurisdiction in a way similar to the DIFC Courts (see my previous reporting [here](#) and [here](#) and the wording of Art. 8, ADGM Arbitration Regulations 2015, making the Regulations applicable to “*the recognition and enforcement of arbitral awards in the Abu Dhabi Global Market, irrespective of the state or jurisdiction in which they are made*”; and the similar wording of Art. 12, Law No. (4) of 2013). Despite these promising prospects, it should be cautioned that unlike the situation between the mainland Dubai and DIFC Courts (see Art. 7, Judicial Authority Law as amended), there is presently no mechanism of mutual recognition in place between the Abu Dhabi onshore and the ADGM offshore courts even though Art. 11 of Law No. (3) of 2013 provides the foundations for the adoption of memoranda and agreements between the relevant stakeholders to facilitate the required forms of (judicial) co-operation (also see Arts 168(2) and 169, ADGM Courts Regulations, read together with Art. 180). This being said, the enforcement of foreign awards in the ADGM will benefit from international enforcement instruments binding on the UAE (see Art. 170, ADGM Courts Regulations), including in particular the 1958 New York Convention (on the recognition and enforcement of foreign arbitral awards), which is expressly referenced in the ADGM Arbitration Regulations 2015 (see Art. 55(b), ADGM Arbitration Regulations 2015). Needless to say, the restrictions imposed on enforcement by the public policy exception (see Arts 53(20(b)(ii) and 57(1)(b)(ii), ADGM Arbitration Regulations 2015) take guidance from the meaning of public policy under UAE law. For the avoidance of doubt, bar some erratic developments of the concept of UAE public policy in recent UAE arbitration history (see in particular my previous reporting on the subject-matter [here](#) and [here](#)), arbitration in the UAE is considered a secular means of dispute resolution that in practical reality remains little influenced by notions of the Islamic Shari’a.

Pending these uncertainties, the ADGM is likely to remain a jurisdiction of limited significance to arbitration outside the confined limits of the ADGM and is unlikely to develop quite the same magnetic attractiveness as the DIFC has done to date. This being said, the ADGM is still very much in its formative days and no doubt measures that will turn the ADGM into an attractive alternative common law arbitration jurisdiction are in the offing.

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