



ABU DHABI GLOBAL MARKET
سوق أبوظبي العالمي

CONSULTATION PAPER NO 12 OF 2015

14 OCTOBER 2015

ARBITRATION REGULATIONS

INTRODUCTION

WHY ARE WE ISSUING THIS PAPER?

1. The Board of Directors (the “**Board**”) of Abu Dhabi Global Market (“**ADGM**”) has issued this Consultation Paper to invite public comment on the Board’s proposals to issue regulations governing arbitration within ADGM (the “**Regulations**”). A proposed draft of the Regulations is set out at Annex A to this Paper.

WHO SHOULD READ THIS PAPER?

2. The proposals in this Consultation Paper would be of interest to individuals, organisations and investors with an interest in establishing a presence in ADGM or otherwise doing business in ADGM, and their professional advisers.

HOW TO PROVIDE COMMENTS

3. All comments should be in writing and sent to the address or email specified below. If sending your comments by email, please use the Consultation Paper number in the subject line. You may, if relevant, identify the organisation you represent in providing your comments. The Board reserves the right to publish, including on its website, any comments you provide, unless you expressly request otherwise at the time of making your comments. Comments supported by reasoning and evidence will be given more weight by the Board.

WHAT HAPPENS NEXT?

4. The deadline for providing comments on these proposals is **13 November 2015**. Once we receive your comments, we will consider whether any modifications are required to these proposals. We will then proceed to enact the Regulations. You should not act on these proposals until the relevant Regulations are issued by the Board. We shall issue a notice on our website telling you when this happens.

COMMENTS TO BE ADDRESSED TO:

Consultation Paper No. 12 of 2015

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BACKGROUND

5. ADGM was established pursuant to Abu Dhabi Law No. 4 of 2013 as a financial free zone in the Emirate of Abu Dhabi, with its own civil and commercial laws. ADGM will offer market participants a world-class legal system and regulatory regime.

APPROACH TO THE ARBITRATION REGULATIONS

6. In furtherance of its objective to offer market participants a world-class legal system and regulatory regime, the Board has decided to enact comprehensive Regulations to govern the arbitration of disputes within ADGM. The Regulations establish the legal framework for any arbitration conducted within ADGM as well as for the recognition and enforcement of arbitral awards in ADGM Courts. The Regulations have been designed with the overarching objectives that they be modern, reflect best international arbitration practice, be fit for the intended purposes of ADGM users and encourage the wide use of ADGM as a seat of arbitration in the region.
7. A pervasive “pro-arbitration” approach has been taken in the Regulations, which principally means that the Regulations have been designed to encourage the enforcement of agreements to arbitrate and arbitral awards and to facilitate the arbitral process within ADGM in accordance with the parties’ agreement. In furtherance of this approach, under the Regulations, (i) there is limited scope for court intervention in the arbitral process; (ii) a tribunal will have the power to consider and decide disputes concerning its own jurisdiction; and (iii) the grounds for challenging an arbitral award are limited to narrow circumstances with no review of the merits of the dispute. In addition, the Regulations ensure that tribunals constituted within the ADGM must be independent of and impartial as between the parties, must respect due process and must ensure that the parties to any arbitration are treated equally.
8. The Regulations use as a starting point the Model Law on International Commercial Arbitration published by the United Nations Commission on International Trade Law (the “**UNCITRAL Model Law**”), as updated in 2006, which is a widely recognised global standard for arbitration regulation¹ and covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, the extent of court intervention and the basis on which awards might be challenged. The Board has implemented a series of modifications and enhancements to the UNCITRAL Model Law to bring the Regulations up to date, to maximise party autonomy and control over the arbitral process and to accommodate the unique nature of ADGM’s jurisdictional and legal framework. Significant modifications include:
 - a. Enhanced confidentiality and privacy, given the nature of the business that will be conducted in ADGM and the prevailing culture of discretion in the region;
 - b. Greater scope for the consolidation of two or more related arbitrations covering similar subject matter and the joinder of third parties to an existing arbitration; and
 - c. An option for parties to dispense entirely with the right to bring an action to set aside an arbitral award in ADGM Courts, which has the effect of making the award completely final and “unappealable”.

¹ As matters stand today, over 65 jurisdictions have either adopted the UNCITRAL Model Law or enacted legislation based on it, including the Dubai International Financial Centre.

9. The Board considers these modifications and enhancements to reflect the most modern and progressive arbitration practice internationally, which it believes will appeal to end users of ADGM arbitration and the regional legal community alike.

PART 1 – GENERAL

10. Part 1 provides that the Regulations apply exclusively to all arbitral proceedings conducted within ADGM. It also clarifies that the provisions of the UAE Civil Procedure Code (Federal Law No. 11 of 1992), or any Federal Law in respect of arbitration, will not apply to arbitrations or arbitral awards that are subject to the Regulations.

PART 2 – SCOPE OF APPLICATION

11. Part 2 provides that the Regulations apply to arbitrations where the seat of the arbitration is ADGM or where an arbitration agreement refers to the application of the Regulations. This Part also provides that the Regulations apply to the recognition and enforcement of awards in ADGM, irrespective of the state or jurisdiction in which they are made.

PART 3 – ARBITRATION

12. Part 3 of the Regulations sets out all of the rules and procedures applicable to arbitral proceedings conducted in ADGM. It is divided into eight separate chapters, each of which addresses a different aspect of the arbitral process.

Chapter 1 – General provisions

13. Chapter 1 contains basic provisions concerning communications between the parties, a party's waiver of the right to object to irregularities before a tribunal and the limited role of the ADGM Court of First Instance (the "**Court**") in connection with the arbitral process.
14. With respect to communications between the parties (i.e. service of process), Chapter 1 differs from many arbitration laws in that it includes electronic communications among the permissible methods of official communications between the parties (*see* section 9(a)).
15. With respect to objections, as in the UNCITRAL Model Law, a party is deemed to have waived any objection it may have to any irregularity if it fails to raise the objection with the tribunal in a timely manner or within any prescribed time limit (*see* section 10).
16. Chapter 1 provides for a limited role for court intervention in the arbitral process, requiring that no court shall intervene in an ADGM arbitration except to the extent provided for in the Regulations (*see* section 10).

Chapter 2 – Arbitration agreement

17. Chapter 2 concerns the parties' agreement to arbitrate. Of note in this Chapter are the different rules as to the required form of the arbitration agreement according to the residence or domicile of the parties. Under section 13(2), where the seat of the arbitration is outside ADGM and neither party to the arbitration agreement has its residence or domicile in ADGM, the agreement is not subject to any requirements as to its form. Under section 13(2), however, where at least one party to the arbitration agreement is resident or domiciled in ADGM, the agreement must be in writing. Section 13(3) makes clear that the writing requirement in subsection (3) is met by an electronic communication.

18. This chapter also establishes the primacy of the arbitral tribunal's role in adjudicating disputes that are subject to an arbitration agreement between the parties. Section 14 makes clear that when the Court is asked to rule upon a matter which is the subject of an arbitration agreement, it is required to exercise judicial restraint and defer to the competence or jurisdiction of the arbitral tribunal by allowing the arbitral tribunal the first opportunity to rule upon such issues.
19. Where the Court is asked to make a determination as to whether the arbitration agreement is null and void, inoperative or incapable of being performed, the Court must make no more than a prima facie determination of that issue. Under section 14(4), where an action in respect of the validity of the arbitration agreement has been commenced in the Court, the arbitral proceeding may nevertheless be commenced or continued while the issue is pending before the Court.

Chapter 3 – Composition of the arbitral tribunal

20. Chapter 3 sets out the rules applicable to the appointment of arbitrators and the termination of their appointment.
21. Section 16 allows the parties to determine the number of arbitrators to be appointed to the tribunal, provided that it is an odd number. Where the parties have not agreed on the number of arbitrators to be appointed, the number shall be one. This differs from the UNCITRAL Model Law where the default number of arbitrators is three and under which the parties may agree to an even number of arbitrators.
22. Section 17 provides that no person shall be precluded from acting as an arbitrator by reason of his nationality unless otherwise agreed by the parties. The parties are also free to agree on a procedure for appointing the arbitrator or arbitrators. If no such agreement has been reached, section 17 sets out the procedure under which either a single arbitrator or three arbitrators are to be appointed.
23. Section 18 requires an arbitrator to disclose before his appointment and during the arbitral proceedings any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. This section also allows a party to challenge an arbitrator's appointment but only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties.
24. Section 19 sets out the procedure under which an arbitrator may be challenged in the absence of an agreement between the parties as to the appropriate procedure.
25. Section 20 provides that an arbitrator's appointment shall terminate if the arbitrator becomes, as a matter of fact or law, unable to perform his functions. A party may request the Court to decide on the termination of the mandate. In the event an arbitrator's mandate is terminated for any reason, section 21 sets out the procedure under which a substitute arbitrator is appointed.
26. Section 22 provides that no arbitrator, arbitral institution or appointing authority (including employees of such entities) shall be liable for any act or omission in connection with an arbitration unless they are shown to have caused damage by conscious and deliberate wrongdoing.

Chapter 4 – Jurisdiction of arbitral tribunal

27. Chapter 4 addresses the jurisdiction of the arbitral tribunal and enshrines the central concepts in arbitration of *competence-competence* and separability. This chapter closely follows the approach to the tribunal's jurisdiction in the UNCITRAL Model Law and modern arbitration laws worldwide.

28. Section 23(1) provides that the arbitral tribunal be accorded the first opportunity or competence to rule on the issue of whether or not it has the competence or jurisdiction to decide a dispute submitted to it for decision, including any objections to the existence or validity of the arbitration agreement.
29. Section 23(2) provides that an arbitration agreement which forms part of a contract shall be treated as an agreement independent of, and separable from, the other terms of the contract and that the arbitral agreement shall not be affected if such contract is void.
30. Section 23(4) provides that a tribunal may rule on the issue of its jurisdiction either as a preliminary question or in an award on the merits. If the tribunal rules on the issue as a preliminary question, a party may request that the Court decide the matter, which decision shall not be subject to appeal.

Chapter 5 – Interim measures and preliminary orders

31. Chapter 5 sets out the rules and procedures applicable to requests for interim measures. The tribunal is given wide powers to order such measures.
32. Section 24 grants the arbitral tribunal the authority, at the request of a party, to grant interim measures.
33. Section 25 sets out the two conditions, only one of which must be satisfied by a party requesting interim measures:
 - a. Subsection (a) requires the requesting party to satisfy the tribunal that harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and that such harm outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted. This standard is identical to the UNCITRAL Model Law.
 - b. Subsection (b) requires, in the alternative, a showing that the existence of the obligation that is the subject of the request “cannot be seriously challenged”.
34. Section 27 provides that the tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.
35. Under section 29, the party requesting an interim measure is liable for any costs and damages caused by the measure to any party if the tribunal later determines that, in the circumstances, the measure should not have been granted.
36. Section 30 makes clear that an interim measure issued by the tribunal must be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the Court or any competent court, irrespective of the country in which it was issued, but subject to the grounds for non-recognition set forth in section 57 (which is discussed below).
37. Section 31 ensures that a party may still apply for interim measures prior to the tribunal being constituted notwithstanding the existence of an arbitration agreement.
38. Section 32 was added to protect the parties’ privacy in arbitration related court procedures. Subsection (1) requires that all arbitration-related proceedings in the Court be heard in closed court. There are two exceptions to this provided for in Section 32:

- a. Subsection (3) provides that the Court must not make a direction permitting information to be disclosed during arbitration-related proceedings held in closed court unless (a) all parties agree that the information may be published; or (b) if the Court is satisfied that the information, if published, would not reveal any matter that any party reasonably wishes to remain confidential.
- b. Subsection (5) provides that the Court may order arbitration-related proceedings to be heard in open court if (a) all parties agree that the proceedings may be heard in open court; or (b) the Court is satisfied that those proceedings be heard in open court.

ISSUES FOR CONSIDERATION

Q1: DO YOU AGREE WITH THE APPROACH TAKEN THAT ARBITRATION-RELATED COURT PROCEEDINGS BE CONDUCTED IN CLOSED COURT? DO YOU AGREE WITH THE EXCEPTIONS IN SECTION 32?

Chapter 6 – Conduct of arbitration proceedings

39. Chapter 6 addresses various aspects of the arbitration, including the rules of procedure, the seat of the arbitration, the commencement of arbitration proceedings, consolidation and joinder, hearings and written procedures, confidentiality, and so on. Enhanced consolidation and joinder provisions have been added to encourage more streamlined and cost-effective arbitration proceedings in respect of multi-party and / or multi-contract disputes. The Board has also added enhanced privacy protections for parties to ADGM arbitrations.
40. Section 33 ensures that the parties to the arbitration will be treated equally and that each party must be given an equal and reasonable opportunity to present its case.
41. Section 34 gives parties the freedom to agree on the procedure to be followed by the tribunal in conducting the proceedings. In the absence of an agreement between the parties, the tribunal may conduct the arbitration in such manner as it considers appropriate. In all cases, however, the arbitral tribunal is required to adopt procedures which are suitable to the circumstances of the particular case and which avoid unnecessary delay and expense.
42. Section 35 allows the parties to agree the seat of arbitration. Failing such an agreement, the seat is selected by the tribunal. Irrespective of the selection of the seat of arbitration, the tribunal may, subject to an agreement between the parties, meet at any place it considers appropriate to conduct proceedings.
43. Section 37 gives the tribunal the power, upon the request of a party, to consolidate one or more arbitrations (typically arising out of a single transaction) into a single arbitration. There is no similar provision in the UNCITRAL Model Law and it has been added to the Regulations in order to reduce the incidence of multiple parallel arbitral proceedings arising out of the same subject matter and potentially contradictory awards. The Board is of the view that this will make ADGM arbitration proceedings significantly more fit-for-purpose, streamlined and cost-effective. Where a consolidation order is made, a party receiving notice of the order may request the Court to review the order. The Court's decision on the consolidation order is not subject to appeal.

ISSUES FOR CONSIDERATION

Q2: DO YOU AGREE THAT TRIBUNALS WITHIN ADGM SHOULD BE GIVEN THE POWER TO CONSOLIDATE MULTIPLE ARBITRAL PROCEEDINGS?

44. Section 37 gives the Court the authority, upon the request of a party, to allow one or more third parties to be joined to the arbitration prior to the confirmation or appointment of any arbitrator provided that the party to be joined is a party to the arbitration agreement. Like the consolidation mechanism in section 37, this provision has been added to the Regulations to streamline arbitrations within ADGM and improve cost-effectiveness in disputes involving multiple parties arising out of a given transaction.
45. Section 42, which concerns the confidentiality of arbitration proceedings in ADGM, is another provision that has been added by the Board and is intended to provide enhanced privacy for ADGM participants. Under this section, parties are required to keep confidential any information relating to the arbitration proceedings under the arbitration agreement and any award made in those arbitration proceedings. This is subject to certain exceptions, including where the disclosure of confidential information is necessary in court proceedings to enforce or challenge the award either in or outside ADGM.

ISSUES FOR CONSIDERATION

Q3: DO YOU AGREE WITH THE BOARD'S APPROACH TO PROVIDE ENHANCED PRIVACY AND CONFIDENTIALITY IN ADGM ARBITRATIONS?

46. Under section 44, unless otherwise agreed between the parties, the tribunal may appoint one or more experts to report to it on specific issues to be determined by the tribunal.
47. Section 45 permits the tribunal (or a party with approval from the tribunal) to request from the Court assistance in taking evidence. The Court's assistance in response to such requests will be subject to the ADGM Courts Regulations and Rules.

Chapter 7 – Making of award and termination of proceedings

48. Chapter 7 addresses the arbitral tribunal's power to make an award, the contents of that award and the termination of proceedings.
49. Section 46 makes clear that the arbitral tribunal must decide the dispute in accordance with the rules of law chosen by the parties. In the absence of any designation by the parties, the tribunal will decide the dispute according to the rules of law it considers appropriate.
50. Section 47 provides that in arbitration proceedings with more than one arbitrator, any decision made by the tribunal must be made by a majority of all its members, unless the parties agree otherwise. In the event there is no majority, the award is made by the president of the tribunal alone.
51. Under section 48, if the parties settle the dispute after arbitration proceedings have commenced, the arbitral tribunal terminates proceedings and, if requested by the parties, may record the settlement in the form of an award on agreed terms.

52. Section 50 sets out the required form and content of an award, including that it be made in writing, that it state the reasons upon which it is based, that it state its date and the seat of arbitration, that it fix the costs of the arbitration, and so on.
53. Section 51 addresses the termination of the arbitration proceeding. As a general matter, arbitration proceedings are terminated by the tribunal's award. Proceedings will also terminate when the claimant withdraws its claim, the parties agree on the termination of proceedings or, at the request of a party, the tribunal finds that the continuation of the proceedings has become unnecessary or impossible. Subsection (5) also creates a procedure under which the Court may resolve a dispute over the tribunal's fees and expenses.
54. Section 52 sets out the procedure for the correction and interpretation of an award.

Chapter 8 – Recourse against award

55. Chapter 8 sets out the rules and procedures for setting aside an award in ADGM. These grounds are limited and can, by express agreement, be limited further or eliminated altogether.
56. Section 53 provides that the Court will be the exclusive forum in which an application to set aside an award rendered in an arbitration seated in ADGM may be made. Subsection (2) provides the exclusive grounds for set aside in such a proceeding, which are:
 - a. an erroneous decision on the tribunal's jurisdiction;
 - b. a violation of due process;
 - c. the tribunal's decision went beyond the claims submitted to it or failed to decide one of the items in the claim;
 - d. the tribunal was not properly constituted;
 - e. the subject matter of the dispute is non-arbitrable under the legislation of ADGM;
 - f. the dispute is expressly referred to a different body or tribunal for resolution under the Regulations or any mandatory provision of the legislation of ADGM; or
 - g. the award conflicts with the international public policy of the UAE.
57. Consistent with the "pro-arbitration" bias of the Regulations, section 53(5) makes clear that in a set aside proceeding, the Court must not undertake a merits review of the award.
58. In furtherance of the goal of promoting party autonomy, to increase finality and reduce costs, and to streamline the resolution of disputes within ADGM, the Board has added section 54 which permits the parties to agree to waive fully the right to bring an action for setting aside an award or to limit the grounds for set aside set forth in section 53. This approach is in line with the most modern and progressive practice internationally, and mirrors the approach now taken in France, which is widely recognised as having one of the most modern arbitration laws in the world.

ISSUES FOR CONSIDERATION

Q4: DO YOU AGREE WITH THE BOARD'S APPROACH OF PERMITTING PARTIES TO AGREE TO LIMIT THE SCOPE AND AVAILABILITY OF THE SET ASIDE PROCEDURE?

PART 4 – THE RECOGNITION AND ENFORCEMENT OF AWARDS

59. Part 4 sets out the rules and procedures applicable to actions for the recognition and enforcement of awards rendered both inside and outside ADGM. This Part closely follows the approach to recognition and enforcement set out in the UNCITRAL Model Law and gives effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).
60. Section 55 provides, among other things, that arbitral awards made by an arbitral tribunal pursuant to an arbitration agreement, irrespective of the jurisdiction in which it was made, shall be recognised as binding within ADGM. This section also makes clear that any treaty entered into by the UAE in relation to the recognition and enforcement of arbitration awards applies in ADGM. In addition, this section makes clear that where an arbitral award is enforced by the Court, it must be enforced as if it were a judgment of the Court.
61. Section 56 gives the Court the power to issue an order recognising an arbitral award.
62. Finally, section 57 sets out the exclusive grounds for non-recognition or enforcement of an arbitral award which are the same as those grounds listed in section 53 (discussed above) for setting aside an award.



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ANNEX A: PROPOSED ARBITRATION REGULATIONS