



ABU DHABI GLOBAL MARKET
سوق أبوظبي العالمي

*CONSULTATION PAPER
NO. 3 OF 2020*

**ELECTRONIC TRANSACTIONS
REGULATIONS**

15 September 2020

Introduction

Why are we issuing this paper?

The Abu Dhabi Global Market (**ADGM**) proposes to introduce regulations to facilitate electronic transactions, electronic records and electronic signatures. ADGM has issued this Consultation Paper to invite public feedback and comments on those regulations.

Who should read this paper?

The proposals in this Consultation Paper will be of interest to ADGM entities and investors, and those wishing to establish a presence in ADGM or otherwise doing business in ADGM, and their professional advisors.

How to provide comments

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. If relevant, please identify the entity you represent when providing your comments. The ADGM reserves the right to publish, including on its website, any comments you provide, unless you expressly request otherwise at the time of making any comments. Comments supported by reasoning and evidence will be given more weight by ADGM.

What happens next?

The deadline for providing comments on this proposal is **14 October 2020**. Once we receive your comments, we will consider whether any modifications are required to the proposed Electronic Transactions Regulations. The Board will then proceed to enact the Regulations.

You should not act on any proposal in this consultation paper until the new regulations are issued. We will issue a notice on our website when this happens.

Comments to be addressed to:

Consultation Paper No. 3 of 2020
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Background

1. Online contracting and the use of electronic signatures is now commonplace and many businesses are required to manage a vast quantity of electronic records. Although businesses and consumers are adapting to electronic dealings, legal concepts that have traditionally been based on the existence of a tangible or physical medium, such as an instrument, a document, an 'original' or a 'signature', still remain relevant in legislation and need to be considered in this changing environment.
2. ADGM often receives enquiries in relation to its legal position on electronic contracts and specifically the validity of electronic signatures. Currently, the law in ADGM addresses these matters in a limited manner, including certain protections under English common law around the formation of contracts adopted through the Application of English Law Regulations 2015 and under the Companies Regulations 2020 around the acceptance of documents delivered electronically. We recognise that there is scope for improvement to the current position, particularly in relation to electronic signatures and electronic contracts.
3. ADGM considers that the implementation of specific legislation regulating electronic dealings in ADGM would bring ADGM's regulatory framework more in line with international best practice in relation to e-Commerce and electronic dealings. It would also provide greater certainty within ADGM in relation to the ability of parties to use electronic documents, retain electronic records and rely on electronic signatures.
4. To ensure ADGM develops legislation that is consistent with international best practice, ADGM has benchmarked the Regulations across a number of jurisdictions and found that many countries have based their legislation on the following instruments published by the United Nations Commission on International Trade Law:
 - (a) the Model Law on Electronic Commerce (1996);
 - (b) the Model Law on Electronic Signatures (2001); and
 - (c) the Convention on the Use of Electronic Communications in International Contracts (2005),(together, the **Model Law**), while incorporating their own variations and modifications to best suit their individual jurisdiction's needs.
5. Accordingly, the proposed Regulations are based on the Model Law.
6. The proposed Electronic Transactions Regulations (Regulations) are set out in Annex A.
7. Unless otherwise defined, capitalized terms referred to in this paper have the meanings attributed to such terms as contained in the Regulations and the Interpretation Regulations 2015.

Approach and structure of the Regulations

8. Electronic transactions legislation has taken many different forms at the international and UAE domestic levels. There are three main legislative approaches for dealing with signature and authentication technologies.
9. The first approach is the **prescriptive** approach. This approach imposes use of a specific technology, typically digital signature technology. This approach has been adopted in many countries including the UAE, Argentina, Brazil, Colombia, South Africa, Japan, India and Russia.
10. The prescriptive approach requires a specific technical method for the electronic signing of documents, and dictates the types of permissible signature technologies. Some prescriptive laws do not recognise an electronic transaction, unless the mandated technology is used.
11. The second approach is the **two-tiered** approach. This approach creates legal presumptions in favour of one technology or method, but also admits other means of identification. This approach has also been adopted in many countries including Italy, Germany, Finland, Spain, France, Ireland, Hungary, Norway, UK, Singapore and Thailand.
12. Many European countries follow the two-tier approach. This approach accepts all or most electronic signatures on a technology-neutral basis, but also creates a class of approved technologies similar to the prescriptive approach. While these laws may dictate a specific process to create digital signatures, most of the countries which follow this approach also allow parties to agree between themselves what is an acceptable form of signature.
13. The third approach is the **minimalist** approach. This approach provides minimum requirements and leaves the parties free to choose the signature method they deem appropriate. This approach has been adopted in countries including Australia, Canada, New Zealand, USA and the DIFC.
14. Considering the specific characteristics of ADGM and in particular its common law jurisdiction with principles-based legislation and regulatory approach, together with innovation focus, ADGM believes following the 'minimalist' approach is the most suitable approach to follow. This approach has been adopted by other leading common law jurisdictions as referred to above. Under the minimalist approach, electronic signatures are considered to be the functional equivalent of handwritten signatures, provided that the technology employed is intended to serve certain specified functions and, in addition, meets certain technology-neutral reliability requirements. Such an approach is also consistent with the explanatory note of the Model Law, which warns against prescribing certain technologies, as technology itself is ever developing and changing.
15. The proposed Regulations aim to remove any potential legal obstacles in relation to electronic dealings within ADGM, by providing for the equivalent treatment for users of paper-based documentation and users of electronic information. The Regulations are intended to be a framework that is permissive in nature, rather than proscriptive, giving the parties the freedom to choose the electronic methods they deem appropriate. In other words, the framework does

not attempt to set out rules covering every aspect of electronic transactions. In addition, adopting the minimalist approach will provide the legal clarity and comfort that is sought by ADGM entities and, importantly, will maintain and promote the ease of doing business in ADGM, by:

- (a) facilitating rather than over-regulating electronic transactions;
- (b) adapting existing legal requirements to the requirements of electronic commerce while allowing for technological advances; and
- (c) providing for basic legal validity of electronic transactions and providing increased legal certainty.

Q1: DO YOU HAVE ANY COMMENTS ABOUT THE PROPOSAL TO ADOPT A MINIMALISTIC APPROACH IN THE REGULATIONS?

Electronic signatures, Contracts and Records

Electronic Signatures

- 16. While section 39 of the Companies Regulations 2015 provides that a document is executed by a company “if it is signed on behalf of the company”, the section is neutral and does not express the form that the signature may take; that is, it does not specify that the document must be ‘in writing’, or how it can be provided.
- 17. However, Rule 12, Part 3 of the ADGM Courts Procedure Rules 2016 provides a clearer position as follows:

“12. Signature of documents

Where any of these Rules or any practice direction requires a document to be signed, that requirement shall be satisfied if the signature is electronic.”

- 18. While this Rule is useful in relation to documents produced in Court, we believe a more general provision in relation to the use of electronic signatures in any document used in ADGM would benefit stakeholders.
- 19. The Model Law provides the most widely used set of legislative criteria for establishing a generic functional equivalence between electronic and handwritten signatures. It provides that where a law requires a signature of a person, that requirement is met in relation to a data message if:
 - (a) a method is used to identify the signatory and to indicate the signatory’s approval of the information contained in the data message; and
 - (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated.

20. This provision contemplates the two main functions of handwritten signatures are to identify the signatory, and to indicate the signatory's intent with respect to the signed information. Any technology that can perform these two functions in electronic form should, according to the Model Law, be regarded as satisfying a legal signature requirement.
21. Accordingly, the Regulations are technology neutral, as they do not depend on or presuppose the use of any particular type of technology, and can be applied to the communication and storage of all types of information. Technological neutrality is important given the speed of innovation, and helps to ensure that legislation remains capable of accommodating future developments and does not become obsolete (and in need of regular amendment). It also puts the onus on the parties to determine the level of security that is adequate for their communications and transactions.

Electronic Contracts

22. The fundamental principle under the Model Law is that the medium used to form a contract should not affect its legal significance. This eliminates the medium as a reason to deny the effect or enforceability of a contract and confirms that contractual offer and acceptance can be expressed via electronic communications. The Regulations go further to negate any potential claim by a party that there is an inherent lack of human intent in relation to contracts formed by automated means. The requisite intention flows from the programming and use of a digital machine involved in contracting.

Electronic Records

23. Under the Model Law, laws relating to electronic records need to be consistent with recognised and established international approaches in markets, adopting a functional equivalent approach to electronic records based on an analysis of the purpose and function of paper-based documentary requirements.
24. Paper documents fulfil many functions. These include:
 - (a) providing a record of a transaction or other information;
 - (b) ensuring integrity of the information contained therein by setting out the information in an unaltered form;
 - (c) permitting reproduction of the information, whether for the purpose of sharing the record of agreed terms between two contracting parties or presenting evidence of the information contained in the document; and
 - (d) allowing for authentication by means of a signature, seal or stamp.
25. For all these functions, electronic records can provide the same level of security as paper and, in most cases, with a much higher degree of reliability and speed, provided that a number of technical and legal requirements are met.
26. Where a provision in any ADGM enactment or subordinate legislation requires information to be in writing or for information to be delivered or records to be retained, the use, delivery or retention of an Electronic Record will satisfy those requirements. This ensures that information not be denied legal effect solely due to it being in the form of an electronic record.

Q2: DO YOU HAVE ANY COMMENTS ABOUT THE PROPOSED SCOPE OF THE REGULATIONS?

Q3: ARE THE PROVISIONS OF THE REGULATIONS CLEAR? IF NOT, PLEASE EXPLAIN WHY NOT.

Exclusions

27. Taking into consideration the exclusions under the Model Law, ADGM has included a set of exclusions in the Regulations to best meet the needs of ADGM entities. The exclusions are generally the types of transactions that require secondary witnessing or attestations or which are required under applicable law (for instance, transactions relating to the sale of real property). These include:
- (a) the creation, performance or enforcement of a power of attorney;
 - (b) the creation, performance or enforcement of a declaration of a trust (with the exception of implied, constructive and resulting trusts) and any provision in the Trusts (Special Provisions) Regulations 2016 and Foundations Regulations 2017 requiring information to be written or in writing;
 - (c) the creation and execution of wills, codicils or testamentary trusts;
 - (d) transactions involving the sale, purchase, lease (for a term of more than 10 years) and other disposition of immovable property and the registration of other rights relating to immovable property;
 - (e) any document to be notarised before the notary public; and
 - (f) negotiable instruments, documents of title, bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money.
28. However, with respect to trusts, while these are excluded in a number of common law jurisdictions, in ADGM the only requirements for trust-related records to be “in writing” are:
- (a) the Trust (Special Provisions) Regulations 2016; section 4(8) requires enforcers to resign office by notice in writing; and
 - (b) Foundations Regulations 2017, which requires by-laws, the Charter, notices and resolutions to be in writing.
29. ADGM does not object to trust documents being made and kept in electronic form and would recommend this exclusion be removed. However we have retained it in the draft Regulations for the purposes of public consultation.

30. Finally, in most jurisdictions, negotiable instruments are excluded from similar legislation. Given cheques (which are negotiable instruments) are still widely used in the UAE and must be signed in ink, an exclusion for cheques appears necessary.
31. However, ADGM is also aware of the development of digital negotiable instruments in certain jurisdictions (for instance, electronic letters of credit and bills of lading) to support digitalization of international trade finance, provided the legislative framework facilitates it.

Q4: DO YOU HAVE ANY CONCERNS REGARDING THE PROPOSED EXCLUSIONS? IF SO, WHAT ARE THOSE CONCERNS.

Q5: DO YOU AGREE TRUST RECORDS SHOULD BE REMOVED FROM THE EXCLUSIONS?

Q6: WOULD YOU LIKE TO SEE NEGOTIABLE INSTRUMENTS REMOVED FROM THE EXCLUSIONS? IF SO, WHY?

Q7: ARE THERE ANY OTHER MATTERS NOT ALREADY LISTED THAT YOU WOULD LIKE TO SEE EXCLUDED FROM THE REGULATIONS?

The “in writing” requirement

32. Currently under ADGM law, section 1(1) of the Interpretation Regulations 2015 provides:

“writing” and expressions referring to writing include printing, lithography, typewriting, photography and other modes of representing or reproducing words or figures in visible form.”

33. ADGM proposes to amend the current definition of “writing” in section 1(1) of the Interpretation Regulations 2015 to specifically include the use of electronic modes of representing or reproducing words within the definition. This will ensure it is clear the defined term also includes electronic modes of representing or reproducing words. The proposed amendment to the Interpretation Regulations 2015 are set out in Annex B.

PROPOSED AMENDMENTS AND REGULATIONS

- **Annex A Proposed Electronic Transactions Regulations 2020**
- **Annex B Proposed Interpretation (Amendment No.1) Regulations 2020**