



ADGM Arbitration Centre
مركز تحكيم سوق أبوظبي العالمي

*CONSULTATION PAPER
NO. 8 OF 2020*

**PROPOSED AMENDMENTS
TO THE ADGM ARBITRATION
REGULATIONS 2015**

25 November 2020



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 proposed amendments to the ADGM Arbitration Regulations 2015 (“**Regulations**”). A draft of the proposed amended Regulations is **Annexure A** to this Paper.

How to provide comments

2. All comments should be in writing and sent to the email specified below. Please state the Consultation Paper number in the subject line. If relevant, please identify the organisation you represent when providing your comments.
3. 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.
4. The deadline for providing comments on this proposal is **Wednesday, 9 December 2020**.
5. Once we receive your comments, we will consider whether any further modifications are required to the proposed amendments Regulations. We will then proceed to publish the Regulations. A notice will be posted on our website informing you when this happens.

Address for comments

Consultation Paper No. 8 of 2020

Email: enquiry@adgmac.com

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The Regulations

BACKGROUND AND APPROACH

6. The ADGM Arbitration Regulations 2015 (“**Regulations**”) have been a prime example of ADGM’s commitment to providing outstanding regulatory frameworks for the global and investor communities. The Regulations firmly established ADGM as a progressive seat of arbitration.
7. ADGM recently undertook a 5-year review of the Regulations with the aim of ensuring they continue to resonate with the needs of the arbitration community. The review included: a comparative analysis of arbitration laws from leading Model Law jurisdictions; and a review of the rules of the major arbitral institutions as well as recent arbitration-related cases and judgments. The review has resulted in amendments being proposed to the Regulations to make them more contemporary and aligned to international best practice.
8. When preparing the amendments, at the forefront was ADGM’s vision to be innovative, particularly in relation to the use of technology to increase efficiency in the arbitral process and to reduce the cost of arbitration to parties wherever possible. As part of this, ADGM wished to be ahead of the curve in the way that ADGM’s arbitration law deals with incorporating technology-related solutions into the arbitral process, which is reflected in the amendments.
9. Significant modifications include:
 - a. identifying the mandatory provisions in the Regulations;
 - b. clarifying the scope of an arbitration agreement in writing;
 - c. broadening the Court’s powers to grant interim measures in support of non-ADGM seated arbitrations and against non-parties to the arbitration agreement;
 - d. promoting the use of technology in real terms to enhance the efficient and expeditious conduct of the arbitration;
 - e. mandating disclosure requirements in relation to third party funding agreements;
 - f. providing for the summary disposal of claims, counterclaims and defences; and
 - g. regulating party and party representative conduct.
10. ADGM believes the proposed amendments to the Regulations will enhance its arbitration framework and will appeal to end users of arbitration, thereby further encouraging the wider use of ADGM as a seat of arbitration.

PART 3: ARBITRATION

Chapter 1 – General Provisions

11. Section 9 is a new section that identifies (by reference to Schedule 2) the mandatory provisions in the Regulations. This will provide parties with added clarity as to which provisions are mandatory and cannot be contracted out of. Section 9 also confirms that parties are able to make their own arrangements in relation to any non-mandatory provisions, including by way of agreeing a set of institutional rules.

Chapter 2 – Arbitration Agreement

12. Section 14(2) has been amended to clarify that an arbitration agreement can be in writing without it being recorded in writing by the parties themselves. A similar provision is found in section 5 of English *Arbitration Act* 1996, which was included to cover persons taking up bills of lading that have an arbitration clause, or subscribers of shares where the articles of association contain an arbitration clause.
13. Section 14(2) has also been amended to provide that a party (who does not record his agreement in writing) may agree to be bound by the arbitration agreement orally or by conduct. This does not take away from the requirement that the arbitration agreement itself must be in writing.
14. Section 14(6) is a new provision that codifies the English common law position in relation to dispute resolution option clauses. It confirms that, as a matter of ADGM law, these clauses are enforceable.

ISSUES FOR CONSIDERATION

Q1: DO YOU AGREE WITH THE APPROACH TAKEN IN SECTION 14(2).

Chapter 5 – Interim measures (Section 31)

15. The amendments to section 31 expressly provide that the Court has the power to make an order for interim measures even if:
 - a. the seat of the arbitration is outside ADGM; or
 - b. the interim measure is sought against a non-party to the arbitration agreement.
16. The interim measures that the Court may order include the taking of evidence and provisional or conservatory measures. Significantly, these powers now extend to granting interim measures in support of non-ADGM seated arbitrations, including against non-parties to the arbitration agreement. The taking of witness evidence from non-parties was recently considered by the English Court of Appeal in *A v C* [2020] EWCA Civ 409. The amendments reflect the outcome in this case, but are broader in scope in that they also expressly apply to provisional or conservatory measures.

17. The amendments also deal with the process where the case is one of urgency and where the case is not one of urgency. They also confirm that the Court shall have the same power of issuing any interim measures in relation to arbitration proceedings as it has in relation to Court proceedings.

Chapter 6 – Conduct of arbitral proceedings

Section 34 – Determination of rules of procedure

18. Section 34(2) is a new provision which provides that parties can agree to adopt the ADGM Arbitration Centre Guidelines ('Guidelines'), regardless of the seat or the applicable rules of procedure. This clarifies that the Guidelines operate alongside any applicable arbitration laws or institutional rules, and do not compete with them.
19. Section 34(5) is a new provision that promotes the use of technology wherever possible to enhance the efficient and expeditious conduct of the arbitration. Seven technology-related solutions are included in section 34(5) which the arbitral tribunal shall consider using in appropriate cases. These seven solutions are:
 - a. the submission, exchange or communication of documents by electronic means;
 - b. the use of electronic signatures for documents submitted, exchanged or communicated;
 - c. documents being provided in electronic searchable form;
 - d. the use of an electronic document review system for disclosure or document production;
 - e. the use of an electronic document management system for merits hearings;
 - f. the use of an online case management platform in the arbitral proceedings; and
 - g. conducting hearings, in whole or in part, by video conference, telephone or other communication technology
20. The identification of these seven technology-related solutions is a stand-out feature of the Regulations, as no other arbitration law in our review went into such detail in relation to the use of technology in arbitral proceedings. The approach adopted in the Regulations is intended to give parties greater comfort that technology-related solutions are part of ADGM's arbitration DNA and is encouraged in ADGM seated arbitrations wherever appropriate.
21. However, and importantly, 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. The 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.

ISSUES FOR CONSIDERATION

Q2: DO YOU AGREE WITH THE APPROACH TAKEN IN SECTION 34(5)? ARE THERE ANY OTHER TECHNOLOGY-RELATED SOLUTIONS THAT SHOULD BE INCLUDED?

Section 35 – Seat of arbitration

22. Section 35(1) is a new provision which clarifies that parties with no other connection to ADGM can agree to have their disputes determined by way of arbitration seated in ADGM. This was always the case, but this provision reflects the recent amendment made to the ADGM Founding Law which removes any doubt about whether there is a nexus requirement for arbitrations seated in ADGM.
23. Section 35(5) is a new provision which provides that, unless otherwise agreed by the parties, any meetings or hearings may take place in person or remotely using communications technology in one or more geographical locations.

Section 37 – Disclosure of a third-party funding agreement

24. Section 37 is a new section. It requires a party to notify the arbitral tribunal and all other parties to the proceedings of the existence of any third-party funding agreement and the identity of the funder. The requirement to disclose the identity of the funder was included so that each tribunal member could consider whether this raised any potential conflict of interest issues.
25. Section 37(2) sets out when the notification is to be made and reflects the early notification provisions contained in section 225(7) of the ADGM Courts Regulations 2015. Section 37(3) provides that the tribunal may, after consulting with the parties, order the disclosure of other details of the third-party funding agreement.

Section 42 – Summary disposal of claims, counterclaims and defences

26. Section 42 is a new section relating to the summary disposal of claims, counterclaims and defences.
27. Section 42(1) provides that, unless otherwise agreed by the parties, a party may apply to the arbitral tribunal for the summary disposal of a claim, counterclaim or defence on the basis of two available limbs:
 - a. (the jurisdiction limb) - being, the claim, counterclaim or defence is manifestly outside the jurisdiction of the tribunal; or
 - b. (the merits limb) - being, any other party has no real prospect of success on the claim, counterclaim or defence.
28. The inclusion of similar provisions in some institutional rules has generally been welcomed by the arbitration community in the hope that it will embolden arbitral tribunals to summarily dispose of claims in appropriate cases. However, it is noted that there may be potential for overlap between the jurisdiction limb in section 42(1) and the objection to jurisdiction

provisions contained Chapter 4 of the Regulations ('Jurisdiction of arbitral tribunal'), and there is perhaps a threshold question as to whether the jurisdiction limb in section 42(1) should be retained.

ISSUES FOR CONSIDERATION**Q3: SHOULD THE JURUSDICTION LIMB IN SECTION 42(1) BE RETAINED?**

29. Section 42(2) provides the tribunal with a gatekeeper role (expressed as a "full discretion") as to whether an application made under s38(a)(1) should proceed.

Section 43 – Hearings and written proceedings

30. Section 43 has been amended to expressly provide for the use of technology in relation to hearings and written proceedings. Subject to any contrary agreement of the parties, it permits hearings to be conducted by way of video conference, telephone or other communications and for statements, documents, evidence or other information to be supplied or communicated electronically.

Section 44 – Party and Party Representative conduct

31. Section 44 is a new section that is based on Module 6 of the Guidelines.
32. Section 44(1) regulates party representative conduct in that the representative shall:
- a. not engage in activities intended to obstruct or delay the arbitral proceedings, jeopardise the integrity of the proceedings or the finality of any award;
 - b. not knowingly or recklessly make a false statement to the arbitral tribunal;
 - c. preserve and not knowingly conceal or destroy documents that are likely to be relevant to the issues in dispute in the arbitration or which the arbitral tribunal has ordered to be produced; and
 - d. advise the party for whom he or she acts to preserve and not to conceal or destroy such documents.
33. Section 44(2) sets out the potential sanctions for a breach of subsection (1) along with the process for making an adverse finding. Section 44(3) requires any decision to be communicated to the parties in writing. Section 44(4) provides that, in all cases, the tribunal is entitled to consider the conduct of the parties and the party representatives when making any decision allocating the costs of the arbitration between the parties.

ISSUES FOR CONSIDERATION**Q4: DO YOU AGREE WITH THE APPROACH TAKEN IN SECTION 44?**

Section 48 – Court assistance in taking evidence

34. The amendments to section 48(1) set out a non-exhaustive list of areas where the Court, or any competent court, may assist in taking evidence. This is subject to the relevant court's competence and rules on taking evidence under section 48(2). Section 48(3) confirms that the provisions of sections 30(2), (3) and (7) also apply to section 48.

Chapter 7 – Making of award and termination of proceedings

Section 55 – Form and contents of award

35. Section 55(3) has been amended to clarify that the award shall be deemed to have been made at the seat of arbitration regardless of the method whereby it is signed, whether it is signed by the tribunal members in person, signed by each member separately or is signed by electronic means.
36. Section 55(4) is a new provision which confirms that an award signed by electronic means shall have the same legal validity and enforceability as an award that has been signed manually.
37. Section 55(6) has been amended to provide that the overriding principle of reasonableness and proportionality applies when the tribunal is assessing costs. In addition, the costs of party-appointed experts and technology solutions have been expressly included in the definition of "costs" to remove any doubt about these items.

Section 57 – Correction and interpretation of award; additional award

38. Section 57(1) is a new provision that provides that the parties are free to agree on the powers of the arbitral tribunal to correct, interpret or make an additional award. Section 57(2) confirms that absent such agreement the provisions set out in the remainder of section 57 shall apply.

PART 4: THE RECOGNITION AND ENFORCEMENT OF AWARDS

Section 61 – Recognition and enforcement of awards

39. Section 61(2) has been amended such that it is sufficient for a party to provide a copy of the arbitration agreement (as opposed to the original or a duly certified copy of the agreement) when seeking recognition or enforcement of an award. This is to accommodate the situation where a party is unable to locate the original document containing the arbitration agreement.
40. Section 61(5) has been amended to make that subsection subject to Article 13 of the ADGM Founding Law so as to provide consistency in relation to the approach mandated in ADGM in relation to conduit jurisdiction.

Schedule 1 – Interpretation

41. Section 3 of Schedule 1 has been amended to include definitions for:

- a. arbitral tribunal;
- b. ADGM Founding Law;
- c. Party Representative; and
- d. third party funding agreement.

Schedule 2 – Mandatory provisions of the regulations

42. Schedule 2 is a new schedule which lists the mandatory provisions of the Regulations and is to be read by reference to new section 9.