

The ADGM Arbitration Guidelines: bridging the procedural divide between civil and common law arbitrations

September 2019

Authors: [Michael Turrini](#), [Sarah Kelly](#), [Aimy Roshan](#)

On 17 September 2019, the Abu Dhabi Global Market (ADGM) Arbitration Centre launched the ADGM Arbitration Guidelines. The ADGM Arbitration Guidelines have been developed to provide end-users of arbitration, practitioners, and arbitrators with a set of innovative best practice procedures to assist in bringing greater certainty and efficiency to the arbitral process whilst maintaining procedural safeguards.

ADGM and Arbitration

ADGM is a financial free zone in the capital of the United Arab Emirates, Abu Dhabi, which was established by Federal Decree in 2013. It has its own independent judicial system and legislative framework which directly incorporates English common law and a list of English statutes by reference. The ADGM Courts commenced operation in 2016.

In recent years, ADGM has taken a number of pro-arbitration steps, making it an attractive arbitral seat and a global leader in the alternative dispute resolution community.

For example, in December 2015, ADGM enacted arbitration regulations based on the UNCITRAL Model Law. The ADGM Arbitration Regulations allow contracting parties to choose ADGM as the seat of their arbitration and select any institution to administer it.

Further, in 2018 the ADGM launched a hearing venue, the ADGM Arbitration Centre. While ADGM does not have its own arbitral institution, the ICC Court last year opened a representative office for the MENA region within ADGM, which allows parties to register arbitration cases under the ICC Rules.

The release of the ADGM Arbitration Guidelines is yet another example of ADGM's progressive and innovative approach to arbitration.

The ADGM Arbitration Guidelines

The ADGM Arbitration Guidelines were developed by a working group in consultation with UAE-based in-house counsel and private practice arbitration practitioners, from both civil and common law backgrounds. The ADGM Arbitration Guidelines aim to provide best practice procedures designed to apply neutrally to proceedings involving parties from different legal systems, without leaning more heavily towards one or other tradition.

The ADGM Arbitration Guidelines can be adopted, in whole or part, by parties or tribunals in any arbitration, regardless of the seat or the applicable institution rules. One of their key features is the built-in flexibility and procedural safeguards that can be adapted to the unique circumstances of a particular dispute.

The ADGM Arbitration Guidelines have been structured into Modules, each of which deals with a different aspect of the arbitral process. The six Modules are explored further below.

Module 1 – Written Submissions, Issues and Applications

Module 1 sets out guidance in relation to certain standard elements of arbitral proceedings, including the content and format of written submissions, the identification and treatment of the issues to be decided, and interlocutory applications for relief.

One of the innovative features introduced in Module 1 is the requirement for the parties to prepare and seek to agree a List of Issues of both fact and law once written submissions have been exchanged, but before the claims / counterclaims are heard (Module 1, Section 3(1)). Such a process encourages parties to limit the issues to which evidence may be directed, bringing greater efficiencies to the arbitral process.

Module 2 – Fact Witness Evidence

Module 2 deals with the submission of fact witness evidence.

This Module similarly advocates for the clear and early identification of issues, requiring the parties to identify, amongst other things:

- the specific issue(s) of fact arising in connection with their claim or counterclaim, or defence thereto, to which each fact witness' evidence is said to be relevant (Module 2, Section 2(b)); and
- state the reasons why the fact witness' testimony would materially assist the Tribunal's adjudication of a particular claim or counterclaim, or defence thereto (Module 2, Section 2(c)).

Potentially more controversial is Section 7(2) of Module 2, which empowers a Tribunal, on the application of a party, to exclude a witness from testifying at the evidentiary hearing on the basis that the testimony would not materially assist the Tribunal's adjudication of the specific issues under consideration at the evidentiary hearing to which the witness's evidence is said to be relevant.

A decision by a Tribunal to exclude a witness from testifying at a hearing would need to be exercised with caution, given the potential implications with respect to challenges on the basis of procedural unfairness.

Module 3 – Expert Witness Evidence

Module 3 sets out guidance in relation to the submission of expert witness evidence in arbitral proceedings.

Similar to Module 2 (Fact Witness Evidence), Module 3 requires the parties to clearly identify the specific issues to which each expert's evidence is said to relate (Module 3, Section 2(b)), and state the reasons why the expert's testimony would materially assist the Tribunal's adjudication of a particular claim or counterclaim, or defence thereto (Module 3, Section 2(2)(c)). The Tribunal is also empowered, on the application of a party, to exclude an expert witness from testifying at a hearing if it determines the testimony would not materially assist the Tribunal's adjudication of the specific issues under consideration (Module 3, Section 10(2)). Our comments above regarding the exclusion of fact witness testimony under Section 7(2) of Module 2 apply equally here.

A welcome clarification is set out in Section 9(10) of Module 3, which relates to Tribunal-appointed Experts. A Tribunal is required to weigh the evidence submitted by a Tribunal-appointed expert in the same manner it would any other evidence before the Tribunal and, in any event, in accordance with the applicable law of the arbitration. This mirrors provisions in other soft law instruments, including the CIArb International Arbitration Practice Guideline on Party-appointed and Tribunal-appointed Experts, which provides that arbitrators shall not simply adopt an expert's opinion, as doing so may result in a challenge to their award.

Module 4 – Documentary Evidence

Module 4 addresses the requesting and production of documents. The objective of this Module is to ensure maximum efficiency and cost-effectiveness in the (often unwieldy) document production phase.

Safeguarding against common tactics employed by parties during the document production stage, Section 6(2) of Module 4 precludes a party from submitting Document Requests which seek the production of Documents that support the other party's own claims, thus preventing Document Requests from being used as a means of identifying evidentiary gaps in the other party's claims.

Module 5 – Hearings

Module 5 sets out guidance in relation to procedural and evidentiary hearings in arbitral proceedings. This Module recognises the often very significant costs incurred in connection with merits hearings, and aims to ensure that they are organised and conducted in a fair, efficient and cost-effective manner, having regard to the complexity and value of the issues in dispute.

Recognising that employing technology can result in significant time and cost savings, Section 14(1) of Module 5 advocates for the appropriate use of electronic document management systems for merits hearings, and requires parties to make every effort to minimise the use of hard-copy document bundles.

Module 6 – Counsel Conduct

Module 6 addresses the conduct of counsel in arbitral proceedings. This Module identifies the expected standards of good conduct of Party Representatives, and provides a procedure for complaints regarding breaches of such standards.

Section 9(7) of the Module identifies the types of sanctions a Tribunal may impose against a Party Representative if it decides to uphold a Complaint, whilst affording the Tribunal broad discretion to order any appropriate measure which it considers necessary to preserve the fairness and integrity of the proceedings.

A Tribunal may also find a Complaint which is unsubstantiated, unparticularised or otherwise unfounded to be in breach of the Module (Module 6, Section 9(8)). It is hoped that such a provision will deter parties from abusing the Complaints procedure as a diversionary tactic.

Section 9(9) of Module 6 also expressly allows the Tribunal to consider the conduct of the parties and their representatives when making decisions as to the allocation of the costs of the arbitration.

Conclusion

The launch of the ADGM Arbitration Guidelines further enhances ADGM's standing as a progressive (albeit relatively new) venue for the resolution of disputes by arbitration.

The ADGM Arbitration Guidelines provide a refreshing, neutral alternative to existing guidelines which are considered to be more heavily weighted in favour of either the common law or civil law approaches. In this respect, the ADMG Arbitration Guidelines can be said to be truly international in nature.

While it is yet to be seen whether the ADGM Arbitration Guidelines will be widely adopted and prove to be successful in achieving their stated objectives, their launch is undoubtedly a welcome development in the global international arbitration arena, and a positive step for the promotion of arbitration in the UAE and the Middle East in particular.

White & Case LLP
16th Floor, Al Sila Tower, Abu Dhabi Global
Market Square
PO Box # 128616, Abu Dhabi
United Arab Emirates
T +971 2 611 3400

White & Case LLP
Level 6, Burj Daman, Happiness Street
Dubai International Financial Centre
PO Box 9705, Dubai
United Arab Emirates
T +971 4 381 6200

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.