

# The Abu Dhabi Global Market—Legislative Framework, Approach and Methodology

Barnabas Reynolds\*

☞ Abu Dhabi; Commercial arbitration; Common law; Company law; Constitutional law; Courts; Criminal law; Financial regulation; Foreign law; Insolvency; Islamic law; Real property; Takeovers

## Abstract

*Written by the legal team behind the creation of the Abu Dhabi Global Market (ADGM), this article explains the thinking, process and procedure behind the structure and scope of the innovative new legal regime. In its consideration of various elements of the ADGM legal framework, this article discusses how the rules and regulations were carefully designed to ensure the confidence of global investors by balancing the need for legal depth and breadth, achieved by leveraging the reputation of developed regimes, with the need to remain flexible and responsive to the requirements of a modern financial centre looking to compete on a global scale.*

## Introduction

It is rare to be asked to assist in producing an entirely new legal regime from scratch. It is rarer still to be called upon to advise on its structure and scope, and to produce its content. The authors of this article did just that. This article examines the bespoke legal regime that has been developed for the ADGM in order to serve its particular needs and the jurisprudential basis on which the new legal system has been established. In particular, it will focus on the specific parts of the new regime which raised interesting and novel concerns and will analyse the way such concerns arose and how they were addressed. The aim of this article is to draw on those experiences and provide potentially useful background to the development of the new regime, which may be of interest to practitioners and, ultimately, the courts.

Abu Dhabi, one of the United Arab Emirates (UAE), through a number of Federal and Abu Dhabi legislative instruments, recently decided to set up a new financial centre to be known as the Abu Dhabi Global Market. The

Federal Cabinet of the UAE allocated an island for the purpose, Al Maryah Island. They also provided the ability for the government authorities that govern the island to pass their own civil and commercial laws, and for those authorities to pass regulations to regulate the market on the island. In order for this all to operate, a court was also established as well as a Registrar of Companies (Registrar) and a financial services regulator.

The laws and regulations needed to be attractive to international businesses. Abu Dhabi decided strategically that the system should be based on English common law, even though the existing system in the UAE is heavily influenced by civil law systems, namely, French, Roman, Egyptian and Islamic law. Historically, the UK had administered the UAE under various arrangements, beginning with the treaty with the Trucial Sheikdoms in 1892, and ending with full independence in 1972, but had not colonised it. Further, the ADGM accepted our advice that the common law should be adopted in its entirety rather than in codified form. This had not been attempted before in such a context but precedents were to be found in legislation in Hong Kong and Singapore.<sup>1</sup> Perhaps counter-intuitively, commerce requires more law rather than less. Codified versions of the common law simplify and ossify the law as at the date of enactment, and have all the disadvantages of a civil law system without all the ongoing jurisprudence that is essential to optimise such a system. The ADGM also accepted that the statutory regime should fit in with the UK system and benefit from interactions with the common law case law so far as possible. Thus, for instance, the enactment of a set of companies regulations utilising the latest UK Companies Act should benefit from case law clarifying provisions of that text, thereby reducing legal uncertainty. The result is the establishment of the ADGM pursuant to Federal Law No.8 of 2004 (Law No.8) and by the requisite Federal Cabinet Decree and Resolution<sup>2</sup> together with Abu Dhabi Law No.4 of 2013 (Law No.4), and a series of regulations and other legal instruments of the ADGM itself.<sup>3</sup> Launched in 2015, the ADGM has a system of civil and commercial laws which aim to offer market participants a world-class legal system and regulatory regime.

New legal systems looking to gain traction must address one overarching question: how can we create a new legal jurisdiction with the infrastructure and flexibility of a modern financial centre looking to be dynamic and competitive on a global scale, but which has the reputational foundation and gravitas to ensure that investors and market participants have confidence in the reliability of the new system? Other systems have begged, borrowed and stolen from established jurisdictions, but

\* Co-editor of J.I.B.L.R. and Partner, Shearman & Sterling LLP. Special thanks to Emmanuel Givanakis, Director and Head of Policy and Legal at the Abu Dhabi Global Market, for his contributions to this article. Thanks are also due to Oliver Linch for his support in co-ordinating and editing the opening sections and the various contributions that make up this article. I am also grateful to the co-authors listed by respective sections below as well as James Comyn and Aatif Ahmad for their help on the project generally, and to the Rt Hon. The Lord Hope of Craighead KT and Linda Fitz-Alan for their comments on an earlier version of this article. All faults that remain are my own.

<sup>1</sup> See, for example, Singapore's Application of English Law Act 1993 and Hong Kong's Application of English Law Ordinance 1966, Ch.88.

<sup>2</sup> Federal Decree No.15 of 2013 and Cabinet Resolution No.4 of 2013.

<sup>3</sup> In this article, all legislation referred to is ADGM legislation unless otherwise specified.

the ADGM's novel response to this question has been to leverage the reputation of one of the most trusted legal systems in the world—that of the UK—on an “evergreen” basis and tailor it according to its own specific requirements. Some had suggested that this could not be done.

### Constitutional framework—the UAE

The UAE was founded in 1971 as a federation of seven emirates: Abu Dhabi, Ajman, Dubai, Fujairah, Ras al-Khaimah, Sharjah and Umm al-Quwain. Abu Dhabi is the capital of the UAE and the Abu Dhabi emirate; the largest of the UAE's seven member emirates.

Under the Constitution of the UAE (the Constitution), each emirate is governed by an absolute monarch. Together, they jointly form the Federal Supreme Council, which has an elected chairman and vice-chairman. By convention, the ruler of Abu Dhabi is the President of the UAE (the head of state) and the ruler of Dubai is the Prime Minister (the head of government).

In addition to the Federal Supreme Council, the Constitution provides that the Prime Minister will lead a cabinet, called the Council of Ministers. Further, there is a 40-member national assembly, called the Federal National Council, which is a consultative body whose members are partially appointed by the emirate rulers and partially elected. There is an independent judiciary which includes the Federal Supreme Court.

Under arts 116 and 122 of the Constitution, matters not specifically allocated to the federal level are under the jurisdiction of each emirate. Federal jurisdiction extends to matters such as foreign affairs, security and defence, currency, banking, major legislation relating to the Penal Code, Civil & Commercial Transactions Code, companies law, and codes of procedure before the civil and penal courts.

### Constitutional framework—financial free zones

The Constitution provides for a two-level allocation of legal competence. The federal level covers matters expressly listed in the Constitution. The emirates have jurisdiction over residual matters not governed at a federal level.

Article 121 of the Constitution was amended in 2004 to provide for the establishment of Financial Free Zones (FFZs). This permitted the establishment of zones and the creation by such zones of their own laws on matters which would otherwise be governed by federal law, including matters such as currency, banking, company law and civil law more generally. The constitutional amendment was followed by legislation setting out the mechanism and operation of FFZs:

- Law No.8 establishes the federal-level machinery for the establishment of a FFZ and sets out what activities may be carried out in FFZs. This Law provides that an FFZ

may only be established by Federal Decree. Once established, FFZs are exempt from federal, civil and commercial laws;

- Federal Decree No.15 of 2013 establishes the ADGM as an FFZ in Abu Dhabi. Al Maryah Island is designated by Cabinet Resolution No.4 of 2013 as the geographical location of the ADGM;
- Law No.4 establishes the organs of governance in the ADGM, including the Board of Directors, the Registration Authority, the Financial Services Regulatory Authority (the Regulator or FSRA) and ADGM courts, including setting out their powers and duties; and
- a series of new regulations, passed by the ADGM, pursuant to these authorities.

### Legal framework—relationship between ADGM and the UAE

The relationship between the federal legal system of the UAE and the FFZ legal system of the ADGM is complex and the limitations on the ADGM's legislative competency were sometimes an important issue in the legislative and drafting process. The relationship is governed both by way of federal law and at Abu Dhabi emirate level. Though complex, the interplay between federal and state laws is not uncommon in federal systems of government.

Pursuant to Law No.8, entities licensed in the ADGM (FFZ Entities) are restricted in the financial services that they can provide in relation to the UAE (non-FFZ Entities) or in relation to UAE persons. FFZ Entities (i.e. those in the ADGM) are prohibited from carrying out certain activities, including:

- accepting deposits from the UAE markets;
- accepting deposits in UAE Dirhams;
- undertaking foreign exchange transactions involving UAE Dirhams;
- providing credit in UAE Dirhams; and
- effecting, carrying out or acting in relation to a contract of insurance in relation to a risk situated within the UAE, unless the risk is situated in the ADGM or the contract is one of re-insurance.

These requirements are reflected in s.26 of the Financial Services and Markets Regulations 2015 (FSMR) and rr.4.3 and 7.2 of the ADGM Conduct of Business Rulebook (COBS).

Additional federal-level protections in the sphere of international law are found in arts 5 and 6 of Law No.8, which provide that FFZs may not do anything which may lead to contravention of any international agreements to which the UAE is a party, but that their authorities may enter into memoranda of understanding with similar entities and parties provided that they do not conflict with the treaties to which the UAE is a party. This provides

the FFZ authorities, including, for example, the ADGM, with the ability to enter into Memorandums of Understanding (MoUs) with regulatory authorities in other jurisdictions and countries.

As regards the allocation of powers between Abu Dhabi and the ADGM, the remit of the ADGM's legislative jurisdiction is prescribed in Law No.4, which allocates specific spheres of legislative competence to the ADGM and fleshes out more of the tripartite allocation of competences (federal-level, emirate-level and FFZ-level) established in the UAE constitutional amendment.

### **Criminal Law**

Broadly, the ADGM has legislative capacity with respect to civil and commercial laws for the FFZ. Jurisdiction in respect of criminal law is not vested in the ADGM but is rather a federal matter. Federal criminal law addresses areas such as criminal penalties for insider dealing, money laundering, fraud and dishonesty. As such, although not specifically developed for the ADGM, federal criminal law in most cases supports the proper functioning of the ADGM in respect of both common and financial crimes.

ADGM regulations support federal criminal law in the FFZ context by requiring participants to comply with their obligations under federal law. This was achieved by imposing—as a matter of ADGM regulation—legal obligations on market participants in the ADGM, for example, in relation to anti-money laundering obligations and taking measures to detect and prohibit market abuse. Such activities, therefore, not only constitute criminal activities under existing federal criminal law but also constitute breaches of ADGM regulations. This dual reinforcement provides for a robust enforcement culture, designed to ensure market confidence in the integrity of the zone.

### **Sharia Law**

Applicability of *Sharia* law:

- art.7 of the Constitution provides that “Islam shall be the official religion of the Union. The Islamic Shari’ah shall be a principal source of legislation in the Union”;
- *Sharia* is therefore a source of law throughout the UAE. Prohibitions under Islamic law, such as gambling, are therefore reflected in the Federal Penal Code. *Sharia* law also governs matters such as inheritance for Muslims in accordance with Islamic tradition; and
- UAE law does not prohibit persons conducting commercial transactions from entering into contracts such as Western lending and derivatives agreements.

Consistent with this, the ADGM allows both Western and Islamic products to be offered. Usage of these models is therefore left to consumer choice.

### **Legal framework—common law**

The ADGM took the decision to root its new legal framework in the common law, taking as its primary source the English common law. Common law, as opposed to civil law or mixed systems, is the leading choice of law in most major international financial centres and the governing law for most commercial contracts. This pre-eminence is reflected by the fact that the legal systems of the top four leading financial centres (London, New York, Singapore and Hong Kong) are all derived from the common law. These centres dominate not only the core financial sectors such as banking, securities and derivatives, but also other commercial sectors such as insurance, shipping, international trade, commodities and logistics. They also provide the governing law and dispute resolution system for these activities and the commercial agreements entered into. Given the aim of the government of Abu Dhabi is to encourage financial services, commodities trading and logistics, the adoption of a common law-based legal system was seen as a logical choice.

The ADGM took the decision to move away from a more codified model adopted by other FFZs, such as the Dubai International Financial Centre (DIFC). The legal structure of the DIFC is also based on common law but was realised by way of a plain language codification of English common law, rather than adoption of a common law case law system in its entirety. For example, the DIFC contract statute attempts to codify the common law principles of contract, with specific sections on offer and acceptance, termination and damages.<sup>4</sup> This simplifies the common law, denuding it of judicial authority in areas of complexity and uncertainty and ossifies the common law as at the date of enactment. Another drawback to the DIFC approach is that its ability to leverage off developments in other jurisdictions is limited. This is because, as noted in the DIFC courts' *Enforcement Guide*, the DIFC “might be described as *sui generis*”.<sup>5</sup> This means that, in order to interpret that law, one needs to guess the likely views of the DIFC courts, with their relatively limited throughput of cases, rather than being able to rely upon decisions flowing regularly from the most sophisticated common law courts in the world.

The ADGM instead developed an evergreen approach to common law, adopting English common law and incorporating it—as it stands from time to time—into ADGM regulations. This approach is designed to allow the ADGM to tap into the significant numbers of qualified common law lawyers from around the world. They can review and advise on ADGM law and, if suitably

<sup>4</sup> Contract Law, DIFC Law No.6 of 2004.

<sup>5</sup> DIFC Courts, *Enforcement Guide*, 4th edn (2016), fn.17 available at: <http://difccourts.ae/wp-content/uploads/2016/01/ENFORCEMENT-GUIDE-2016-AW.pdf> [Accessed 28 March 2017].

qualified, argue cases in ADGM courts. Similarly, textbooks written on English law and on systems derived from it, such as Australian, New Zealand and Singapore law, can provide guidance on points of uncertainty. Instead, therefore, of relying on a local bar of a small number of expatriates, the ADGM system taps into the vast infrastructure of advisers and commentators on the common law from around the world.

### Legal framework—English law in ADGM

Following a detailed review of various models, the ADGM adopted the Application of English Law Regulations 2015 (Application of English Law Regulations), which provide that “the common law of England (including the principles and rules of equity), as it stands from time to time, shall apply and have legal force in, and form part of the law of, the Abu Dhabi Global Market”.<sup>6</sup>

In addition, the decision was taken to adopt UK statutes as the basis for the legislative framework where possible since these fit with the common law. Adjustments were made to fit in with the ambitions of a free market centre. By way of example, as a primarily non-retail financial centre, the English common law’s extensive consumer client and retail protections were considered unnecessarily burdensome and unsuitable for application in the ADGM.

This establishes the application of English common law in the ADGM, including the principles and rules of equity, on all civil and commercial matters such as contracts, tort, equitable remedies, unjust enrichment, damages, conflicts of laws, security and personal property.

A significant aspect and benefit of the ADGM’s incorporation of English common law is that the common law is considered to be “ever-green” since the common law “as it stands from time to time” is to apply. As such, future developments in the English common law will also have an effect in the ADGM and the ADGM will continue to benefit from the incremental additions to English law developed through the common law system.

This approach contrasts with the approach taken in, for example, Singapore, where only a retrospective approach applies, meaning that any further developments in English common law have no effect in Singapore.<sup>7</sup> The Singaporean approach was considered appropriate in a nation-state context, where legislative and legal autonomy are required by democracy and sovereign independence. However, in a FFZ based on the English common law, the ADGM took the view that reflecting best international practice, ensuring familiarity and predictability, and leveraging the international reputation of English law as it stands from time to time were key drivers.

There was then an extensive review of all of the English law statutes, modifying aspects of the common law from the Statute of Frauds 1677 onwards. These included essential pieces of legislation such as the Law of Property Act 1925, Contracts (Rights of Third Parties) Act 1999 and codifications of various aspects of the prior common law such as the Partnership Act 1890.<sup>8</sup> Under s.2 of and the Schedule to the Application of English Law Regulations, these statutes were adopted into ADGM law with modifications stated, for instance, to remove references to Scotland and Northern Ireland, named UK institutions or ministries and other matters extraneous to the ADGM.

On top of this framework, specific legislation was produced in a highly tailored manner to cover matters of particular concern such as companies, insolvency and financial services law, as set out further below.

In the event of any conflict or inconsistency between English common law and these ADGM enactments, the ADGM regime will depart from English law. The Application of English Law Regulations uphold the precedence of the ADGM’s own regulations and expressly clarify that:

- any English common law applied within the ADGM is subject to modifications as required by the specific circumstances of the ADGM. ADGM courts are able to determine which variations in each case are appropriate for the circumstances in question; and
- ADGM legislation overrides the English common law. This ensures that the ADGM is not fettered in its ability to manage its own affairs and can respond efficiently to the needs and wishes of banks, participants and other investors in the ADGM.

Where the UK legislature abolishes or modifies a rule of common law, such as through the Contract (Rights of Third Parties) Act 1999 or a mistake of law, such changes will be of no effect in the ADGM unless similar legislation is expressly adopted by the ADGM.

### Legal framework—two systems interact

This interaction between English common law and ADGM-specific legislation raises several points of interest as regards potential for development—and conflict—as the ADGM legal system develops and matures.

First, it remains to be determined how ADGM courts will deal with a situation where its decision irreconcilably conflicts with a decision of English courts. ADGM court decisions would prevail over the latest English common law and, of course, always bind the parties to the dispute

<sup>6</sup> Section 1(1) of the Application of English Law Regulations 2015.

<sup>7</sup> Section 3(1) of the Application of English Law Act 1993 provides that “the common law of England (including the principles and rules of equity) ... shall continue to be part of the law of Singapore”. Some in Singapore are hoping this will enable Singapore law to float away from English law and develop its own separate identity. That would, of course, require a large number of sophisticated judgments to flow from the court system there in order to provide suitable and credible alternative guidance.

<sup>8</sup> One significant exclusion is that real property matters are not governed by English common law but have instead been codified in the Real Property Regulations 2015, as described further below.

in the case. The question, however, is how to interpret the extent of any change of direction. Would it be limited to similar facts or would a more expansive interpretation be appropriate, permitting ADGM courts to change direction entirely. Given the evergreen nature of English common law, one would envisage that the ripples from any change would be rather limited. The point will ultimately be driven by the approach of ADGM courts. Their reasoning will need to be very clear at the outset on such matters so as to enable lawyers to obtain the maximum possible guidance as to the future direction of local law on points of departure. If there were to be consistent and significant departures from the English common law that would potentially reduce legal certainty and denude the new system of many of the advantages with which it has been bestowed.

Secondly, the question of the weight of reliance on decisions and judgments from other (i.e. non-English) common law jurisdictions remains open. Much has been written on reliance on foreign jurisprudence in various jurisdictions<sup>9</sup> but the issue arises with particular force in a jurisdiction whose existence is premised on “borrowing” law from other legal systems. In England itself, decisions of other common law jurisdictions are often considered, particularly where the point is particularly complex, pertains to particularly difficult ethical or policy questions, or relates to a novel issue (as a result of technological advancements, for example).<sup>10</sup> In contrast, in Singapore, the question of reliance on English cases can be particularly controversial,<sup>11</sup> particularly now due to the fact that the Singaporean courts have access to alternative local jurisprudence.<sup>12</sup> The approach to be taken by the ADGM will be developed by its courts as the system matures. Given that the Application of English Law Regulations adopts English common law, a starting point for ADGM courts is likely to be to follow the English law approach to foreign common law decisions. This would mean that ADGM courts would look to other jurisdictions in circumstances where an English court would do likewise.

Thirdly, it may be anticipated that as the ADGM develops as a financial centre, and given the UAE’s political and social background, there may be situations in which English common law is deemed unsuitable. The Application of English Law Regulations explicitly provides for a “carve-out” from English common law,

stating that English law applies “so far as it is applicable to the circumstances of the Abu Dhabi Global Market” and “subject to such modifications as those circumstances require”.<sup>13</sup> The ambit and scope of this qualification is yet to be determined by ADGM courts. It can be envisaged that the specified “carve-out” would be of rather limited scope as a local public policy exemption. Allowing an expansive reading of this qualification could give ADGM courts an extraordinarily wide power of interpretation, far beyond what the judicial branch is typically accustomed to and with the power to frustrate concepts such as freedom of contract.

Singapore has a similar provision in its Application of English Law Act 1993. Section 3(2) of the Application of English Law Act 1993 provides that the “common law shall continue to be in force in Singapore, as provided in subs.(1), so far as it is applicable to the circumstances of Singapore and its inhabitants and subject to such modifications as those circumstances may require”. This qualification was recognised even before the passing of the Application of English Law Act 1993 by virtue of the decision in *Regina*.<sup>14</sup> In practice, reliance on this “carve-out”, which necessarily involves a certain amount of judicial activism, is minimal. It is envisaged that the ADGM “carve-out” will be sparingly used and would likely be limited to particular moral circumstances unique to the ADGM or the UAE, such as for particular religious or *Sharia* issues. The ADGM is likely to be involved in treading a very narrow line in this regard, balancing the need to recognise Western concepts that are important in commerce, such as derivatives, with the requirements of *Sharia* law.<sup>15</sup> As a potential commodity trading centre, it is anticipated that the ADGM will need to develop a sensitive and thoughtful approach to commodity derivatives, as it will experience pressures with which English law need not contend. Given these concerns, it is likely that developments will take the form of further legislative solutions as required, rather than relying on judicial discretion and activism. Accordingly, the impact of this “carve-out” may be less extensive than it might at first seem.

Fourthly, the existence of EU law adds an additional layer of complexity—given the incorporation of English law, which is itself currently subject to EU law—although the position will of course change after Brexit.<sup>16</sup> The effect of EU law on the English common law has been noted

<sup>9</sup> For example, the New Zealand Court expressly adopted the conclusion of Mr P.J. Millett QC’s (later Lord Millett) 1985 article on Quistclose trusts in *General Communications Ltd v Department Finance Corp of New Zealand* [1990] 3 N.Z.L.R. 406 which discusses monies loaned for the express purpose of facilitating the purchase of a plant.

<sup>10</sup> For example, in *Patel v Mirza* [2016] UKSC 42; [2016] 3 W.L.R. 399; [2016] 2 Lloyd’s Rep. 300, the English Supreme Court referred to the jurisprudence in Australia, Canada and the US in considering the reliance principle and the illegality defence in order to resolve whether a claim should be enforced if it would be harmful to the integrity of the legal system. In *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] A.C. 742; [2016] 1 P. & C.R. 13, the English courts looked at Singapore contract law to resolve the question of what the appropriate test for the contractual implication of terms should be. In *Sempre Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34; [2008] 1 A.C. 561; [2007] 3 W.L.R. 354, the English courts considered conclusions in Australian jurisprudence that the time value of money may be awarded at common law by way of restitution for unjust enrichment.

<sup>11</sup> For example, see *Chng Suan Tze v Minister for Home Affairs* [1989] 1 M.L.J. 69.

<sup>12</sup> *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 S.L.R. (R.) 663.

<sup>13</sup> Section 1(a) and (b) of the Application of English Law Regulations 2015.

<sup>14</sup> *Regina v Willans* (1858) 3 Kyshe 16.

<sup>15</sup> Bashar H. Malkawi, “Financial Derivatives between Western Legal Tradition and Islamic Finance: A Comparative Approach” (2011) 26 J.I.B.L.R. 276.

<sup>16</sup> Following Brexit, the Prime Minister, for the sake of expediency, has announced that there will be a grandfathering process for many laws at the point the UK exits the EU. Existing EU laws will be converted into UK law until the UK repeals or amends such laws. Regardless of this, the EU law dimension will become more complex following Brexit.

in other jurisdictions. For example, this point was considered to be particularly controversial in Singapore,<sup>17</sup> where it was noted in the second reading for the Application of English Law Act 1993 that the nexus between EU law and English law was such that English law was no longer suitable to be applicable in all circumstances in Singapore.<sup>18</sup> In particular, the relationship between UK statutes and EU law, and the existence of constitutional statutes in the UK for these purposes, requires unpacking before implementation into the ADGM.<sup>19</sup>

The question of how an ADGM court will—in applying English (common) law—deal with the impact of EU law will be vital. Broadly, there are three options available:

- first, it could apply English common law without regard to EU measures. This seems artificial, if not practically impossible. EU law has been integrated with English law since 1972, either by having direct application (in the case of EU regulations) or by being incorporated (in the case of EU directives). In either event, English law must be interpreted in the light of EU law.<sup>20</sup> The attempt to distil some sort of pure English law from this situation is unlikely to be successful;
- secondly, it could apply EU law only to the extent that such EU law has actually affected English common law, that is to say, when actual cases have materialised determining a particular point. Again, however, this might be deemed artificial. ADGM legislation clearly reflects the input of certain pieces of EU legislation, such as the Markets in Financial Instruments Directive 2014/65 amending Directive 2002/92 and Directive 2011/61.<sup>21</sup> It is accepted in England that EU law, guidance and regulations are authoritative in this sphere. Cases are unlikely to be brought in situations where, for example, the European Securities and Markets Authority (ESMA) guidance on an EU instrument is clear. This is likely to be the case even where such guidance contradicts previously-existing English common law. It is clear to all parties that EU law—which supersedes English law—also supersedes English

common law. The attempt to separate out certain types of EU law—i.e. those which have explicitly been held to supersede English law in an EU case—from the remainder is again likely to be extremely difficult in practice; and

- thirdly, it could decide cases in the same way as an English court would determine such cases. Clearly, certain processes—such as a reference to the Court of Justice of the European Union—that would be available to the English courts would not be available to ADGM courts, but in most circumstances, the reference to English law being deemed to include English law (including EU law), is likely to be the best approach. This is what we envisaged when putting the legislation together.

## Financial services

### *Barnabas Reynolds, Thomas Donegan, Oliver Linch*<sup>22</sup>

When it came to financial regulation, the philosophy was slightly different. Here, the regime needed to be wieldy for a small regulator and for local compliance staff. It had to be simplified. In addition, however, it needed to reflect the latest regulatory developments introduced by the G20, in Europe and the US after the credit crunch. Furthermore, it had to be readily recognisable by compliance personnel already located in the UAE, including the DIFC, so as to reduce local UAE overhead. It was considered that overly prescriptive financial regulation, leading to a requirement for large compliance departments and extensive regulatory costs, would prove unattractive to banks, financial services companies and market participants assessing whether to invest in the new jurisdiction.

Similarly, the ADGM was conscious that, as a fledgling financial centre, it is particularly susceptible to macroeconomic circumstances, and—while ensuring that adequate protection is afforded to regulated entities in terms of certainty and appropriate checks and balances—a certain amount of discretion and malleability on the part of the regulator is therefore necessary to guard against such market fluctuations. This led to financial regulations being developed which broadly follow the UK-based

<sup>17</sup> Louise Vaughan, “Singapore—Jurisdiction: Application of English Law Act 1993” (1994) 9(3) J.I.B.L. 55.

<sup>18</sup> *Parliamentary Debates Singapore: Official Report* (26 February 1993), Vol.60, No.6 available at: [https://sprs.parl.gov.sg/search/topic.jsp?currentTopicID=00063432-ZZ&currentPubID=00076966-WA&topicKey=00076966-WA.00063432-ZZ\\_1%2Bid037\\_19930226\\_S0003\\_T00071-bill%2B](https://sprs.parl.gov.sg/search/topic.jsp?currentTopicID=00063432-ZZ&currentPubID=00076966-WA&topicKey=00076966-WA.00063432-ZZ_1%2Bid037_19930226_S0003_T00071-bill%2B) [Accessed 28 March 2017].

<sup>19</sup> In *R. v Secretary of State for Transport Ex p. Factortame Ltd (No.2)* [1991] 1 A.C. 603; [1990] 3 W.L.R. 818; [1990] 3 C.M.L.R. 375 HL, the court held that the Merchant Shipping Act 1988 did not impliedly repeal the European Communities Act 1972. Parliament voluntarily accepted a limit on its sovereignty by enacting the European Communities Act 1972. Accordingly, European Community law had supremacy over national law. Similarly, in *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] Q.B. 151; [2002] 1 C.M.L.R. 50, the court held that the European Communities Act 1972 could not be impliedly repealed. Unlike the reasoning in *Factortame*, the court introduced the concept of a constitutional statute. Constitutional statutes are those which condition the relationship between the citizen and the State in a general, overarching manner, or those which enlarge or diminish the scope of what can be regarded as fundamental constitutional rights. Constitutional statutes cannot be impliedly repealed.

<sup>20</sup> See, for example, *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1 A.C. 546; [1989] 2 W.L.R. 634; [1989] 2 C.M.L.R. 194 HL.

<sup>21</sup> Directive 2014/65 on markets in financial instruments and amending Directive 2002/92 and Directive 2011/61 [2014] OJ L173/349.

<sup>22</sup> Partners and associate respectively, Shearman & Sterling LLP. In addition to these authors, other team members advising on the ADGM financial services legislative framework included Azad Ali, Aatif Ahmed, James Campbell, Aysuria Chang and Ruba Noorali.

Financial Services and Markets Act 2000 and relevant regulatory rules, and also reflect the latest International Organization of Securities Commissions (IOSCO), Basel Committee, IAIS, Financial Stability Board (FSB) and other international standards.

## Regulatory framework

The FSMR is a piece of legislation issued by the Board of Directors of the ADGM. It is supplemented by various rulebooks as well as indicative, non-binding guidance issued by the FSRA.

## Regulatory supervision

The FSMR contains two general restrictions which broadly set out the range of financial services that would trigger a licensing requirement for activities undertaken within and from the ADGM, based closely on the UK regulatory architecture.<sup>23</sup> The first prohibits persons from carrying on a regulated activity<sup>24</sup> without either authorisation or the benefit of an exemption: termed the “General Prohibition”. The second requires that all financial promotions<sup>25</sup> either be made by a firm that is licensed by the Regulator (a Regulated Firm) or have their content approved by a Regulated Firm<sup>26</sup>: the Financial Promotion Restriction. Regulated Firms are also prohibited from accepting deposits from the UAE markets and may not undertake foreign exchange transactions involving UAE Dirhams.<sup>27</sup> The Regulator may take disciplinary action, such as imposing a public censure or financial penalty, against any corporate or individual which breaches either restriction. There may also be further commercial consequences following breach of either restriction, such as agreements being rendered unenforceable.

Unlike the UK regime, there is no exemption for making financial promotions to high net worth individuals (or corporates) but there is an exception for cross-border business with regulated institutions.

Schedule 1 to the FSMR defines the scope of regulated activities. It is largely modelled on the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) (RAO). Regulated activities are activities carried on by way of business which relate to a specified investment. As with the RAO, specified investments under the FSMR include contracts of insurance, deposits and government securities. However, they also extend to geographic-specific investments such as *Sharia* compliant specified investments and *sukuk*. There are two levels of

regulatory supervision within the ADGM: one for Regulated Firms (known in the FSMR and ADGM Rules as “Authorised Persons”, referred to in this article as Regulated Firms); and one for individuals employed by those Regulated Firms. The first level comprises the assessment and authorisation by the Regulator of firms seeking to perform regulated activities in the ADGM and the ongoing supervision of such firms. Once a Regulated Firm is authorised, it will have permission to carry out its relevant regulated activities.

The second level relates to the individuals working within a Regulated Firm. Individuals who perform certain controlled functions (i.e. chief executive officer and all directors) in the businesses of Regulated Firms must be assessed and approved by the Regulator. Once approved, such individuals are known as “Approved Persons”. Rather than having the Regulator police and approve other senior managerial appointments, the Regulated Firms themselves are responsible for assessing and approving compliance customer-facing and senior managerial staff who perform what is termed “Recognised Functions” (for example, senior managers, customer-facing staff, compliance officers, money laundering reporting officers), although these persons must be notified to the Regulator. These individuals are known as “Recognised Persons”. Recognised Persons are still required to abide by the same principles as Approved Persons, including integrity and due care and diligence. This approach places the responsibility on Regulated Firms to initially assess the individuals that they employ in these roles and to continually assess their competence, fitness and propriety. In placing this responsibility on Regulated Firms, the ADGM regulatory framework has lessened the Regulator’s administrative burden in comparison to some other regimes without depriving the Regulator of the appropriate enforcement tools.

## Investigations and enforcement

The Regulator’s supervisory oversight is supplemented with suitably comprehensive information-gathering and investigatory powers, balanced by appropriate procedural protections. The Regulator has a range of enforcement and remedial powers, which it may choose to exercise if any of the regulatory requirements are breached.<sup>28</sup> Although the Regulator may take enforcement action at various stages in the regulatory process, the general

<sup>23</sup> Regulated activities are activities carried on by way of business which relate to a specified investment.

<sup>24</sup> As specified in Sch.1 to the FSMR.

<sup>25</sup> As defined in Sch.2 to the FSMR.

<sup>26</sup> A Regulated Firm is a legal person, other than a Recognised Clearing House or Recognised Investment Exchange, who is authorised under the FSMR to carry out certain regulated activities in or from the ADGM.

<sup>27</sup> COBS r.4.2 and 4.3.

<sup>28</sup> Pts 19–21 of the FSMR.

structure of any formal enforcement action is to provide written notices: a warning notice<sup>29</sup> followed by a decision notice<sup>30</sup> and, where necessary, a final notice.<sup>31</sup>

Administrative measures the Regulator may take if a breach has occurred include issuing a private warning, public censure, imposing financial penalties, suspension or disqualification of auditors, and prohibiting individuals from undertaking certain types of activities and enforceable undertakings. Various remedies are also available to the Regulator by way of civil action in ADGM courts (as applicable) for contravention of the FSMR, including injunctions, restitution, compulsory winding-up and actions for damages.

To ensure due process and procedural fairness, two independent decision-making bodies have been created for the ADGM: the Regulatory Committee and the Appeals Panel. Any decision made by the Regulator under the FSMR may be referred to the Regulatory Committee for a full merits review. The Appeals Panel can then review any decision of the Regulatory Committee. A decision of the Appeals Panel may then be only judicially reviewed by ADGM courts on a point of law.

## General rules applicable to all authorised firms

The Regulator's monitoring and supervisory powers are set out in the *General Rulebook* (GEN). The GEN applies to all FSMR-regulated entities, namely Regulated Firms, Approved Persons, Recognised Persons and Recognised Bodies (i.e. recognised clearing houses and recognised investment exchanges established in the ADGM). The GEN also deals with processing regarding applications for amendments and variations of permission, requests for information by the Regulator and the approval/notification requirements for change of control over Regulated Firms.<sup>32</sup>

In addition, a set of general regulatory requirements (Principles)<sup>33</sup> are set out in the GEN. These Principles apply to Regulated Firms, Approved Persons and Recognised Persons. They are designed to reflect similar standards of conduct to those outlined in the UK's general principles. The Principles work in conjunction with the Rules by providing legally binding standards of conduct. A breach in the Principles may, for instance, result in administrative disciplinary action, including a suspension or withdrawal of a Regulated Firm, Approved Person or Recognised Person status. Regulatory authorities in the UK have found the existence of these principles to be valuable in enforcement proceedings and numerous

decisions have been made on the basis of a breach of these broader principles, rather than engaging in detailed analysis of the minutiae of specific requirements.

The ADGM regulatory framework also prescribes rules on systems and controls. The Approved Persons regime reflects the new UK standards, tailored as appropriate to context. Senior managers of a Regulated Firm must be entrusted with responsibility for internal management, organisation and compliance. Approved Persons are tasked with ensuring the appropriate allocation of management responsibilities and that effective systems and controls over the affairs of the Regulated Firm are implemented. The GEN further provides guidance on complaints-handling.

## Regulatory capital requirements

The ADGM's capital rules for Authorised Persons, including banking entities, are designed in line with global standards. The Prudential, Investment, Insurance Intermediation and Banking Rules (PRU) provide the ADGM's rules on regulatory capital. The PRU are tailored to conform to the Basel III framework, applied proportionately in the context of the ADGM.

The PRU establish five categories for the purposes of capital requirements. Regulated Firms will fall within one of these categories primarily on the basis of their authorised activities.<sup>34</sup> Category 1 prescribes the strictest capital requirements. Regulated Firms are considered to be in Category 1 if they are authorised to accept deposits or manage profit-sharing investment accounts. Category 5 prescribes capital requirements for Islamic Financial Institutions that manage profit-sharing investment accounts. The PRU place the burden on Regulated Firms as they are required to identify the category applicable to their activities in order to calculate their capital requirements.

The PRU follow the implementation timetable of the Basel III framework. Accordingly, certain capital requirements, such as the liquidity cover ratio, have been provided for. However, other items, such as a binding leverage ratio, have not been included at this stage, due to their later implementation date.

## Market infrastructure

The ADGM's rules for financial market infrastructures have been modelled on IOSCO, and European and English regulatory standards. This has the potential to enable the ADGM to be "plugged into" cross-border recognition regimes. Investment exchanges and clearing houses can

<sup>29</sup> This is provided when the Regulator intends to take action that may be adverse to applicants for Regulated Firm status or Regulated Firms. The affected person has a right to respond but this right must be exercised within a specified period.

<sup>30</sup> This is provided when the Regulator decides to take action that may be adverse to applicants for Regulated Firm status or Regulated Firms. Following receipt of a decision notice, the affected person has a right to refer the matter to the ADGM Court. Further decision notices (in relation to different actions to be taken in respect of the same matter) may be provided.

<sup>31</sup> This is provided following a decision notice by the Regulator on taking action to which the decision notice relates.

<sup>32</sup> Chapter 8 of the GEN.

<sup>33</sup> Chapter 2 of the GEN.

<sup>34</sup> Appendix 1 to the PRU.



achieve “Recognised Bodies” status, and thereby be exempt from the General Prohibition, by fulfilling the requirements of Pt 13 of the FSMR.

Settlement finality provisions protect the integrity and finality of trades executed/cleared through the ADGM market infrastructure from the insolvency of other clearing members and of the Recognised Bodies themselves. Additionally, primacy is given to the Recognised Body’s own default management rules and procedures over any contrary insolvency or property laws. This is to ensure that market infrastructure can operate effectively to protect counterparties during any instances of economic turbulence.

The Market Infrastructure Rules (MIR) supplement the FSMR. The MIR apply to exchanges and clearing houses incorporated or operating in the ADGM. They prescribe special conduct and organisational rules. A recognition scheme based on the European model of recognition has been established to provide guidance for exchanges and clearing houses incorporated outside the ADGM wishing to obtain recognition in order to access users inside the ADGM.

Recognised Bodies—including Recognised Investment Exchanges and Recognised Clearing Houses operating within the ADGM but established outside the ADGM, in respect of whom specialist rules apply—are subject to notification obligations, supervisory powers of the Regulator, capital requirements and, in the event of non-compliance, disciplinary measures.

## Recent updates

The ADGM’s rules have been updated in order to ensure they accurately reflect recent regulatory updates; these updates include, for example, the latest additions to the Basel III framework.

## Funds structuring

*John Adams, Amy Watt*<sup>35</sup>

The funds regime was drafted with the goal of making the ADGM a go-to jurisdiction for both local and foreign investment. The regime aims to reflect current international best practice by incorporating the best aspects of funds regimes in Europe (for example, by incorporating the more well-received aspects of the Alternative Investment Fund Managers Directive—AIFMD<sup>36</sup>) and across the globe (for example, by introducing cell company regimes), whilst also catering for local needs. The regime aims to create a clear and concise regulatory framework for the management and marketing of funds, striking a balance between clear, robust and effective regulatory oversight on the one hand and flexibility for fund managers on the other.

## English law statutes—Limited Partnerships Act 1907

The Limited Partnerships Act 1907 has been the subject of extensive discussions between the UK Government and private funds industry practitioners for a number of years, with industry participants calling for reforms to simplify the regime and ensure that the rules applicable in the UK were brought into line with international standards. One of the main criticisms of the current English law is the inability for limited partners to have any involvement in the management of a partnership without losing their limited liability status, which is viewed in the market as overly restrictive. Another aspect of the English limited partnership law that is generally deemed archaic and impractical is the prohibition on returning capital to a limited partner during the life of the partnership, which has led to the entirely artificial but now standard practice of having limited partners make a nominal capital contribution to the partnership and then contribute the remainder of their commitment by way of a loan.

Therefore, when deciding on its partnership laws, the ADGM was able to take and tailor UK legislation to create a more user-friendly and competitive regime, an approach which was subsequently suggested by the UK Government itself in its proposals to reform the UK legislation.

The ADGM decided to include a white list of activities which limited partners could participate in, while maintaining their limited liability status. As a result, under the ADGM statute, limited partners can take part in decisions concerning, for example, variations of the partnership agreement, whether to approve or veto certain investments, and approval of asset valuations, all without losing their limited liability status. Furthermore, there is no prohibition on returning capital to limited partners during the life of the partnership; greatly simplifying the mechanics of investing for limited partners.

The ADGM has also made changes to the English statute that go beyond the proposed amendments currently being considered in the UK, in order to make its regime competitive with other fund jurisdictions on a global scale by simplifying the notification requirements for registration of a new partnership.

## ADGM Fund Rules

When considering the drafting of ADGM Fund Rules, an obvious development to take into account was the AIFMD. While the aims of this legislation, i.e. increased investor protection and management of systemic risk, are noble ones, the AIFMD is generally recognised as imposing an enormous regulatory and administrative burden on fund managers in an overly-paternalistic and

<sup>35</sup> Partner and associate respectively, Shearman & Sterling LLP.

<sup>36</sup> Directive 2011/61 on Alternative Investment Fund Managers and amending Directives 2003/41 and 2009/65 and Regulations 1060/2009 and 1095/2010 [2011] OJ L174/1.

unnecessary fashion, especially given that alternative investment funds are generally only used by institutional or other sophisticated investors—not the general public.

Notwithstanding the above, there are aspects of the AIFMD that have been welcomed by the industry. For example, the requirement to appoint an independent custodian is generally considered a sensible development in the wake of the Madoff scandal, as well as the functional and hierarchical separation and independence between the functions of risk management and portfolio management, and both of these requirements are reflected in ADGM Fund Rules.

Therefore, by cherry-picking certain aspects of the AIFMD that have been generally well-received by the industry, the ADGM has managed to create a best in class funds regime in terms of investor protection but has managed to avoid imposing the other expensive and excessive regulatory burdens which are so disliked by fund managers across the industry.

## Companies regulations

*Matthew Powell*<sup>37</sup>

The Companies Regulations 2015 (the Companies Regulations) are substantially based on the UK Companies Act 2006 (the UK Act). The decision to use the UK Act as the principal precedent for the drafting of the Companies Regulations was taken in view of the fact that the UK Act is a well-established and highly regarded statute that has undergone evolution and improvement over a long period of time. The UK Act also has the benefit of being supported by precedents and regular English court decisions, providing increased legal certainty and predictability. The UK Act is also consistent with EU law and therefore the company laws of EU Member States. Another benefit of this approach is that the UK Act is well known to a large number of practitioners in the UAE and widely used in international business.

As a result, the drafting of the Companies Regulations presented the ADGM with an opportunity to take the best of the UK approach while avoiding some of its historic peculiarities that have been removed or abandoned by the best practice of other jurisdictions. Some of the key departures from the UK Act (and the rationale behind them) are summarised below.

### Restricted scope companies

The ADGM allows establishment of a Restricted Scope Company (RSC): a vehicle which is bound by less onerous public disclosure and compliance requirements. It is envisaged that these will be holding vehicles for professional investors and limited instances of institutions for whom less regulation and a greater degree of confidentiality will be appropriate.

The Companies Regulations include a number of provisions intended to address Financial Action Task Force (FATF) standards as well as the Organisation for Economic Co-operation and Development (OECD) Global Forum on Double Taxation Common Reporting Standards and provisions relating to the US Foreign Account Tax Compliance Act 2010. For example, RSCs are required to file annual returns with the Registrar and to maintain up-to-date membership records. Despite a light approach to disclosure relative to private companies, the existence of RSCs would not prevent the ADGM from being compliant with any international obligations for the sharing of information between regulatory bodies, including any FATF anti-money laundering standards, for so long as either an RSC allows other companies to conduct client due diligence in relation to it (including by allowing it to inspect its private filings with the Registrar) or the RSC avoids, for example, financial business through wire transfers.

RSCs have the following key features:

- an RSC is required to file its articles, details of its registered office, details of its directors and secretary (if it has one) and an annual return with the Registrar. Of these documents, only its articles and details of its registered office will be made publicly available;
- an RSC is obliged to keep accounting records, to have an accounting reference date and to prepare (but not audit) accounts on the basis of the small companies regime. RSCs will not, however, be obliged to file these accounts with the Registrar (unless requested by the Registrar) or to circulate them to its members or debenture holders. A RSC will not be required to prepare directors' reports;
- an RSC may only be incorporated as a subsidiary of a group that publicly files consolidated accounts or as a subsidiary of a company formed by Emirati decree or by an individual and their close family members (which is intended to facilitate their use by single family offices). It is not possible to re-register a private or public company as an RSC, as to do so may deprive existing shareholders and creditors of protections previously enjoyed by them. Third parties will know that an RSC is subject to less onerous requirements due to the requirement to have (Restricted) in the company's name. The onus will then be on such third parties to conduct diligence on the company as part of a bilateral dialogue, rather than through an open register; and

<sup>37</sup> Partner, Shearman & Sterling LLP. In addition to this author, other team members advising on the ADGM companies regulations legislative framework included James Comyn, Jeremy Kutner, Michael Scargill, Sam Whitaker and Matthew Anson.

- the requirement to seek members' approval for certain transactions with directors, including directors' service contracts, is disapplied for an RSC, in keeping with the deregulated regime for these companies.

## Nominal value

Unlike under the UK Act, shares in companies incorporated under the Companies Regulations do not have a nominal value. In adopting this approach, much of the commentary on the drafting of the equivalent provisions of the UK Act was considered. When consulting on the draft UK Act in 1999, the DTI Company Law Review Steering Group recommended that the concept of nominal value be abolished.<sup>38</sup> Ultimately, however, concerns over the practicalities for existing companies in connection with a move towards not having a nominal value, combined with the requirements of the second Company Law Directive 2012/30<sup>39</sup> for shares to have a value assigned to them—either as a nominal value or accountable par—meant that the concept of nominal value was retained in the UK Act. Clearly, these considerations are not relevant to the ADGM which, as a newly created jurisdiction, is free to follow the best practice in other markets such as Singapore or Hong Kong which have abolished the concept.

## Continuance

Continuance provisions have been included in the Companies Regulations to provide a route for companies to redomicile in the ADGM. Similar provisions feature in a number of jurisdictions, including Delaware, New Zealand, Bermuda, Jersey, the British Virgin Islands and the DIFC. The provisions are reciprocal, allowing a foreign body corporate to continue as a company in the ADGM and an ADGM company to continue as a body corporate in other jurisdictions.

## Duty to avoid conflicts of interest

Section 175 of the UK Act imposes a duty on directors to avoid conflicts of interest. This duty has been the subject of criticism in the UK, with the Law Society Company Law Committee and City of London Law Society Company Law Committee previously submitting to the UK Business Innovation and Skills Select Committee that considerable uncertainty arises as to when one might be in breach of this duty, given that the duty is to avoid conflict rather than a duty on what to do when

one is in conflict. The Companies Regulations do not include a duty to avoid possible conflicts but instead impose a duty not to act in relation to matters where the director has an actual or possible conflict, without the approval of the unconflicted directors or the members.

## Disqualification

The provisions of the Companies Regulations dealing with the disqualification of directors have been drawn from two sources. The substantive grounds on which directors may be disqualified have been largely taken from the Company Directors Disqualification Act 1986. Although, under that Act, the power to disqualify directors rests with the English court, the Companies Regulations vest this power in the Registrar. The procedure to be followed by the Registrar is based on the procedures adopted by the UK Financial Conduct Authority, which envisage a staged process involving the issuance of a warning notice followed by an opportunity to make representations to the Registrar, the issuance of a decision notice followed by the opportunity to contest the Registrar's decision in court and finally, the issuance of a final notice.

It is hoped that this approach will operate to reduce the burden on ADGM courts. In addition, in light of the ADGM's status as an FFZ, it was thought that this approach will better align the powers of the Registrar as regards the disqualification of directors and the FSRA as regards the withdrawal of financial services authorisation (given that these processes are likely to be used in parallel in practice).

## Derivative claims

In relation to proceedings brought by a shareholder on behalf of a legal entity against a third party (so-called "derivative claims"), a common criticism of the derivative claims regime in the UK is that it can be used by any member, regardless of shareholding or interest. In particular, this can make the process vulnerable to vexatious litigants, who might avail themselves of derivative claims to further personal campaigns simply by acquiring one share. Certain protections from abuse in the UK Act were retained in the Companies Regulations, for example, an applicant being required to show a *prima facie* case against the defendant and then only being permitted to proceed with the court's permission. Given that ADGM courts will be newly-formed, it was considered advisable to try to reduce

<sup>38</sup> In Company Law Review Steering Group, "Modern Company Law for a Competitive Economy—The Strategic Framework" (February 1999), para.5.4.27, the Steering Group remarked: "We believe that the requirement that shares should have a nominal value has become an anachronism. There is no real distinction between share capital and share premium account, except that the latter may be applied in certain (very limited) ways in which share capital account may not. The existence of a nominal amount of share capital attributable to a share, which rapidly ceases to have any significance other than a historical one, tends to confuse the layman. The only real function of nominal value is to set a minimum price below which shares cannot be issued. But as long as all the proceeds of an issue [of shares] are retained in an undistributable capital account, there is no reason to impose any particular limit below which the issue price cannot fall. Thus arguments based on the need for a minimum issue price are in our view misconceived. New issues of shares can never damage creditors, indeed they will always be for their benefit. Members of a company issuing NPV [no par value] shares are well aware of the commercial position on the price that can be charged for a new issue. For these reasons, we would favour the end, for public and private companies alike, of the requirement for shares to have a nominal or par value."

<sup>39</sup> Directive 2012/30 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (Recast) [2012] OJ L315/74.

this potential burden further. Accordingly, the right to bring a derivative claim is restricted to eligible members holding 5% of the share capital. It is intended that by doing so the derivative claims regime will only be utilised by those with significant holdings and legitimate and material grievances. Members holding a lower percentage than this will still be able to pursue the remedy of unfair prejudice, if appropriate.

## Mergers

Nearly all mergers in the UK take the form of private share (or asset) acquisitions or public takeover offers, meaning that the UK Act's merger procedure has barely, if at all, been used. Merger processes in a number of other jurisdictions—such as Delaware, Hong Kong, Bermuda, Jersey and the British Virgin Islands—tend not to involve the transfer of assets and liabilities or the dissolution of one or more of the merging companies but instead involve universal succession concepts under which the merged company is absorbed or consolidated with another company into a successor or surviving company. This is the approach that has been adopted in the Companies Regulations. However, the publicity and other administrative requirements required under the UK Act before a merger can be approved and become effective have been retained—for example, the adoption of draft terms of merger, the preparation of various reports, the calling of shareholder meetings to approve the merger and the publication of the merger terms and reports prior to the meeting. These publicity requirements apply equally to RSCs.

## Cell companies

Bearing in mind the ADGM's goal of becoming a pre-eminent jurisdiction for the conduct of financial services business, with a particular focus on fund management, it was considered desirable to include provision for cell companies. Cell companies operate via multiple cells within the company with their own allocated assets and liabilities, which are intended to be distinct from the assets and liabilities of the company itself with their own balance sheets and separate insolvency processes per cell. Cell companies (typically used in the investment funds industry) may take two forms under the Companies Regulations: (1) an incorporated cell company (where each cell has a distinct legal personality); or (2) a protected cell company (where a creditor's recourse is limited to cellular assets by operation of law).

## Takeover regulations

### *Matthew Powell*<sup>40</sup>

To enhance the ADGM's attractiveness as a listing venue, a robust takeover regime is important. Shareholder protections were introduced in the Takeover Regulations (Takeover Code) 2015 (Takeover Regulations).

When considering which approach to adopt for the FFZ's takeover regime, consideration was given to the City Code on Takeovers and Mergers (the UK Code) and the US's takeover regime. While both frameworks have their merits, it was thought that importing the US regime would result in a significant level of additional complexity on the basis that it has two sources: (1) the relevant provisions of the US Securities Exchange Act of 1934; and (2) the corporate law of the state in which the target company is incorporated, typically the State of Delaware where many publicly-held US companies are incorporated. While it would be possible to transpose the takeover provisions of the Securities Exchange Act of 1934 into ADGM law, it would be very difficult, in light of the ADGM's adoption of English common law and the Companies Regulations, to adopt the state of Delaware's corporate laws as they apply to takeovers without introducing uncertainty into the ADGM's legal framework. It was also thought that the adoption of a regime based on that of the UK would have various advantages, including that:

- the UK Code is a well-established and highly-regarded yet flexible set of rules, which has undergone evolution and improvement over a considerable period of time and is supported by regular input from the UK takeover panel (including guidance in the form of "practice statements) which may be instructive;
- the UK Code is regarded as providing a high level of shareholder protection (the US takeover regime, for example, does not include a rule on mandatory offers);
- a takeover code based on the UK Code could be policed by a regulator rather than the courts, reducing the scope for litigation and increasing the speed at which differences are resolved; and
- ADGM legislation closely based on the UK Code would be consistent with the Companies Regulations based on the UK Act, could be consistent with the Takeover Directive 2004/25<sup>41</sup> and would be familiar to practitioners in the UAE from the EU, Singapore, South Africa and Hong Kong, among others.

<sup>40</sup> Partner, Shearman & Sterling LLP.

<sup>41</sup> Directive 2004/25 on takeover bids [2004] OJ L142/12.

The Takeover Regulations provide for the establishment of a takeover panel similar to that in the UK. In common with the UK, this panel will adopt detailed takeover rules in due course and will also issue guidance periodically.

## Securities

### *Marwan Elaraby*<sup>42</sup>

As discussed above, the philosophy adopted for financial regulation in the ADGM, including the rules for the offering and listing of securities, was to have requirements that were readily recognisable to compliance personnel and practitioners in the UAE. The FSMR therefore prescribes an extensive set of rules on the listing of securities in the ADGM, many of which are very similar to the rules in the DIFC. Specific rules on securities listing are set out in the Market Rules module (MKT), which is substantively based on the current EU Prospective Directive requirements. The Market Rules cover offers of securities to the public, the appointment and obligations of sponsors, market abuse, market disclosure, and governance. They should therefore be broadly familiar to businesses with experience of dealing in the London and other European securities markets.

The Market Rules were drafted with a view to creating an attractive listing venue for issuers and shareholders, while maintaining high standards of disclosure and shareholder protection. The Regulator is given responsibility for maintaining the official list, the admission of securities to listing, the discontinuance and suspension of listings and the approval of prospectuses and sponsors. Listed entities are subject to disclosure requirements and the Regulator may take disciplinary measures for misleading statements and omissions in prospectuses. Provisions have been made for the legal effect and procedure of business transfer schemes and the powers and duties the ADGM courts have in approving such a scheme. Finally, the rules on listing have been complemented with rules on suspension and removal of financial instruments from trading.

A particular area of concern for many potential regional issuers and shareholders has been the level of minimum free float, which states that a certain number of shares must be held in public hands at the time of admission of securities to an exchange. This requirement has been as high as 55% on some regional exchanges, which has discouraged many potential shareholders from listing their companies in the region either due to the desire to maintain control or because the contemplated offering size would be too large for the market to absorb.<sup>43</sup> Several regional companies have, in the last five years, instead

listed their shares on the London Stock Exchange. The Market Rules adopted a flexible approach (similar to the approach in Singapore) to this requirement by tying minimum free float to the size of the issuer's market capitalisation at the time of admission to listing:

- smaller issuers with a market capitalisation of under \$500 million: at least 20% of the shares in relation to which the application for admission is made must be held in public hands;
- issuers with market capitalisations of \$500 million to \$1 billion: 15% of the shares for which the application for admission is made must be held in public hands; and
- issuers with a market capitalisation of \$1 billion or more: at least 12% of the shares in relation to which the application for admission is made must be held in public hands.

This approach avoids a one-size-fits-all 25% minimum float requirement, as applied in the EU and DIFC, in favour of a more tailored calibration taking into account the market capitalisation of the issuer as the relevant benchmark for the minimum float requirements.

## Insolvency regulations

### *Clifford Atkins, Tom Berisford*<sup>44</sup>

#### Overview

In the same vein as the Companies Regulations, the Insolvency Regulations 2015 (Insolvency Regulations) establish an insolvency regime for companies formed or registered in the ADGM and certain other legal entities,<sup>45</sup> and are based largely on English insolvency laws. The Insolvency Regulations also include other features, drawing on the flexibility of the deed of company arrangement used in Australia.

Overall, the Insolvency Regulations, together with the Companies Regulations, provide creditors with certainty of process and outcome whilst at the same time fostering a rescue culture for debtors in financial difficulty. The spirit of the Insolvency Regulations reflects the general trend, which has developed in the UK insolvency regime since the introduction of the Insolvency Act in 1986 (UK Insolvency Act) of promoting the rescue of a company in financial difficulties through an administrative appointment, with the aim of saving the business and associated jobs as opposed to allowing secured creditors

<sup>42</sup> Partner, Shearman & Sterling LLP.

<sup>43</sup> The new UAE Commercial Companies Law (Federal Law No.2 of 2015) has dropped the minimum free float for listing on domestic UAE exchanges from 55% to 30%.

<sup>44</sup> Of Counsel and associate respectively, Shearman & Sterling LLP. In addition to these authors, other team members advising on the ADGM insolvency legislative framework included Patrick Clancy and Simon Thexton.

<sup>45</sup> An insolvency regime for financial institutions, similar to the Bank Recovery and Resolution Directive 2014/59 (Directive 2014/59 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Directive 82/891, and Directives 2001/24, 2002/47, 2004/25, 2005/56, 2007/36, 2011/35, 2012/30 and 2013/36, and Regulations 1093/2010 and 648/2012 [2014] OJ L173/190), is to be adopted at a later date in a separate piece of legislation.

to break up a company's assets by using a self-help remedy, such as receivership or administrative receivership.

Certain of the interesting features of the Insolvency Regulations and the key departures from the UK insolvency regime are described below.

## Structure

The UK insolvency regime currently consists principally of the UK Insolvency Act and the Insolvency Rules 1986<sup>46</sup> (UK Insolvency Rules), with other supporting legislation (including parts of the Companies Act 2006). Where the UK Insolvency Act sets out the general framework of the insolvency regime, the UK Insolvency Rules and other legislation generally provide procedural steps and guidance to companies, directors, insolvency practitioners and other concerned parties regarding an insolvency process.

The Insolvency Regulations provide both the insolvency framework and procedures within a single document, facilitating its ease of reading and quick reference. At the drafting stage, the ADGM also considered and reflected in the Insolvency Regulations certain aspects of the proposed extensive revision of the UK Insolvency Rules, in particular by consolidating certain disparate sections that are common to different insolvency procedures—for example, those requirements for the content and delivery of documents, creditors' meetings, creditors' committees, distributions and remuneration of insolvency practitioners. This has meant that the descriptions of those aspects of each insolvency proceeding have been significantly shortened and streamlined.

## Rescue culture

Consistent with establishing a rescue culture for struggling debtors, the Insolvency Regulations include an administration procedure similar to that under the UK insolvency regime, which has as its primary objective the rescue of a company as a going concern. Administration allows for the reorganisation of a company in financial difficulty or the realisation of its assets under the protection of a statutory moratorium during which creditors are prevented from taking legal action against, or petitioning for the winding-up of, the company.

The Insolvency Regulations allow for an administrator to be appointed by the ADGM Court, a company or its directors and by the holder of a qualifying charge.

Under the UK Insolvency Act, only the holder of a floating charge over the whole (or substantially the whole) of a company's property may appoint an administrator. In contrast, the Insolvency Regulations extend this right to the holders of *any* charge or charges (whether fixed or floating) which together relate to the whole (or substantially the whole) of a company's property. This acknowledges that the use and recognition of floating

charges over a company's property may be more limited in the Middle East than in the UK and so the significance afforded to floating charges under the UK regime is not necessarily appropriate in the ADGM.

As described above, the self-help remedies of receivership and administrative receivership are included within the Insolvency Regulations but given limited application (as in the UK insolvency regime) in order to encourage creditors to use the administration process. Whereas a receiver or administrative receiver is required to act in the interests of the secured creditors that have appointed him, an administrator is required to act in the best interests of the creditors of a company as a whole with the primary objective of promoting the rescue of a company.

An administrative receiver may only be appointed by the holder of a qualifying charge and only where such appointment relates to:

- a capital markets arrangement involving a debt of at least US \$50,000,000; or
- a project financing which includes step-in rights and where such project incurs more than US \$50,000,000 in debt.

Furthermore, upon the appointment of an administrator, any administrative receiver appointed in respect of a company or any receiver appointed in respect of any part of a company's property must vacate office.

While the rescue culture promoted by the administration process, with its statutory moratorium, is given pre-eminence, the FSRA still has an overriding power to wind up a company in administration if it is of the opinion that:

- the company is unable to pay its debts;
- it is just and equitable to do so;
- there has been a serious contravention of any regulation of the ADGM; or
- it is expedient in the interests of the ADGM that the company should be wound up.

## Creditor compromise processes

The Insolvency Regulations do not include the company voluntary arrangement (CVA) process, which exists in the UK insolvency regime. A compromise or restructuring of a company's obligations similar to a CVA may, in any case, be achieved through use of a scheme of arrangement under the Companies Regulations and so a separate compromise process was not considered by the ADGM to be necessary. However, the Insolvency Regulations do include a CVA-style arrangement, known as a Deed of Company Arrangement (DOCA), within, and as an exit route from, the administration process.

Based on the process used under the Australian companies' legislation, the DOCA is a flexible tool for an administrator to implement a binding agreement between a company's creditors, the administrator of the

<sup>46</sup> At the time of writing, the Insolvency (England and Wales) Rules 2016 (SI 2016/1024) had not yet entered into force (anticipated to be 6 April 2017).

deed and the company regarding its debts and other obligations. There is, in theory, no restriction on the terms of the compromise that might be agreed between creditors and so a DOCA provides great flexibility to an administrator.

A DOCA binds all creditors, the company and the administrator, except for secured creditors, owners or lessors of property who will only be bound by a DOCA if they vote in favour of it, affording some protection to the ability of those creditors to enforce their contractual or security rights. ADGM courts, however, may prevent a secured creditor or lessor of property from exercising such rights where to do so would have a material adverse effect on the purposes of the DOCA, thereby avoiding such a creditor derailing a restructuring by prioritising its own interests.

Unlike a CVA, which is a standalone procedure that similarly binds those who have voted or are eligible to vote in favour of it, the DOCA operates within the administration procedure and can therefore be proposed by an administrator already in office, without having to open a separate insolvency procedure, which saves time and expense.

## Netting and effectiveness of collateral

Part 7 of the Insolvency Regulations (Financial Markets and Netting) provides for two key protections for parties to financial transactions in the event of the insolvency of one counterparty. These provisions will be familiar to derivatives and financing markets since they are based upon the ISDA Model Netting Act 2006 and are supplemented by provisions derived from the UK's Financial Collateral Arrangements (No.2) Regulations 2003, which themselves implement the EU Financial Collateral Directive.<sup>47</sup> In their interpretation of Pt 7 of the Insolvency Regulations relating to netting and financial collateral, ADGM courts will therefore be able to draw from the case law of the English courts relating to these complex provisions. Again, the Insolvency Regulations have organised these provisions within a single piece of legislation for ease of reference.

## Netting

First, the Insolvency Regulations allow for the continued enforceability of netting provisions (for example, those found in ISDA documentation), notwithstanding the insolvency of one party to a transaction. This allows for payments due from each party to be set off against one another, resulting in a single net amount being due from one party to the other. The non-defaulting party will be able to claim in the event of insolvency of the defaulting party in respect of such net amount (or be liable only for such net amount if the negative balance is due to the insolvent party). By allowing such provisions to continue

in effect upon insolvency, this provides a greater level of certainty for market participants in respect of their financial markets transactions.

## Collateral arrangements

Secondly, the Insolvency Regulations allow for a person to be able to enforce against certain collateral arrangements entered into between parties (whether by way of transfer of title to collateral or by way of security), notwithstanding that the collateral provider has commenced insolvency proceedings. Subject to certain conditions, the collateral-taker will be entitled to realise, liquidate or appropriate the collateral in order to satisfy the obligations owed to it by the defaulting party, where such action might otherwise be restricted by a moratorium or stay or where a creditor would be required to give notice to the debtor prior to such action. In addition, Pt 7 of the Insolvency Regulations sets out the process by which a collateral-taker may appropriate collateral without prior reference to a court. Consistent with the UK Financial Collateral Regulations 2003, the Insolvency Regulations also disapply certain legislative provisions where collateral arrangements are involved—for example, a collateral arrangement creating a charge would not need to be registered with the companies registrar as normally required under the Companies Regulations.

## Cross-border insolvency proceedings

The Insolvency Regulations incorporate and apply the UNCITRAL Model Law on Cross-Border Insolvency (1997), which aims to facilitate the process and procedure relating to cross-border insolvencies.

As a result, foreign insolvency officials may apply to ADGM courts to have foreign insolvency proceedings recognised, which would have the effect of staying or suspending certain actions or proceedings that may otherwise be taken against a debtor or its assets within the ADGM. There is also a requirement for ADGM courts to co-operate with foreign courts or foreign representatives in connection with cross-border insolvencies.

## Cape Town Convention

Through the subsequent adoption of the Insolvency (Amendment No.2) Regulations 2016, it has been confirmed that the Convention on International Interests in Mobile Equipment signed in Cape Town on 16 November 2001 (Cape Town Convention), together with the related Protocol on matters specific to Aircraft Equipment (Aircraft Protocol), apply and have legal force within the ADGM.

<sup>47</sup> Directive 2002/47 on financial collateral arrangements [2002] OJ L168/43.

The Cape Town Convention and the Aircraft Protocol establish a system of registration by which the buyer or creditor in respect of an aircraft or an airframe, aircraft engine or helicopter (aircraft objects) may register its interest at the international aircraft registry in Dublin.

An interest in an aircraft or aircraft object that is duly registered will have priority over any interest that is registered subsequently or over any unregistered interest, subject to limited exceptions.

The Cape Town Convention and the Aircraft Protocol further provide that a creditor having the benefit of an international interest shall have certain important remedies available to it upon a breach by the debtor of the terms of its financing documentation.

The remedies available to a creditor under the Cape Town Convention and the Aircraft Protocol are designed to address the challenges created by the international and mobile nature of aircraft so that a creditor which has a registered interest may take possession of, sell or lease an aircraft or aircraft object or procure the physical transfer of an aircraft or aircraft object from the territory in which it is currently situated.

Furthermore, if insolvency proceedings are opened against a debtor, an international interest will remain effective provided that it has been registered against an aircraft or aircraft object.

The confirmation by the ADGM of the application of the Cape Town Convention and the Aircraft Protocol was intended to create a framework which promotes and facilitates the acquisition, use and financing of aircraft, airframes, aircraft engines and helicopters, in line with the ADGM's ambition to become an "aviation financing and asset management hub in the UAE and the MENA region".<sup>48</sup>

Since the Insolvency (Amendment No.2) Regulations' adoption in late 2016, this move has already borne fruit: in January 2017, it was announced that Etihad Airways had entered into a sale and leaseback arrangement in relation to two Airbus A380 aircraft owned by special purpose vehicles located in the ADGM.<sup>49</sup>

## Real property

*John Opar, Robert Sein*<sup>50</sup>

The Real Property Regulations 2015 and Strata Title Regulations 2015 (collectively, the RP Regulations) promulgate a comprehensive system of real property law. The RP Regulations recognise traditional estates and

interests in real property and establish a system for registration of those estates and interests, all of which should be familiar to real estate investors from a variety of jurisdictions. Several important policy decisions were required to be taken when drafting the RP Regulations and are summarised below.

## Type of registration system

The drafters of the RP Regulations, in consultation with the Board of the ADGM, considered both a "Torrens"-style system<sup>51</sup> and an "abstract"-style system.<sup>52</sup> A Torrens-style system was preferred and adopted for a number of reasons. Under a Torrens-style system, a governmental authority issues evidence of registration of an interest in real property (i.e. certificates of title), which provide conclusive evidence of ownership.<sup>53</sup> Under the alternative abstract-style system, evidence of registration is not issued by a governmental authority. Rather, it is incumbent on market participants to search the land records and make their own determinations of ownership. Under the abstract-style system, spurious or inaccurate filings could confuse the land records because specific required forms of documents eligible for recording purposes have not been uniformly promulgated. Also, under the abstract-style system, market participants would likely require either title insurance or legal opinions of title in connection with transactions, leading to additional transaction costs as there is no governmental certification as to ownership.

## Limitations on freehold ownership of land

Law No.4 mandates that "[a]ll transactions relating to the transfer of ownership of land located within the geographical boundaries of the Global Market shall be governed by the real estate laws of the Emirate and all its implementing resolutions".<sup>54</sup> This provision restricts the holding and transfer of freehold ownership of land located within the ADGM to citizens of Member States of the Cooperation Council for the Arab States of the Gulf and bodies corporate wholly-owned by such persons (the Ownership Restriction). The RP Regulations include the Ownership Restriction.<sup>55</sup> Accordingly, transfers of freehold ownership of land will be registered in the ADGM register but all such transfers shall be subject to the Ownership Restriction.

<sup>48</sup> ADGM Press Release, "ADGM Aims to be Aviation Financial Hub" (7 December 2016) available at: <https://www.adgm.com/mediacentre/press-releases/adgm-aims-to-be-aviation-financial-hub/> [Accessed 28 February 2017].

<sup>49</sup> ADGM Press Release, "Etihad Airways and Natixis Close the First Aircraft Leasing Transactions in Abu Dhabi Global Market (ADGM)" (17 January 2017) available at: <https://www.adgm.com/mediacentre/press-releases/etihad-airways-and-natixis-close-the-first-aircraft-leasing-transactions-in-abu-dhabi-global-market-adgm/> [Accessed 28 February 2017].

<sup>50</sup> Partner and Counsel respectively, Shearman & Sterling LLP. In addition to these authors, other team members advising on the ADGM real property legislative framework included Alex Rosenthal.

<sup>51</sup> The torrens-style system is a land registration system which was first introduced in Australia in 1858 and was later adopted by, and further developed in, England.

Torrens-style registration systems can now be found in a number of jurisdictions internationally, including certain Canadian provinces.

<sup>52</sup> The abstract-style system can be found in most states of the US.

<sup>53</sup> Subject to limited exceptions, a registered owner holds the registered interest subject to all prior interests registered in the folio for the relevant lot but free from all other interests.

<sup>54</sup> Article 22(12) of Law No.4.

<sup>55</sup> Section 1(a) of the Real Property Regulations 2015.



## Recognition of *musataha* and usufruct

The *musataha* and *usufruct* are interests in real estate traditionally recognised under Abu Dhabi law. The RP Regulations continue to respect the validity of these interests. To this end, the *musataha* and usufruct are recognised under the Real Property Regulations 2015 as leases. The parties to *musataha* and usufruct interests in existence, as of the date of the publication of the RP Regulations, were required to register such interests as leases pursuant to memoranda of leases by no later than the first anniversary of the date of publication of the RP Regulations on 3 March 2015, subject to any extended registration period for which provision may be made by the board. Unless the parties elect to convert the legal form of the underlying instrument to a lease, the contractual rights and obligations arising under the relevant arrangement shall not be changed by reason of such registration.<sup>56</sup> If any *musataha* or usufruct was previously registered and a fee paid therefor, the Registrar is required to make reasonable efforts to exempt any initial registration of the interest from any additional fee.<sup>57</sup>

## ADGM courts

*Jo Rickard, Simon Cohen*<sup>58</sup>

ADGM courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 (the Courts Regulations) are modelled principally on English courts legislation.<sup>59</sup> As with the Companies Regulations, the decision to use English law as the principal precedent for drafting the Courts Regulations was taken having regard to the fact that the English Acts are well established and have been subject to considerable judicial discussion and consideration, providing the degree of legal certainty and predictability which is demanded by the commercial and legal communities.

One of the results of a judicial system, such as the English courts, which has undergone extensive evolution and development over a prolonged period of time, is that the legislation which establishes and governs that system is spread across a plethora of enactments. By contrast, the Courts Regulations are a single, unified statute which combines various elements of English legislation, specifically tailored to ADGM courts' requirements, which is both effective and accessible, and is recognisable by and familiar to all those practising in or familiar with common law jurisdictions.<sup>60</sup>

## Structure of ADGM courts

Part 1 of the Courts Regulations establishes the Court of Appeal—being the Court of Final Instance—and the Court of First Instance. The Court of First Instance is, itself, comprised of three divisions:

- the Civil Division;
- the Employment Division; and
- the Small Claims Division.

Broadly, the Civil Division has jurisdiction to hear and determine any claim except for: (1) money claims where the amount in dispute is US \$100,000 or less; (2) claims arising out of or in connection with family proceedings; and (3) claims which relate to the enforcement of any right or obligation, or the enforcement of any other matter, under the Employment Regulations 2015 (Employment Regulations).

The Employment Division has exclusive jurisdiction to hear and determine any claim which relates to the enforcement of any right or obligation, and any other employment matter, under the Employment Regulations.

The Small Claims Division has exclusive jurisdiction to hear and determine any claim which has a monetary value of US \$100,000 or less. The Small Claims Division may also hear claims normally reserved for the Employment Division where all parties have consented in writing. In a departure from the English system, appeals from the Small Claims Division can only be made to the Civil Division. Appeals from the Civil and Employment Divisions are made to the Court of Appeal.

Another notable departure from the traditional, hierarchical nature of many court systems, including the English courts, is that ADGM courts are modelled on Scotland's Courts of Session, which is a unitary collegiate court. It is intended that judges of ADGM courts will have jurisdiction to sit in both the Court of First Instance and the Court of Appeal as required. However, the Courts Regulations prohibit a judge from sitting on an appeal from his or her own first instance judgment. The decision to adopt the Scottish, rather than English, court system in this regard was taken with a view to allowing for the more efficient and swift management and progression of cases in ADGM courts (and to cater for an initially smaller jurisdiction).

<sup>56</sup> Section 11 of the Real Property Regulations 2015.

<sup>57</sup> Section 11(2) of the Real Property Regulations 2015.

<sup>58</sup> Partner and associate respectively, Shearman & Sterling LLP.

<sup>59</sup> Judgments Act 1838; Attendance of Witnesses Act 1854; Criminal Procedure Act 1865; Promissory Oaths Act 1868; Debtors Act 1869; Promissory Oaths Act 1871; Perjury Act 1911; Foreign Judgments (Reciprocal Enforcement) Act 1933; Civil Evidence Act 1968; Attachment of Earnings Act 1971; Civil Evidence Act 1972; Land Charges Act 1972; Evidence (Proceedings in Other Jurisdictions) Act 1975; Charging Orders Act 1979; Contempt of Court Act 1981; Senior Courts Act 1981; Administration of Justice Act 1982; Administration of Justice Act 1985; Courts and Legal Services Act 1990; Civil Evidence Act 1995; Damages Act 1996; Civil Procedure Act 1997; Access to Justice Act 1999; Financial Services and Markets Act 2000; Constitutional Reform Act 2005; Tribunals, Courts and Enforcement Act 2007; Legal Services Act 2007; Legal Aid, Sentencing and Punishment of Offenders Act 2012; Criminal Justice and Courts Act 2015.

<sup>60</sup> There have also been enacted six Rules which lie beneath the Courts Regulations, namely: Divisions and Jurisdiction (Court of First Instance) Rules 2015; Certification of Enforcement Agents Rules 2015; Taking Control of Good and Commercial Rent Arrears Recovery Rules 2015; Judicial Discipline Prescribed Procedures Rules 2015; Judicial Conduct (Judicial Office Holders) Rules 2015; ADGM Court Procedure Rules 2016; and ADGM Courts Rules of Conduct 2016.

## Proceedings before ADGM courts

In keeping with the ADGM's ambition of becoming a global financial and commercial centre, all proceedings before ADGM courts will be conducted in English. Moreover, sittings, and any other business, of ADGM courts may be conducted at any place in the world<sup>61</sup> and it is envisaged that some hearings will be conducted by video-conference. The ADGM recognised that many of ADGM judges currently also hold judicial or other office and are therefore located in various countries and that, equally, many of the lawyers who will have conduct of the proceedings before ADGM courts may be resident or domiciled outside of the ADGM or Abu Dhabi.

It is hoped that providing for sittings by video-conference will enable the judges to manage their assigned cases with greater flexibility so that proceedings are processed expeditiously. This flexibility could have the added benefit of limiting the parties' costs as far as possible.

In order to discourage frivolous cases, it was decided that only lawyers who have been practising or employed as a qualified lawyer for a continuous period of at least five years immediately prior to appearing before the courts have a right of audience.<sup>62</sup> Where a lawyer practises in a jurisdiction which has a split profession, such as England and Wales, it is not necessary for a solicitor to have higher rights of audience in his home jurisdiction in order to have a right of audience before ADGM courts.

However, cases before the Small Claims Division may be pleaded by attorneys with less than five years' continuous experience. Such attorneys are required to comply with rules of conduct of ADGM courts.<sup>63</sup>

## Reciprocal recognition and enforcement of foreign judgments and arbitral awards

In spring 2016, ADGM courts entered into memoranda of understanding with the Abu Dhabi Judicial Department and the UAE Ministry of Justice for the reciprocal recognition and enforcement of judgments and arbitral awards. ADGM courts may also enter into similar memoranda of understanding with the judicial departments of the other members of the UAE<sup>64</sup> and with equivalent courts in other jurisdictions around the common law world.

Where the UAE has entered into a treaty with a foreign country relating to the mutual recognition and enforcement of judgments,<sup>65</sup> ADGM courts will comply with the terms of that treaty and recognise and enforce judgments rendered by the courts of that foreign country.<sup>66</sup>

If a country is not a party to an applicable treaty with the UAE, ADGM courts may still recognise and enforce the judgments of that country's courts under the common law regime provided that the Chief Justice of ADGM courts:

- is satisfied that substantial reciprocity of treatment will be assured as regards the recognition and enforcement in that country of ADGM courts' judgments<sup>67</sup>; and
- after consulting with the Chairman of the ADGM Board, orders that the courts of that country be recognised foreign courts for the purposes of the registration and enforcement of judgments.<sup>68</sup>

## Arbitration in ADGM

### *Alex Bevan*<sup>69</sup>

ADGM Arbitration Regulations 2015 (Arbitration Regulations) are built upon the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (UNCITRAL Model Law). Using the UNCITRAL Model Law as the starting point, the ADGM set out to create a modern and progressive arbitration law that would promote the efficient resolution of disputes within the ADGM according to well-recognised procedures and best international arbitration practice, whilst also tailoring those procedures to meet the needs of the ADGM's end users as well as the business culture in the region.

### Establishing ADGM as a seat of arbitration

The Arbitration Regulations establish the ADGM as a new seat of arbitration for disputes arising from business conducted within the ADGM and for transactions and disputes having no connection to the ADGM (or Abu Dhabi for that matter) but where the parties choose the ADGM as the seat of arbitration.<sup>70</sup>

The Arbitration Regulations also allow parties to select an arbitral institution of their choosing to administer their arbitration, which reflects the in-built flexible nature of the Arbitration Regulations and the strong emphasis on party autonomy.

<sup>61</sup> Sections 102(1) and 109(1) of the Courts Regulations.

<sup>62</sup> Section 219(1)(a) of the Courts Regulations.

<sup>63</sup> Section 219(1)(b) of the Courts Regulations.

<sup>64</sup> Section 169 of the Courts Regulations.

<sup>65</sup> For example, the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications 1996; and the Riyadh Convention 1983.

<sup>66</sup> Section 170 of the Courts Regulations.

<sup>67</sup> Section 171 of the Courts Regulations.

<sup>68</sup> Section 171 of the Courts Regulations.

<sup>69</sup> Partner, Shearman & Sterling LLP.

<sup>70</sup> Section 8 of the ADGM Arbitration Regulations.

## Prevailing pro-arbitration approach to the Arbitration Regulations

The Arbitration Regulations reflect a pro-arbitration approach to arbitral proceedings conducted within the ADGM, 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 the ADGM in accordance with the parties' agreement.

Thus, under the Arbitration Regulations, there is very limited scope for court intervention in the arbitral process.<sup>71</sup> A tribunal will have the power to consider and decide disputes concerning its own jurisdiction<sup>72</sup> and the grounds for challenging and setting aside an arbitral award are limited to narrow circumstances with no review of the merits of the dispute.<sup>73</sup>

## Significant modifications to the UNCITRAL Model Law

Whilst built on the UNCITRAL Model Law, the Arbitration Regulations include several modifications to the Model Law to ensure that the Regulations are modern and progressive, to maximise party autonomy and control over the arbitral process and to accommodate the unique nature of the ADGM's jurisdictional and legal framework.

Among the most significant modifications to the UNCITRAL Model law are:

- provisions providing for increased confidentiality and privacy of arbitral proceedings to reflect the nature of the business conducted in the ADGM and the prevailing culture of discretion in the region<sup>74</sup>;
- provisions permitting greater scope for the consolidation of related arbitrations and the joinder of third parties to assist in the efficient resolution of complex multiparty disputes arising out of multi-party/multi-contract transactions, which are common in the region<sup>75</sup>; and
- a provision that allows the parties to agree that the award will not be subject to challenge on *any* ground (i.e. rendering an award essentially unappealable), thus ensuring the finality of the arbitral process.<sup>76</sup>

## Recognition and enforcement of arbitral awards in ADGM

Domestic and international arbitral awards may also be recognised and enforced by ADGM courts.<sup>77</sup> Under the Arbitration Regulations, ADGM courts may recognise and enforce awards rendered in ADGM-seated arbitrations, New York Convention<sup>78</sup> awards, awards that are subject to treaties entered into by the UAE and other awards. The Regulations also adopt the widely-recognised exclusive grounds for non-recognition under the New York Convention.<sup>79</sup>

<sup>71</sup> Sections 11 and 12 of the ADGM Arbitration Regulations.

<sup>72</sup> Section 24 of the ADGM Arbitration Regulations.

<sup>73</sup> Sections 53, 56 and 57 of the ADGM Arbitration Regulations.

<sup>74</sup> Sections 30 and 40 of the ADGM Arbitration Regulations.

<sup>75</sup> Sections 35 and 36 of the Arbitration Regulations.

<sup>76</sup> Section 54 of the Arbitration Regulations.

<sup>77</sup> Section 180 of the Courts Regulations.

<sup>78</sup> New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).

<sup>79</sup> Section 57 of the ADGM Arbitration Regulations.