

# Emirates Legal

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# EMIRATES LEGAL



## Overview

Since its establishment in 2015, the Abu Dhabi Global Market ('ADGM') has become one of the most-high profile, robust and popular financial free zones in the GCC. In particular, the ADGM Courts, one of the ADGM's independent authorities,<sup>[1]</sup> have swiftly become a global leader in the delivery of judicial and dispute resolution services.

Having just celebrated its five-year anniversary, we look back on some of the principal milestones and developments in the ADGM Courts' relatively short history and reflect on its place and role as a common law jurisdiction providing the legal certainty required by an international-standard, highly-regulated centre for global commerce.

## English common law courts

At its foundation, the ADGM Courts are a common law jurisdiction and were the first in the Middle East region to directly apply English common law (adopting a similar approach to that of Singapore and Hong Kong), with the

objective of creating a coherent, recognised and accepted legal framework and judicial system. The basis of the civil and commercial law in the ADGM is provided by the "Application of English Law Regulations 2015". Those regulations make English common law (including the rules and principles of equity) directly applicable in the ADGM. In addition, a broad set of English statutes on civil matters are also made applicable in the ADGM. The regulations for the ADGM Courts, called the "ADGM Courts, Civil Evidence,

Judgments, Enforcement and Judicial Appointments Regulations 2015” are also drawn from Scottish and Australian Federal law and have been tailored specifically to meet the requirements of the ADGM Courts. The ADGM Courts Regulations are complimented by numerous bespoke rules, including the Court Procedure Rules, and various Practice Directions made by the Chief Justice from time to time.

The Judges of the ADGM Courts hail from the most senior levels of the judiciary in some of the world’s leading common law jurisdictions, including the UK Supreme Court, the Court of Appeal of Scotland and the High Courts of England and Wales, Australia, New Zealand and Hong Kong.

The ADGM Court judges sit in a Court in which technology and digital solutions are a priority. With the world’s first truly electronic hearing room and a fully integrated electronic filing, case management and hearing service, the Courts have created the ideal environment for paperless proceedings and one in which parties are able to interact with each other and the Court in real time from anywhere in the world.

## Enforcement

For a number of years, various pathways have existed for the recognition of foreign judgments and arbitral awards by the ADGM Courts based on international treaties, agreements of reciprocity with recognised foreign courts or non-binding international MoUs without any re-examination of the merits of the dispute.

The ADGM Courts, like the DIFC Courts, have strong and developing international links, including with courts in England and Wales, Hong Kong, Australia and Singapore. The ADGM Courts have previously signed international MoUs with: the Commercial Court, Queens Bench Division, England and Wales; Supreme Court of the Republic of Singapore; Federal Court of Australia; Supreme Court of New South Wales; and High Court of the Hong Kong special administrative region of the People’s Republic of China. MoUs have also been signed with the Courts of other Emirates of the UAE. These MoUs provide for the enforcement of judgments of the relevant courts without re-examining the merits of their judgments when recognition suits relating to such judgments are filed before the ADGM Courts.

A significant development in the past five years, and one that was in line with the Courts’ ambition of *“achieving the highest level of judicial performance in our own courts consistent with best international practice”*<sup>[2]</sup>, was the signing in February 2018 of a MoU between the ADGM Courts and the Abu Dhabi Judicial Department (‘ADJD’) to allow the mutual and reciprocal recognition and enforcement of judgments, decisions, orders and ratified arbitral awards between the ADGM Courts and the onshore Abu Dhabi Courts, which are overseen by the ADJD, without the need for the re-examination of the merits of the dispute on which they have been issued.

The 2018 MoU built on the foundations laid down by an earlier MoU signed between the parties in April 2016. This established a framework to create judicial co-operation procedures by both parties, specifically with respect to: procedures for the reciprocal recognition and enforcement of judgments, decisions, orders and arbitration awards; the exchange of information; the creation of electronic services and communication between the court systems; and the delivery of education. The 2018 MoU provided a conclusive and more detailed framework for reciprocal enforcement and was codified into law by recent changes to the ADGM Founding Law, discussed below.

The ADGM Courts have also entered into similar MoUs with courts of the other Emirates. For instance, in May 2019, the Ras Al Khaimah Courts and the ADGM Courts signed a MoU for the reciprocal enforcement of their judgments, decisions, orders and recognised arbitral awards.

# Arbitration

The ADGM Courts developed its pro-arbitration framework as early as 2015, a framework which is modelled on the UNCITRAL Model Law, with specific amendments to reflect the unique region in which it operates.

In 2018, the ADGM Courts launched their Arbitration Centre. Consistent with the Courts' focus on technology and digital solutions, the Centre is equipped with state of the art technology and is open to all parties seeking a hearing facility, regardless of the seat of the arbitration or the administering institution.

In December 2020, the International Court of Arbitration of the International Chamber of Commerce ('ICC Court') and the ADGM announced the opening of a case management office for the ICC Court Secretariat in the ADGM. The existing activities of the ICC MENA representative office, established in the ADGM in 2017, will be integrated into the ICC Court's new case management structure. ICC Arbitration is widely used in the greater MENA region where, in 2019 alone, more than 310 parties engaged in arbitral proceedings under the ICC Arbitration Rules.

As part of the announcement on the ICC official website the ICC Court President, Alexis Mourre, said:

*"The setting up of the ICC Court's office in ADGM will create an extraordinary platform for the development of our offering in the region. The new case management office will contribute to the development of ADGM's reputation by offering dispute resolution services of the highest standards to users in the region and beyond. I look forward to this new collaboration that will strengthen the ICC Court's position as a preferred institution in the region."*

Linda Fitz-Alan, Chief Executive and Registrar of the ADGM Courts, said:

*"Since the opening of the ICC's MENA representative office in 2017, both the ICC and ADGM have driven growth and support of arbitration in the region. The expansion of the ICC Court's footprint is testament to the increasing attraction of Abu Dhabi as a global destination for international dispute resolution. We are delighted that the ADGM Arbitration Centre will be the home of the ICC Court Secretariat. Its state-of-the-art hearing facilities perfectly complement the growing need for physical, virtual and hybrid hearings, with parties able to utilise technology to connect from all over the world. We look forward to continuing our support of the international dispute resolution community in any way we can and to a long and fruitful relationship with the ICC Court."*

# Litigation funding

In a move that reflects the growing interest in litigation funding in the region, in April 2019, the Litigation Funding Rules (the 'Rules') of the ADGM Courts came into effect. The Rules are the first in the MENA region to provide a comprehensive framework for third party litigation funding, regulating both funders and litigation funding agreements ('LFA') related to proceedings before the ADGM Courts.

The Rules are aimed at providing greater certainty to both litigants and litigation funders that their LFA will be enforceable before the ADGM Courts while seeking to ensure an appropriate balance between the interests of both litigants and litigation funders. The Rules also apply to arbitration proceedings in the ADGM.

Rules' requirements are met, a LFA will be enforceable before the ADGM Courts. If such requirements are not met, the enforceability of the LFA will be determined by the ADGM Courts in accordance with English common law principles.

Prospective funders must: (i) have as their principal business the funding of proceedings to which the funder is not a party; and (ii) have qualifying assets of not less than US\$5 million or the equivalent amount in foreign currency.

The Rules regulate the content of LFAs by setting out the minimum criteria for an LFA to be enforceable in the ADGM Courts. LFAs must be in writing and include, as a minimum: (i) the scope, amount and timing of funding; (ii) the funder's recovery including the timing and manner of recovery; (iii) whether the funder is liable for adverse costs/adverse costs insurance; (iv) the funder's involvement in potential settlements; (v) the circumstances in which the funder can terminate the LFA; and (vi) confidentiality obligations on litigation funders, including a duty to preserve legal privilege where applicable. The funder must also take steps to ensure that the funded party has received independent legal advice on the LFA and the LFA must state that the litigation funder submits to the jurisdiction of the ADGM Courts for the purposes of disputes relating to costs between the funded party and any other party to the ADGM Court proceedings.

## Mediation

Mediation has, historically, not been a popular form of alternative dispute resolution in the region and has not been utilised as it has in many other jurisdictions. That position is slowly changing with increased interest in non-traditional, court-based forms of dispute resolution.

In April 2019, the ADGM Courts announced the establishment of its court-annexed mediation service, designed to assist parties reach a cost effective and expeditious resolution of disputes outside the official court forum. Announcing the service, the Right Honourable Lord David Hope of Craighead KT, Chief Justice of the ADGM Courts, said:

*"The introduction of mediation services by ADGM Courts signals a significant step in the development and advancement of the alternative dispute resolution offering in ADGM. Mediation has gained its rightful place as an effective means of resolving disputes outside the scope of judicial proceedings. In response to an increasing demand for and the growing appeal of mediation, the Courts have delivered this framework necessary for the settlement of disputes that will help to preserve commercial, business and personal relationships. This initiative adds to ADGM's recognition as a respected and well-regarded regional and international destination for dispute resolution".*

## Amendments to the 'Founding Law'

In May 2020, the ADGM made several key amendments to its founding law, Abu Dhabi Law No. 4 of 2013 (as amended, the 'Amended Founding Law'). The amendments are contained in Law No.12 of 2020. Four of the eight key amendments are particularly significant and relevant to the ADGM Courts.

### *Confirmation of the ADGM Courts' "opt in" jurisdiction*

New articles 13(8) and 13(9) of the Amended Founding Law confirm the "opt in" jurisdiction of the ADGM Courts. Parties with no connection to the ADGM can agree, in writing, that any claims or disputes will be determined by the ADGM Courts. Parties can also choose the ADGM as the seat of their arbitrations, again whether or not any connection with the ADGM exists. The ADGM Courts' Guide to the amendments ('the Guide') notes that the preferred way to do this is for parties to include an appropriate dispute resolution clause in their contract, however parties can also agree to "opt in" to the ADGM's jurisdiction after the claim or dispute has arisen.

## ***Confirmation that the ADGM Courts cannot be used as a “conduit” jurisdiction for the enforcement of non-ADGM judgments and awards***

Article 13(14) of the Amended Founding Law confirms that the ADGM Courts cannot be used as a “conduit” jurisdiction for the enforcement of non-ADGM judgments and awards in other jurisdictions outside of the ADGM, principally in onshore Abu Dhabi. That is, parties are not permitted to seek to enforce foreign judgments and awards in the ADGM courts, with the sole purpose of then enforcing the resulting ADGM Court judgment onshore.

The Amended Founding Law confirms that parties should take their judgments or awards directly to the place where the relevant assets are located for the purpose of enforcement. The Guide notes that it *“has always been ADGM Courts’ position that parties should go to the place where the relevant assets are located for the purpose of enforcement and that this principle has now been given effect through the amendments to the Founding Law.”*

## ***Codification of the existing enforcement framework between the ADGM Courts and the ADJD***

Articles 13(15) and 13(16) of the Amended Founding Law codify the reciprocal enforcement of ADGM Court judgments and Abu Dhabi Court judgments as had been set out in the 2018 MoU (discussed above). The MoU did not have the force of law and therefore, the Amended Founding Law codifies this procedure and provides more certainty to claimants who may wish to enforce ADGM Court judgments against assets or parties in Abu Dhabi through the Abu Dhabi Courts and vice versa.

## ***Confirmation of the ADGM Courts’ status as courts of the Emirate***

Constitutionally, the ADGM has always been part of the Emirate of Abu Dhabi and the ADGM Courts have always been Courts of the Emirate. The Amended Founding Law confirms that the ADGM Courts are courts of the Emirate and therefore, benefit from the same status as “onshore” courts. This is of particular significance to the enforcement of judgments and arbitral awards issued in the ADGM abroad, pursuant to international treaties and conventions to which the UAE is a signatory.

## **Launch of Pro Bono scheme**

In 2020, the ADGM Court also launched its Pro Bono legal assistance scheme which enables qualified individuals with limited financial means to receive legal assistance at no cost. Al Tamimi & Company was pleased to be involved in the establishment of the scheme and continues to offer advice and assistance to eligible individuals.

[\[1\]](#) Together with the Registration Authority and the Financial Services Regulatory Authority

[\[2\]](#) The ADGM Courts’ Chief Justice regarding the 2016 MoU

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**Boston Legal** aired during my first years of practice in Australia and was essential viewing for all law students and junior lawyers. Unfortunately, the exploits of Alan Shore (James Spader) and Denny Crane (William Shatner) at the firm Crane, Poole & Schmidt were far more exciting than life reviewing documents on Collins Street, Melbourne!