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Abu Dhabi Global Market: The Application of English Common Law

English common law as it stands from time to time will directly apply in, and form part of the law of, Abu Dhabi Global Market (“ADGM”). Other common law systems’ case law can also be used as a persuasive and useful source of law in determining any ADGM dispute. Unlike other jurisdictions which have sought to codify the English common law, the adoption of English common law in its entire original form by ADGM gives it the most sophisticated system available. It is also evergreen so that subsequent English common law authorities will apply, subject always to ADGM legislation and ADGM Court decisions.

Introduction

The Application of English Law Regulations 2015 provide for the application of English common law in ADGM. English common law, including the principles and rules of equity, govern matters such as contracts, tort, equitable remedies, unjust enrichment, damages, conflicts of laws, security and personal property. Certain English statutes which modify aspects of the common law (such as the Contracts (Rights of Third Parties) Act 1999) or which create a statutory regime previously governed by the common law (such as the Partnership Act 1890) are expressly and directly applied in modified form. Real property matters are not governed by English common law but have been codified in the Real Property Regulations 2015.

The Common Law

The common law is a system of law where the decisions and rulings of the court are given precedential weight, so that decisions are consistent and similar principles yield similar outcomes. The decisions of the court are thus not merely interpretative but form part of the general body of law and must be followed by future courts in conjunction with statute, secondary legislation and custom. However, the courts are still able to depart from previous decisions in particular circumstances. For example, a higher court may overrule a lower court or a court may find that its previous decision was wrong in law. This allows the common law to retain a flexibility that would otherwise be absent.

The common law underpins the legal systems of the world’s four top international financial centres—London, New York, Hong Kong and Singapore. In particular, these leading global financial centres dominate not only the core financial sectors such as banking, securities and derivatives, but also related sectors such as insurance, shipping, international trade, commodities and logistics. Bearing in mind Abu Dhabi’s government’s aim to encourage financial services, commodities trading and logistics in ADGM, the adoption of a common law based legal system is a logical choice for the free zone.

The ADGM Approach

The adoption of English common law as an underlying legal framework is consistent with the enactment of separate ADGM regulations and rules in areas such as companies, insolvency and financial services. Common law jurisdictions, such as England, Australia, Hong Kong, New Zealand and Singapore, use statutes, statutory

instruments, regulations and other forms of legislation to supplement the rules and principles formulated in court decisions, which form the basis of the common law. In the event of any conflict or inconsistency, legislation overrides the common law. Common law in ADGM will be subject to, and capable of being superseded by, ADGM legislation.

ADGM has opted to apply English common law directly instead of adopting a code of civil and commercial laws or codifying the common law through legislation. This approach is enshrined in the Application of English Law Regulations 2015, which are modeled on corresponding instruments in Hong Kong¹ and Singapore.² ADGM therefore distinguishes itself from other approaches in the region, such as the Dubai International Financial Centre and Qatar Financial Centre which both adopted a codified version of English common law.

The Regulations uphold the precedence of ADGM's own regulations, and expressly clarify that:

- any English common law applied within ADGM is always subject to modifications as required by the specific circumstances of ADGM. The ADGM Courts are able to determine which variations in each case are appropriate for the circumstances. This approach allows for the potential application of other versions of common law, such as Australian or New Zealand common law. ADGM will therefore be able to obtain the benefit of more than a cumulative millennium of common law jurisprudence;
- ADGM regulations are capable of overriding English common law; and
- the enactment of a specific ADGM regulation is required to incorporate any future statutory modifications to English common law.

The approach adopted by the Application of English Law Regulations is to expressly adopt certain statutes that concern areas of commercial and civil law, such as contract terms or damages. However, the approach adopted is far more dynamic than a simple blanket adoption of English law: the Application of English Law Regulations tailor the legislation to the idiosyncrasies of ADGM business and procedural environment and the purposes for which ADGM was created. Any English court jurisprudence on such statutes (and the common law) is applicable in ADGM. Outside of these areas, English law interpretations are likely to be relevant, but the ADGM Courts have more leeway i.e. on specific applicable ADGM legislation.

The ADGM Courts are predominantly staffed by leading retired English, Australian and New Zealand judges. There is also a common law qualified Registrar. Separate court regulations (the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations) have been passed. This should encourage well-reasoned and effective decisions. Despite the law of the ADGM being modeled on the English common law, there is to be no formal link between the ADGM Courts and any English court and there will be no appeal from the ADGM Courts to any English court.

The ADGM Courts are comprised of two courts: the Court of First Instance and the Court of Appeal. The Court of Appeal is the court from which no further appeals lie. The Court of First Instance is itself comprised of two divisions: the Civil Division and the Employment Division. The Employment Division has exclusive jurisdiction to hear and determine all and any questions, claims and proceedings relating to the enforcement of

¹ See the Hong Kong Application of English Law Ordinance.

² See the Singaporean Application of English Law Act.

all rights and obligations under the Employment Regulations 2015, whilst the Civil Division has jurisdiction to hear and determine all other civil and commercial claims. It is an elective regime: parties, whether or not established or located in ADGM, may submit to the jurisdiction of the ADGM Courts at their discretion.

Conclusion

Given that many legal and business professionals in the United Arab Emirates are already familiar with the common law due to its extensive use in commercial and financial transactions, the adoption of its principles is likely to reduce incremental compliance costs for most corporates, financial institutions and commodities traders. Moreover, many financial market standard agreements such as those developed by the International Swaps and Derivatives Association and the Loan Market Association are based on English law. These can be easily adapted to suit ADGM-specific needs.

These factors, in addition to other practical benefits and ADGM's choice to adopt an approach which maintains the precedence of its bespoke regulations and rules, make the direct application of English common law a unique characteristic of ADGM, and promise to develop its status as a leading global financial centre.

Our Role

Shearman & Sterling advised ADGM on its establishment as an international financial and dispute resolution centre. Working closely with the leadership team at ADGM, Shearman & Sterling helped develop ADGM's world-class legal and regulatory regime to be in line with international standards to provide the sophistication and certainty found in the world's top financial centres. Shearman & Sterling has played a key role in ADGM's adoption of English common law by applying it in its jurisdiction for civil and commercial law. The application of English common law will govern matters such as contracts, tort, trusts, equitable remedies, unjust enrichment, damages, conflicts of laws, security and personal property. Additionally, Shearman & Sterling drafted all legislation governing matters such as companies, insolvency, interpretation, commercial licensing, arbitration, Courts, litigation, employment, limited liability partnerships, real property, financial regulation and strata title.

Shearman & Sterling advises its clients on ADGM laws, out of its Abu Dhabi, Dubai, London and US offices, and has unique insights as a result of its role in developing the legislation.

Please speak to your Shearman & Sterling contact for further information.

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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