

A New Frontier? Enforcing Restrictive Covenants in the ADGM

by Edward Kemp and Bláthnaid Breslin

Introduction

Edward Kemp and Bláthnaid Breslin consider the framework for applying for an injunction in the ADGM to restrain a former employee from breaching a restrictive covenant contained in their contract of employment. As of writing, there are no decisions of the ADGM Courts granting (or refusing to grant) such an injunction, whether on an interim or final basis. This article therefore addresses: (1) the ADGM Courts' jurisdiction; (2) the applicable legal principles; (3) some potential issues that might arise; and (4) the question of enforcement.

Jurisdiction

The starting point is that the ADGM Courts have clear jurisdiction to decide a claim to restrain the breach of a restrictive covenant in a contract of employment. Article 13(7)(b) of Abu Dhabi Law No. (4) of 2013, as amended by Abu Dhabi Law No. (12) of 2020 ("**Law No. 4**"), provides as follows:

"The Court of First Instance and [sic] shall have exclusive jurisdiction to consider and decide on matters according to the following:

...

b) Civil or commercial claims and disputes arising out of or relating to a contract entered into, executed or performed in whole or in part in the Global Market, or a transaction entered into or performed in whole or in part in the Global Market, or to an incident that occurred in whole or in part in the Global Market..."

Section 41(1) of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 (the "**Civil Procedure Regulations**") provides that "[t]he Court of First Instance may by order (whether interim or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court to be just and convenient to do so". This is the same language used in s. 37(1) Senior Courts Act 1981 in respect of the High Court in

England and Wales. Further, Part 10 of the ADGM Court Procedure Rules 2016 provides for the granting of “such interim remedies as are necessary in the interests of justice”, including an interim injunction or an interim declaration (rule 71(1)(a)-(b)).

Legal principles

Introduction

Section 1 of the Application of English Law Regulations 2015 (the “**Application Regulations**”), as amended, provide as follows:

“(1) 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 –

- a) So far as it is applicable to the circumstances of the Abu Dhabi Global Market;*
- b) Subject to such modifications as those circumstances require;*
- c) Subject to any amendment thereof (whenever made) pursuant to any Abu Dhabi Global Market enactment; and*
- d) notwithstanding any amendment thereof as part of the law of England made pursuant to an Act or any legislative instrument adopted thereunder at any time after the date of enactment of these Regulations, which amendment shall not apply and have legal force in, or form part of the law of, the Abu Dhabi Global Market, unless and until an Abu Dhabi Global Market enactment expressly provides that it applies and has legal force in, and forms part of the law of, the Abu Dhabi Global Market.*

“(2) Subsection (1) is subject to any contrary provision in any Applicable Abu Dhabi Law or Abu Dhabi Global Market enactment. In the event of any conflict or inconsistency between (a) a provision, rule or principle of the common law of England (including the principles and rules of equity) and (b) any provision, rule or principle of any Applicable Abu Dhabi Law or Abu Dhabi Global Market enactment, the latter shall prevail.”

There is no statutory law of obligations in the ADGM. The Employment Regulations 2019 provide for minimum rights and obligations of employers and employees, but do not provide for any material obligations which might provide the basis for an injunction to enforce a restrictive covenant. Therefore, in the absence of any applicable ADGM statutory law, the English common law will govern the action subject, in particular, to the caveats contained in s. 1(1)(a)-(b) of the Application Regulations.

The ADGM Courts are therefore likely to apply the English doctrine of restraint of trade to any action to enforce a restrictive covenant.



English law principles

By way of brief overview of the applicable English law principles, the starting point is that any term in a contract that purports to restrict an individual's freedom to work or to follow their trade or business will be void unless it is reasonable in the circumstances, by reference to the interests of the parties concerned and the public interest (*Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* [1894] AC 535, HL). The burden is on the employer to show that the restriction is reasonable.

The first question is whether the employer has proprietary rights which need protection. A restrictive covenant will only be enforceable if it protects a legitimate business interest of the employer. Whether an employer has legitimate interests which it may be able to protect is to be judged first by looking at the nature of the employer's business and second at the employee's position and duties within that business (see, *Mason v Provident Clothing and Supply Ltd* [1913] AC 724 and *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, HL).

The categories of interest that may merit protection are well established under English law namely the protection of the Employer's: (1) trade secrets or other confidential information; (2) its trade connections i.e. customers and suppliers; and (3) the skills and stability of its workforce (see, in respect of (1) the principles as regards the enforcement of covenants in *QBE v Dymoke & others* [2012] IRLR 458 at [208]-[210]).

When it comes to determining the reasonableness of such a clause, the Court will conduct a detailed balancing exercise of the legitimate interests of the employer's business and the individual's right to freedom to follow their own trade and earn a living. The effect on the employee needs to be balanced against the employer's need for protection. The question of reasonableness must be judged as at the time when the contractual term in which it is contained was agreed (see, *Pat Systems Holdings Ltd v Neilly* [2012] EWHC 2609 (QB)).

What is reasonable is highly fact sensitive but would include factors such as: (1) the employee's status; (2) the standards for post-termination restrictions in the employee's industry or market; (3) the nature of the market and the employer's business; (4) duration of the restriction; (5) the geographical scope of the restriction; (6) the scope of restricted activities; (7) the effect on the employee by enforcing the restraint.

Issues

There are a number of potential issues that may arise when making an application for an injunction to enforce a restrictive covenant in the ADGM Courts, for instance:

Choice of forum / arbitration clauses

The Court's jurisdiction (under Article 13(7)(b) of Law No. 4) is subject to Article 13(9) of Law No. 4 which provides that "[n]otwithstanding the provisions of paragraph (7) of this Article, the parties may agree to refer their claims or disputes to arbitration, or, in relation to the issues specified in sub-paragraphs 7(a) and (b), may agree in their commercial contracts and transactions to submit to the jurisdiction of any other court other than the Global Market's Court of First Instance." This does not deprive the Court of jurisdiction, but it means that the Court may (and generally will) stay proceedings to give effect to the parties' agreement, subject to the interests of justice: *NMC Healthcare v Noor Capital PSC* [2022] ADGM CFI 0003 at [48].

However, it is not clear whether a contract of employment will qualify as a "commercial contract" or "commercial transaction". Given the distinction drawn in Article 13(7) between "civil" and "commercial" claims, there is an argument that it would not qualify as such. This would therefore seem to prevent effect being given to a choice of forum or arbitration clause in a claim for enforcement of a restrictive covenant in a contract of employment.

Scope for departure from English law principles

The precise scope of s.1(1)(a)-(b) of the Application Regulations is open to some debate in future cases. It is unclear whether there is room for any argument that the English law principles themselves require modification in the light of any circumstances of the ADGM. The Guidance Notes indicate that entire departures from common law precedents will be rare. It seems more likely that the ADGM Courts will apply the same legal principles but, given the flexibility inherent in the English doctrine of restraint of trade, the application of the principles will take into account any relevant circumstances of the ADGM.

The period of restraint

Finally, it is not clear what period of restraint is likely to be upheld as reasonable in the ADGM Courts. There is no 'one size fits all' answer to this question. It is worth noting that the ADGM sample contract provides for a 6-month non-compete clause, a 1-year non-

solicitation clause and a non-disclosure/confidentiality clause of indefinite duration. It is unclear whether this sample contract will be used by the ADGM Courts as a benchmark of the industry standard in ADGM. In contrast onshore, the Executive Regulations to the New UAE Labour Law provide that non-compete clauses may not have a term that exceeds two years from the expiry date of the contract. It is also worth noting that the ADGM sample contract provides at Clause 15.1 that the parties agree that the restrictive covenants are fair and reasonable, and that the employee *“waives all defences to the enforcement thereof”*. However, as a matter of English law this will not be effective to oust the jurisdiction of the court: restraint of trade is a doctrine of public interest, and it is for the court to decide whether a particular clause is reasonable.

Further, given that reasonableness is assessed at the date of the agreement, the restrictive covenant may need to be revisited over time in order to strike the right balance between (a) protecting the employer’s interests, and (b) ensuring that the protection is not unreasonable and therefore unenforceable.

Any witness statement filed in support of a claim for an injunction should address the period of any relevant restraint by reference to the factors identified above.



Enforcement

If the ADGM Court grants an application for an injunction to restrain the breach of a restrictive covenant, an issue which may arise is whether such an order can be enforced onshore if the ex-employee joins a competitor without any presence in the ADGM. One route to enforcement may be the Memorandum of Understanding (“**MoU**”) between the ADGM Courts and the Abu Dhabi Judicial Department dated 11 February 2018, which allows for reciprocal enforcement of judgments, decisions, orders and arbitral awards between the ADGM Courts and the Abu Dhabi courts.

However, there is presently no MoU on enforcement of judgments between ADGM and the Dubai Courts (*NMC Healthcare v Noor Capital PSC* [2022] ADGM CFI 0003 at [19]).

Conclusion

In conclusion, the ADGM Courts have jurisdiction to determine claims to enforce a restrictive covenant contained in a contract of employment, applying the English doctrine of restraint of trade subject to any necessary modifications to take into account the circumstances of the ADGM. Any such award is likely to be enforceable under the MoU. The scene is therefore set to use the ADGM Courts to protect business interests by enforcing restraints in appropriate cases.



Edward Kemp is a leading expert in the DIFC and ADGM. He has been active in the UAE since 2014 and has appeared in important cases in the employment field instructed by leading international and regional firms in the Court of First Instance and the Court of Appeal. Ed has also lectured for the DIFC Academy of Law. Ed collaborated with Stephenson Harwood Middle East LLP to produce the latest edition of the DIFC Commentaries on the new DIFC Employment Law published by LexisNexis Middle East.



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