



# Dispute Resolution in the Middle East

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FULL HANDBOOK





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# About

## The Middle East's legal framework

With onshore and offshore jurisdictions, common law and civil law systems and processes, and proceedings in both English and Arabic, the Middle East's legal framework is both unique and challenging. For parties looking to resolve disputes in the region, it can also be overwhelming, presenting an array of possibilities and options.

The onshore courts, where proceedings are conducted in Arabic, operate a civil law based system. In contrast, the offshore jurisdictions, which include the Dubai International Financial Centre in Dubai, the Abu Dhabi Global Market in Abu Dhabi and the Qatar Financial Centre in Qatar, are free to adopt their own civil and commercial laws and procedures, and to establish their own courts. Proceedings in the offshore courts are conducted in English and a common law based system is operated.

Arbitrations can be seated in either the onshore or offshore jurisdictions, and can import elements from one or both legal traditions, depending on the circumstances. With arbitration continuing to develop as a dispute resolution mechanism, there are now a number of arbitral institutions established and operating in the region.

'Dispute resolution in the Middle East' is an interactive tool designed to equip you with a better understanding of the legal framework as it applies to the various stages of onshore and offshore litigation and arbitration – from establishing a Power of Attorney to understanding the costs associated with your dispute.

Whilst the tool primarily focuses on the United Arab Emirates (UAE), DLA Piper also has offices in Oman, Bahrain and Qatar, along with a highly experienced team of Litigation, Arbitration and Investigations lawyers who are equipped to advise on disputes both in the UAE and more broadly across the Middle East region.

**[Return to the Dispute resolution in the Middle East tool](#)**

## About DLA Piper

Having established our presence in the Middle East in 2005, we have grown to become one of the largest international law firms in the region, with 27 partners and over 100 lawyers operating from offices in the United Arab Emirates, Oman, Bahrain and Qatar. Our lawyers are fully versed in their local and cultural business communities. We bring a deep understanding of the countries in which we operate, their regulatory environments, market drivers, legal practices and customs – understanding that is further informed by international insight and an appreciation of global best practice.

With 7 Partners and over 30 other lawyers, our Litigation, Arbitration and Investigations team is one of the largest and most highly regarded dispute resolution practices in the Middle East, having won 'Litigation team of the Year 2019' at The Middle East Legal Awards. We are the only firm ranked Band 1 in all dispute resolution categories for international firms in Legal 500 2020 (United Arab Emirates).

Our lawyers specialise in complex, high value, multi-jurisdictional disputes covering the full spectrum of contentious matters, including international arbitration, offshore litigation, onshore litigation in the UAE courts, investigations, sanctions and compliance-related actions. We offer a powerful combination of regional expertise and global reach, ensuring that we are ideally placed to handle our clients' commercial disputes or investigation needs in any forum or jurisdiction.

As one of few international firms in the UAE which boasts an integrated UAE court litigation practice, we can provide a seamless end-to-end litigation service delivered to international standards at a competitive price.

**[Find out more on \[dlapiper.com\]\(#\)](#)**





# Power of attorney

## General overview

A Power of Attorney (PoA) is a legal document which empowers one party ("agent") to act on behalf of, and bind, another party ("principal"). In the onshore, civil jurisdictions of the Gulf Cooperation Council (GCC), a PoA must be produced before a lawyer (as agent) can appear on behalf of his/her client in court, arbitration or in front of any government authority.

It is dangerous to assume that PoAs are straightforward documents. Numerous issues must be considered when drafting a PoA if it is to fulfil its purpose. Even a slight mistake may have a negative impact on the principal's position and may prevent the agent from being able to represent the principal or render actions carried out by the agent void. For these reasons, it is critical that businesses have in place:

- Adequately worded constitutional documents or PoAs granting the requisite authority to those of its officers or employees who are intended to sign contracts containing arbitration clauses; and
- Adequately worded PoAs for particular disputes, which are obtained at an early stage and grant their legal representatives sufficient powers to act on their behalf throughout the course of the dispute.

This volume focuses on PoAs granted in the context of disputes (ie litigation or arbitration), though PoAs can be produced for a range of purposes.

## Onshore litigation

By way of example, in the United Arab Emirates (UAE), Article 55(2) of the UAE Federal Law No.11 of 1992 ("Civil Procedure Law") requires a legal advisor to prove that he/she has the requisite power to represent their client. The procedural laws of the other GCC countries have similar provisions, which are the source of the requirement for PoAs.

The following are the key considerations when producing a PoA:

### LANGUAGE

In common with all official documents submitted to courts in the GCC, PoAs must be in Arabic. That said, it is usual (given the importance of the document) for international clients to have bilingual PoAs produced.

### SCOPE OF POWERS

Since PoAs involve delegation of powers to an agent, it is important that the PoA is not too widely drafted. However, in the context of disputes, it is important to produce a PoA which encompasses all possible permutations that may occur throughout the duration of the case (for example, withdrawal or addition of claims, settlement discussions, filing appeals, etc.). If this does not happen, legal representatives may not be able to represent the client effectively throughout the dispute, or a new PoA may have to be produced.

### TO WHOM SHOULD POWERS BE DELEGATED?

What is permissible depends on the relevant jurisdiction but, as a general rule, more than one lawyer at the law firm representing the principal should be named in the PoA. This is to ensure that changes in personnel do not prevent effective representation.

### NOTARIZATION

It is the duty of the courts to ensure that parties filing or defending cases before them have the requisite authority to do so. In order to ensure this, the courts have given powers to Public Notaries, who are part of the judicial system. In the context of PoAs, Notaries witness signatures, but more importantly they also review the underlying constitutional documents of the principal to establish whether the individual in front of them has valid authority (sometimes through a chain of delegating documents) to grant the relevant powers.

### OVERSEAS COMPANIES

It is relatively straightforward for a party located onshore in the GCC to issue a PoA. However, attesting a PoA overseas (eg for a corporate entity based outside the jurisdiction) is often time-consuming and costly. Because of this, it is important to plan and start this process at the earliest opportunity. For example, in some jurisdictions, the party will be required to have the PoA notarized, and then attested by their own country's Ministry of Foreign Affairs (or equivalent), then the relevant GCC embassy. The PoA must then be sent to the relevant GCC country, and "brought onshore" by being attested by the relevant Ministry of Foreign Affairs. Sometimes, there are additional requirements. Since this process can take weeks or even months, and urgent action might be required, this process needs early consideration and action.

## Offshore litigation

There is no requirement to produce PoAs in the offshore courts of the Dubai International Financial Centre, Abu Dhabi Global Market or Qatar Financial Centre. Ordinarily, no issues of authority arise in these courts. If they were to arise, a simple letter from the client would normally be sufficient to satisfy the court that the legal representative had authority to appear on behalf of their client.

## Arbitration

The critical point for PoAs in the context of arbitration in the Middle East is that, because arbitration is generally regarded by the onshore courts as an extraordinary waiver of the right to litigate, specific powers must be granted by the principal to an agent before that agent can validly commit the principal to an arbitration agreement. For example, in the UAE, Article 4 of Federal Law No. 6 of 2018 on Arbitration (the **"Arbitration Law"**) (read together with Article 58(2) of the Civil Procedure Law) requires a principal to expressly state in the relevant PoA that the agent has the power to enter into an arbitration agreement on their behalf. Without such express authority, there is a real risk that the arbitration agreement in a contract will be void and unenforceable – even if the agent had express authority to sign the contract on behalf of the principal (but not specifically the arbitration agreement contained within it) and Article 53.1(b) of the Arbitration Law identifies this as a ground on which an arbitral award can be challenged. International and regional companies often disregard these formal requirements – and the results can be catastrophic.

More generally, even in arbitrations seated offshore (or in most jurisdictions outside the Middle East), the requisite authority should still be obtained for companies incorporated in onshore Middle East jurisdictions, or there is a risk that any award rendered in any subsequent arbitration will not be enforced by the onshore courts.

However, in arbitrations which are seated onshore in the region, PoAs (or other letters of authority) are generally exchanged at the first procedural hearing – even though it is questionable whether this is a requirement in some regional jurisdictions. Issues are frequently raised as to the adequacy of those documents, so real attention to detail is required to ensure the authority documents are sufficient and demonstrate a clear chain of authority passing to the legal representative. Some tribunals prefer to attach the PoAs relied on to their awards, and there is often a paragraph in the Terms of Reference for the arbitration confirming that both parties are satisfied with the PoAs that their opponents have produced.

One important consideration is whether the relevant PoA grants those signing the Terms of Reference in the arbitration the power to enter into arbitration agreements. If the power is wide enough to encompass this power, then the act of signing may give rise to a new arbitration agreement – which may "perfect" what may be an imperfectly concluded arbitration agreement in the original contract.





# Pre-action

## General overview

The pre-action stage covers any stage before the commencement of the formal claim. The pre-action stage may therefore also include the commencement of actions for interim and/or conservatory remedies (such as injunctions or freezing orders over assets). Given their scope and importance, such actions form the subject of a separate volume of this guide (see Volume 7, "**Interim and Conservatory Measures**").

It is critical that the pre-action stage is effectively managed, both by parties planning to bring, and those defending, claims. This is because the commencement of the claim will (among other things) lead to restrictions on what the parties can do, the timetable to which they must operate and the costs and other consequences associated with their actions. Each party should therefore take the opportunity afforded by the pre-action stage to carefully consider its objectives and the strategy which is most likely to achieve those objectives. It is therefore critical that:

- legal advice is sought before any positive action is undertaken, however innocuous or insignificant that action may seem; and
- an effective litigation strategy is formulated, agreed and implemented on the basis of that legal advice.

The following are just a few examples of important pre-action considerations of general application:

### CONTRACTUAL NOTIFICATION

It is common for certain types of contracts to contain provisions regulating the notification and substantiation of claims. Depending on how such provisions are drafted, and depending on the law which governs the contract, a failure to comply with such contractual requirements can be fatal as they may bar a would-be claimant from pursuing its claims at all. Advice taken at the pre-action stage can help avoid such risks.

### DISPUTE RESOLUTION MECHANISM

A contract may contain other restrictions regarding the commencement of a claim. For example, it may require the claimant to escalate the dispute through various levels of senior management, require attempts at amicable settlement between the parties or it may purport to grant one party unilateral options regarding the conduct of any dispute. It is essential that the legal effect of such clauses is properly understood and the commencement of the claim managed accordingly before any positive action is taken. Commencing a claim without having complied with mandatory pre-dispute procedures can lead to costly, and potentially fatal, jurisdictional challenges.

### IDENTITY AND STANDING OF DEFENDANT

It is essential that the correct defendant(s) are identified before any claim is commenced. In many instances this will be obvious but there are exceptions, for example where there are multiple companies or individuals which may be jointly responsible for loss incurred (which may be sufficient to found, for example, a conspiracy claim), where the defendant operates through a branch in the jurisdiction where a contract was performed, or where shareholders are dissatisfied with the way the affairs of their company have been conducted. It may also be prudent to consider the solvency (or otherwise) of the defendant. It is also important to identify the correct claimant.

### INTERIM RELIEF

It is possible to obtain interim relief prior to the commencement of proceedings, provided certain threshold tests are met. This forms the subject of a separate volume of this guide (see Volume 7, "**Interim and Conservatory Measures**").

### REQUISITE AUTHORITY

It is important, at the outset, to ensure that requisite authorities are granted to those whom will represent the client in any proceedings. Given the importance of this issue, it forms the subject of a separate volume in this guide (see Volume 1, "**Powers of Attorney**").

### ADVICE ON THE MERITS (AND SOMETIMES QUANTUM)

An early assessment of the merits of the claim and the potential for any counterclaim should usually be made before any claim is commenced. It is obviously unwise for a party to pursue litigation that is unlikely to achieve its objectives, but there are also more specific matters to be aware of. For example, a party may be minded to commence a claim to exert pressure, but without intending to pursue the claim to a final judgment. However, such a claimant should be aware that it may lose the ability to unilaterally discontinue



the claim, particularly where counterclaims are introduced, in effect committing to a costly process in which there is no alternative but to participate. It can also be important in some disputes to obtain early advice from quantum or other technical experts to ensure that a claim is framed in the correct way (and to ensure that you have a good idea of the real value of the claim).

## EVIDENCE

An assessment should be made of the evidence that is needed to prove the claim in the relevant forum before it is commenced. It may be, for example, that the relevant documents are being held by a third party which may be unwilling to provide them once a formal dispute has arisen, or that steps need to be taken to identify and safeguard evidence already within the claimant's possession (for example, by suspending policies relating to the automatic deletion of emails and other records).

## INSURANCE AND FUNDING

Before commencing a claim, it may be prudent for a claimant to consider whether it would be possible to take advantage of any insurance policies that can help manage the risk and/or cost of litigation, or the possibility of procuring funding for the costs of pursuing the claim through specialist third-party funders, who are becoming more active in the region.

## ENFORCEMENT

The ability to enforce (and thereby obtain the benefit of) any favorable judgment or arbitral award should be a key consideration when taking the decision to litigate. Given the scope and importance of this issue, it forms the subject of a separate volume of this guide (see Volume 15, "[Enforcement](#)").

Legal advice should be obtained in respect of the above matters at the earliest stage. The legal position is rarely straightforward and any misunderstanding will decrease the chances of a party's objectives being achieved.

## Onshore litigation

### DOCUMENT PRODUCTION

There is no document production process in the onshore courts which is analogous to the common law concept of "disclosure" or "discovery", and no general pre-action disclosure process. A party should therefore think carefully about whether it has, or can obtain, the documents necessary to prove its case by some other method before commencing its claim.

### ORIGINAL DOCUMENTS

The onshore courts are much more likely to require a party to produce original documents in order to substantiate a claim as compared with arbitration or offshore litigation (where disputes regarding the authenticity of documents are rare). In addition, the rules of evidence before the onshore courts give primacy to certain types of documents (eg official government documents, documents bearing signatures) which may impact significantly on how the court assesses the parties' respective evidence.

### LANGUAGE OF PROCEEDINGS

All proceedings before the onshore courts are in Arabic and all non-Arabic documents relied upon must be translated. This may give rise to a "translation risk" (ie that the Arabic translation will be interpreted as meaning something different to the source document). Translation can also be a significant expense where a large volume of documentation is put into evidence.

### COSTS ORDERS

The concept of "costs follow the event" does not apply before the onshore courts, which will only award nominal "advocate fees" to a successful party. This is unlikely to be a significant proportion of the successful party's total legal spend, even in relatively minor cases. In addition, onshore courts will not make adverse costs awards even in respect of hopeless claims which ultimately fail, meaning that such claims are often included, notwithstanding their weakness.

## Offshore litigation

### JURISDICTION

The precise nature and extent of the jurisdiction of offshore courts (such as the Courts of the Dubai International Financial Centre (DIFC), Abu Dhabi Global Market (ADGM) or Qatar Financial Centre (QFC)) must be reviewed carefully, as their relative immaturity means the scope of their jurisdiction changes periodically through legislation or case law. Given the breadth and importance of this subject, this is addressed in a separate volume of this guide (see Volume 5, "[Jurisdictional Challenges](#)"), but these issues give rise to important pre-action considerations. For example, a party may be tempted to commence parallel proceedings in another forum in order to exert additional pressure (as a claimant) or to complicate the process (as a defendant). However, in most cases, the offshore (and onshore) courts still have discretion to decline to exercise jurisdiction in circumstances where it considers that another court is the more appropriate forum.

### DOCUMENT PRODUCTION

The offshore courts have a very different approach to document production (sometimes referred to as "disclosure" or "discovery") compared to the onshore courts, and are much more likely to compel the parties to produce documents in their possession and/or control which are adverse to their case. Disclosure is generally addressed in a separate volume of this guide (see Volume 10, "**Document Production**"). However, relevantly for present purposes, the DIFC (Rule 28.47) and ADGM Courts (Rule 86(1)) include procedures for documents to be requested before the commencement of litigation. Depending on the circumstances of the dispute, this may be a powerful tool in exerting pressure on the other side before the full costs of bringing a claim are incurred.

### **COSTS ORDERS**

The treatment of the parties' legal costs is considerably different in the offshore courts compared to the onshore courts. The general rule is that a successful party can expect to recover the majority of its legal costs (lawyer's fees, expert fees, etc.) from the losing party. However, the courts have a wide discretion and the conduct of the parties (including before the commencement of the claim) is a factor which may be taken into account (eg DIFC Court Rule 38.9(1)) when considering how to allocate costs.

## **Arbitration**

The pre-action considerations that apply to a specific arbitration will depend on a wide range of factors, including the law of the seat of the arbitration (which may be different to the substantive law governing the dispute), the institutional rules (if any) which apply to the arbitration and the terms of the agreement to arbitrate itself. Considerations may include the following:

### **THE LAW OF THE SEAT**

An understanding of the law of the seat is important from a number of perspectives, but fundamentally it is that law which will govern the procedure of the arbitration, and the way in which the claim is presented may need to be adjusted accordingly. For example, most jurisdictions will consider at least some matters to be "non-arbitrable", or they may require a special procedure (possibly involving the local courts) to be followed when pursuing them. Consideration should therefore be given at the pre-action stage as to whether those elements of the claim can be omitted, presented differently, or whether the circumstances are such that attempting to raise the claim in an alternative forum would be desirable.

### **CHOICE OF ARBITRATOR**

Assuming that pursuant to the relevant arbitration agreement and/or the applicable institutional rules, a party will play a role in the selection of a sole arbitrator or a party-nominated arbitrator, consideration should also be given at an early stage to identifying the characteristics of a potential arbitrator that may be favorable to the party. For example, would an arbitrator a civil law or common law background (or both) be beneficial, or would a technically (as opposed legally) qualified arbitrator be more suitable?

### **COSTS**

The rules of certain institutions (eg ICC Rules 2017) require the parties to make certain non-refundable payments as well as an upfront payment intended to cover the costs of the entire arbitration at an early stage. Where the tribunal consists of three arbitrators and the amounts in dispute are large, this pre-payment may be substantial. The claimant may also be required to pay the respondent's share of these costs where the respondent refuses to cooperate. The ability to actually meet these costs should be considered before any unrecoverable costs are incurred (eg lawyer's fees, filing fees).



# Commencing a claim

## General overview

It is essential that all required procedural steps are followed when commencing a claim to avoid delay and/or adverse consequences which may arise as a result of non-compliance. If a party fails to properly comply with the applicable requirements, it risks falling at the first hurdle and incurring unnecessary delay (and costs), which may ultimately jeopardize the successful prosecution of its claim. The relevant procedural requirements are often provided in the applicable laws or rules set by the government and/or the relevant authority.

## Onshore litigation

Proceedings in the onshore United Arab Emirates (UAE) courts commence when the claimant files a statement of claim and pays the court fee. It is important when commencing a claim before the onshore courts to do so in the correct court, by reference to both the subject matter of the dispute and the Emirate in which the defendant is domiciled and/or the damage occurred. Articles 20 to 41 of the Civil Procedures Law (Federal Law No. 11 of 1992) set out the relevant considerations and requirements.

### STATEMENT OF CLAIM

There are no strict requirements as to the contents of the statement of claim. However, it must be in Arabic and include the following:

- details of the claimant;
- details of the defendant;
- the cause(s) of action relied upon;
- the relief(s) (ie remedy) sought; and
- documents relied on as supporting evidence. Gulf Cooperation Council countries, being civil law jurisdictions, rely heavily on documentary evidence, so it is important that all relevant documents are appended to the statement of claim and translated into Arabic by a court-certified translator.

Once the statement of claim is filed with the court office, the summons is issued and the matter is listed for a hearing.

### SUMMONS

A court officer serves the summons, the statement of claim and the documents attached to it on the defendant personally, and the defendant is asked to sign an acknowledgement. If the court officer is unable to serve the summons on the defendant before the hearing date, the court adjourns the hearing to another date.

If the defendant cannot be served for whatever reason, service may be effected through notification, which usually involves the court officer seeking to effect notice at the defendant's last known address. If this fails, the court will serve on the defendant by publication. A notice is published in two widely circulated newspapers, one in English and the other in Arabic. Notice is deemed to be served upon the defendant after this publication, and the case may proceed.

### COURT FEES

- Abu Dhabi: Abu Dhabi Law No. 6 of 2013 (Civil Transactions and Procedures), together with the decision of the Chairman of the Judicial Department No. 2 dated 2 February 2016, provide the court fees applicable in the Abu Dhabi onshore courts. The filing fee for a claim is generally 3 percent of the value of the claim.
- Dubai: Dubai Law No. 21 of 2015 on Judicial fees applicable in the Dubai Courts provides the court fees applicable in Dubai onshore courts. The filing fee for a claim is generally 6 percent of the value of the claim, subject to a minimum of AED500 and a maximum of AED40,000.

### PAYMENT ORDERS IN THE UAE

Recent amendments to the UAE Civil Procedure Law allow for a fast route for the enforcement of admitted debts.

Pursuant to articles 62 and 63 of Cabinet Decision No. 57 of 2018 (amended by Cabinet Decision No. 33 of 2020), a party can file an ex-parte application before the UAE courts, and request the issuance of a payment order for an outstanding debt.



Under these provisions, a payment order is a process by virtue of which a party that has strong written evidence of a quantified debt, which has been acknowledged and accepted by the debtor, may request the court to issue an order against the debtor for the payment of that debt.

In order to obtain a payment order, the creditor is required to provide the court with sufficient evidence that the debt is correct, confirmed in writing, and is due and payable. Procedures relating to payment orders are much shorter than cases pursued under the usual civil procedures.

Article 62 of Cabinet Decision No. 57 of 2018 and its amendment states the following conditions for obtaining a payment order:

- a written acknowledgment of the debt by the debtor;
- the amount of the debt must be specified; and
- the debt must have arisen from a commercial contract or instrument.

A creditor seeking a payment order should first serve a demand notice on the debtor demanding the settlement of the outstanding amount. In the event the debtor fails to settle the outstanding amount within at least five days, the creditor may then file a petition for a payment order requesting the payment of the outstanding amount.

Examples of situations where payment orders may be an available remedy are (a) where the debtor has provided cheques for the amount(s) claimed which have been dishonoured and (b) where in correspondence, the debtor admits the debt but, for example, requests more time for payment.

## Offshore litigation

The procedure for commencing a claim in the Dubai International Financial Centre (DIFC) Courts is governed by the Rules of the DIFC Courts passed by the DIFC Authority (RDC) and in the Abu Dhabi Global Market (ADGM) Courts under Part 5 of the ADGM Court Procedure Rules 2016 (the ACPR) and Practice Direction No. 2 issued on 30 May 2016. To commence a claim, the claimant has to file a claim form.

### DIFC COURTS

In the DIFC Courts, there are three types of claim forms:

- (a) The Small Claims Tribunal (SCT) Claim Form (Form P53/01) is used for claims:
  - where the value of the claim does not exceed AED500,000;
  - where the claim relates to the employment/former employment of a party and all parties agree for the matter to be heard by the SCT (there is no value limit for the SCT's elective jurisdiction in the context of employment claims); and
  - that do not fall in the first two categories but for which the value of the claim does not exceed AED1 million and the parties elect in writing for it to be heard by the SCT (RDC 53.2).

The parties have to request the SCT Registrar for a claim form. In the claim form, the claimant must set out reasons for the remedy sought. The court fee applicable is governed by the Amended Practice Direction 4/2015. The filing fee for employment disputes is 2 percent of the value of the claim with a minimum of USD 100, and for other disputes, 5 percent of the value of the claim with a minimum of USD 100.

- (b) The Part 7 Claim Form (Form P7/01) is used for claims that do not fall under the jurisdiction of the SCT and do not require the use of a Part 8 Claim Form. This is the most commonly used claim form.
- (c) The Part 8 Claim Form (Form P8/01) is used where the claimant seeks a decision on a question that is unlikely to involve a substantial dispute of fact or where there is a rule or practice direction which permits or requires the use of a Part 8 Claim Form. The claim form should state that Part 8 applies and identify the question that the claimant wants the court to decide or the remedy that the claimant is seeking and the legal basis for the remedy.
- (d) The Part 43 Arbitration Claim Form (Form P43/01) is used for any arbitration-related matters or when seeking relief in support of pending arbitration proceedings in the DIFC.

For Part 7 and 8 claims, the claim form and every statement of case must include the title of the proceedings, which states the number of the proceedings, the circuit or division of the court or tribunal (if any) in which they are issued, the full name of each party and whether they are a claimant or defendant. For arbitration claims, the claim form must include a concise statement of the remedy claimed and any question on which the tribunal seeks a decision from the court.

The filing fees for Part 7 and Part 8 claims are 5 percent of the value of the claim and/or property with a minimum of USD 1,500 and a maximum of USD 130,000. Where the claim is for both money and other relief, only the higher applicable fee is payable. The fee for a non-monetary Part 8 claim is USD 5,000.

### ADGM COURTS

The claim form must be in accordance with Form CFI 1 unless it is a small claim (ie (i) a claim for USD 100,000 or less; or (ii) an employment dispute where both parties agree it is a small claim) in which case Form CFI 2 must be used. If the claimant wishes to use a simplified (alternative) procedure under Rule 30 (in cases which do not involve substantial disputes of fact), then form CFI 3 is used.

The court fee depends on the value of the claim. It is USD 2,500 for claims including unquantified damages claims, arbitration claims and judicial review proceedings. For a claim between USD100,000 and USD 500,000, it is 2.5 percent of the value of the claim. For a claim between USD 500,000 and USD1 million, it is USD 12,500 plus 2 percent over USD 500,000. For a claim between USD1 million and USD 5 million, it is USD 22,500 plus 0.5 percent over USD1 million and finally, for claims over USD 10 million, the fee is USD 55,000 plus 0.15 percent over USD 10 million (subject to a cap of USD 65,000). For a small claim dispute, the court fee is 1.5 percent of the claim, subject to a minimum of USD 250 and a maximum of USD1,500.

### CLAIM COMMENCEMENT DATE

In DIFC and ADGM Courts, proceedings start when the claim form is issued by the court at the request of the claimant. This is the date on the claim form.

### STATEMENTS OF TRUTH

In DIFC and ADGM Courts, the claim form must be verified by a statement of truth, which confirms that the claimant believes that the facts stated in the claim form are true.

### PARTICULARS OF CLAIM

In DIFC and ADGM Courts, the particulars of claim must state:

- what final orders are sought;
- particulars of the claimant's case in summary form, and the propositions of law which the claimant relies on. If the particulars of claim are not contained in the claim form or served with it, then they must be served within 28 days of the defendant's acknowledgement of the claim form; and
- details of the claimant's lawyers (if so represented).

### E-FILING

In the DIFC and ADGM Courts, an electronic filing facility is available on the respective court websites. The e-filing system must be used for submitting documents to the court registry (including the submission of the claim form for issue by the court).

## Arbitration

The procedure for commencing a claim in arbitration proceedings depends on both the law applicable to the arbitration and any applicable institutional (or other) rules. The key arbitral institutions in the UAE are the DIFC - LCIA Arbitration Centre (DIFC-LCIA) and the Dubai International Arbitration Centre (DIAC).

Commencing a claim with the DIFC-LCIA or DIAC involves sending a request for arbitration to:

- the DIFC-LCIA Registrar and the respondent(s) to the arbitration (under the DIFC-LCIA Arbitration Rules of 2008 or 2016 (as applicable)). The request must comply with Article 1 of the rules; and
- the DIAC (under the DIAC Arbitration Rules of 2007). The request must comply with articles 3 and 4 of the rules.

The date of receipt of the request for arbitration by the DIFC-LCIA Registrar or the DIAC is the date of commencement of arbitration proceedings.

For ad hoc onshore arbitrations in the UAE, the UAE Arbitration Law (Federal Law No. 6 of 2018) is the key legislation on arbitration. However, it is generally accepted practice among parties to adopt institutional rules as they are more comprehensive and sophisticated. If the arbitration agreement is silent on procedural rules and the parties cannot agree on the procedural rules to apply, the arbitrator(s) must decide on the applicable rules.





# Service

## General overview

In essence, service is the notification to a party of documents relating to proceedings in accordance with the rules of the jurisdiction. This could mean complying with one of, or a combination of, the rules and procedures of:

- the jurisdiction where the proceedings are brought;
- the jurisdiction in which the person (or entity) that is being served is domiciled; and/or
- the relevant arbitral institution or arbitration law.

In addition to the above, and where a dispute arises out of a contract between the parties, the contractual notice requirements (such as method and addresses for delivery of notices) will also need to be considered.

The requirement for service arises at various stages of proceedings. A party involved in a dispute will encounter the requirement to serve process from the beginning of a claim (such as service on a defendant/respondent of a claim form or a request for arbitration) all the way to the enforcement of a judgment, order or arbitral award (such as service on a judgment debtor of the judgment or order to be enforced).

This volume summarizes how service takes place in the context of civil and commercial disputes. It does not consider service in the context of any other proceedings including, but not limited to, criminal and constitutional proceedings and matters of personal status.

Furthermore, this volume does not deal with service of legal proceedings on government or related entities. It is often the case in Gulf Cooperation Council (GCC) countries that proceedings involving the government or related entities will have their own rules and considerations.

## WHY IS SERVICE SO IMPORTANT?

Where service does not take place in accordance with the relevant rules, it is usually described as being defective. There are a range of consequences of defective service: some may be considered minor in that proceedings are delayed because a party has to be re-served, whereas others are more serious and might result, for example, in the annulment of an arbitral award. For example, the New York Convention provides that courts may refuse to recognize and enforce an arbitral award where a party was not given proper notice of the appointment of an arbitrator or arbitration proceedings.

## Onshore litigation

The rules and procedures of the onshore courts of the GCC states as to service appear in their respective civil procedure laws (CPL or CPLs), save for Saudi Arabia where they appear in the law of procedure before the Sharia Courts. The common thread of these procedures is demonstrated by the Manama Document on Uniform Civil Procedure of 2002 (the "Manama Document"), which has been approved by the relevant authorities of all of the GCC states. The purpose of the Manama Document is to harmonize rules of civil procedure in the GCC states, including the rules of service.

Service in the onshore courts of the GCC states is a court driven process, in that where a party files a claim or application, the court will make an order (or effectively give directions) as to the service of that claim or application. Furthermore, the service takes place through officers of the court (ie court bailiffs). The court officer will serve the relevant claim or application and report back to the court on the conduct of such service. There has been some development in this regard in the United Arab Emirates (UAE) where, with the permission of the court, the UAE CPL now allows for service to take place through voice or video recorded calls, "smart applications", SMS, e-mail, fax, or any other means of modern technology.

If the defendant cannot be served for whatever reason, service may be effected through notification, which usually involves the court officer seeking to effect notice at the defendant's last known address. If this fails, the court will serve on the defendant by publication. A notice is published in two widely circulated newspapers, one in English and the other in Arabic. Notice is deemed to be served upon the defendant after this publication, and the case may proceed.

## Offshore litigation

For offshore courts, the rules for service are enshrined in the relevant court rules. In the region, the Rules of the Dubai International Financial Centre (DIFC) Courts (RDC) and the Abu Dhabi Global Market (ADGM) Courts are currently the most extensive.

Service under the rules of the offshore courts of the GCC (being the courts of the DIFC, ADGM and the Qatar Financial Centre (QFC)) is a party-driven process. The party filing a claim or application will need to effect service in accordance with the relevant court rules and then confirm such service to the court, for example by filing a certificate of service. In that certificate, the serving party will confirm the relevant rule under which it effected service and when such service occurred.

There are also some unique features in relation to the service of process in the offshore courts. For example, the RDC makes special provision for the service in the DIFC of any civil or court process which is ongoing before another court or tribunal. The process involves a competent authority providing a written request to the DIFC Court Registrar, along with the documents for service and a translation in English. The translation requirement can be dispensed with if the court or tribunal seized of the matter certifies that the person to be served does not require a translation. Following this, process will be served by a DIFC Court Officer, unless the DIFC Court Registrar directs otherwise.

That said, the DIFC Court has demonstrated that it is willing to waive certain requirements in relation to service where there cannot be any doubt that the party being served fully understood the documentation served on it and was fully aware of the steps it had to take as result of receiving such documentation. Notwithstanding this, parties should seek to comply with all rules of service and should not rely on any potential waiver.

## Arbitration

Generally, where an arbitration is conducted under the auspices of an institution or specific rules, service is conducted in accordance with those procedures and rules. These rules and procedures are generally less stringent and parties will not have to comply with formal requirements. Service in this regard can be effected through a number of practical methods, including:

- the method(s) agreed in the contract between the parties;
- the last known address of a party;
- a place at which the relevant documents may reasonably be expected to come to a party's attention; or
- any other method(s) which the parties have agreed.

## Cross-border / cross-jurisdiction service of court proceedings

It is not unusual to have a cross-border or cross-jurisdictional element to a dispute. An example of this is where proceedings are filed in the DIFC Courts and the party to be served is located onshore in Dubai. Both the DIFC Court and the party to be served, as a matter of geography, are located in Dubai. However, the difference lies in the jurisdiction. The proceedings are filed with the DIFC Courts, which are subject to the RDC, and the party to be served is located onshore in Dubai, which is subject to the UAE CPL. As a result, the following questions arise: what rules of service apply? The RDC? The UAE Civil Procedure Law? Both?

Similar questions will arise where proceedings are, for example, filed with the Kuwaiti Courts and the party to be served is located in Bahrain. The question once again is which rules of service apply? Must the party in Bahrain be served in accordance with the Kuwaiti CPL requirements? The Bahraini CPL requirements? Both?

This section identifies the matters that should be taken into consideration where cross-jurisdiction service of court proceedings is taking place. Appendix 1 provides a summary of the considerations explained in this section in the form of a flowchart.

### CONSIDERATION 1 - LOCATION: WHERE IS THE PARTY TO BE SERVED?

This is the first question to be asked as it will determine which jurisdictions are potentially involved and whether other rules need to be considered. If the party to be served is located in the same jurisdiction where the proceedings are filed, service takes place in accordance with the rules of the jurisdiction in which the proceedings are filed.

### CONSIDERATION 2 - TREATIES: ARE THERE ANY APPLICABLE TREATIES?

It is often useful to consider whether there are any treaties or conventions (whether international, regional or bi-lateral) in place that would override the rules of the relevant jurisdictions which would otherwise apply.

In particular, when considering proceedings that involve more than one jurisdiction in the GCC or the Middle East, there are two treaties that have this effect:

- the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications of 1997 (the "GCC Convention"), which is a regional convention and applies to GCC states; and
- the Riyadh Arab Agreement for Judicial Cooperation of 1983 (the "Riyadh Convention"), which is an international convention and applies to the wider Middle East and certain African states.

In essence, both conventions apply the same rules for cross-jurisdictional service, namely that the court in the jurisdiction in which the proceedings are filed entrusts service to its counterpart court in the jurisdiction in which service is to take place.

For example, where proceedings are filed in the commercial division of the Omani Courts and the party is to be served in Qatar, the commercial division of the Omani Courts would send the documents and information required for service to the commercial division of the Qatari Courts. The Qatari Courts would effect service and confirm this to the Omani Courts.

Although this is the position at law, in practice there is a risk that the courts that are party to these conventions may apply their own rules (whether as to service or otherwise) and not the rules of the relevant treaty or convention. It would be for the party conducting the service through this method to prove to the relevant court(s) that service should take place through the method identified in a treaty or convention.

**CONSIDERATION 3 - ADDITIONAL RULES: (1) DO THE RULES OF THE JURISDICTION WHERE THE PROCEEDINGS ARE FILED PROVIDE RULES FOR SERVICE OUTSIDE THE JURISDICTION? (2) DOES THE JURISDICTION WHERE THE PARTY IS TO BE SERVED HAVE RULES FOR SERVICE FROM OTHER JURISDICTIONS?**

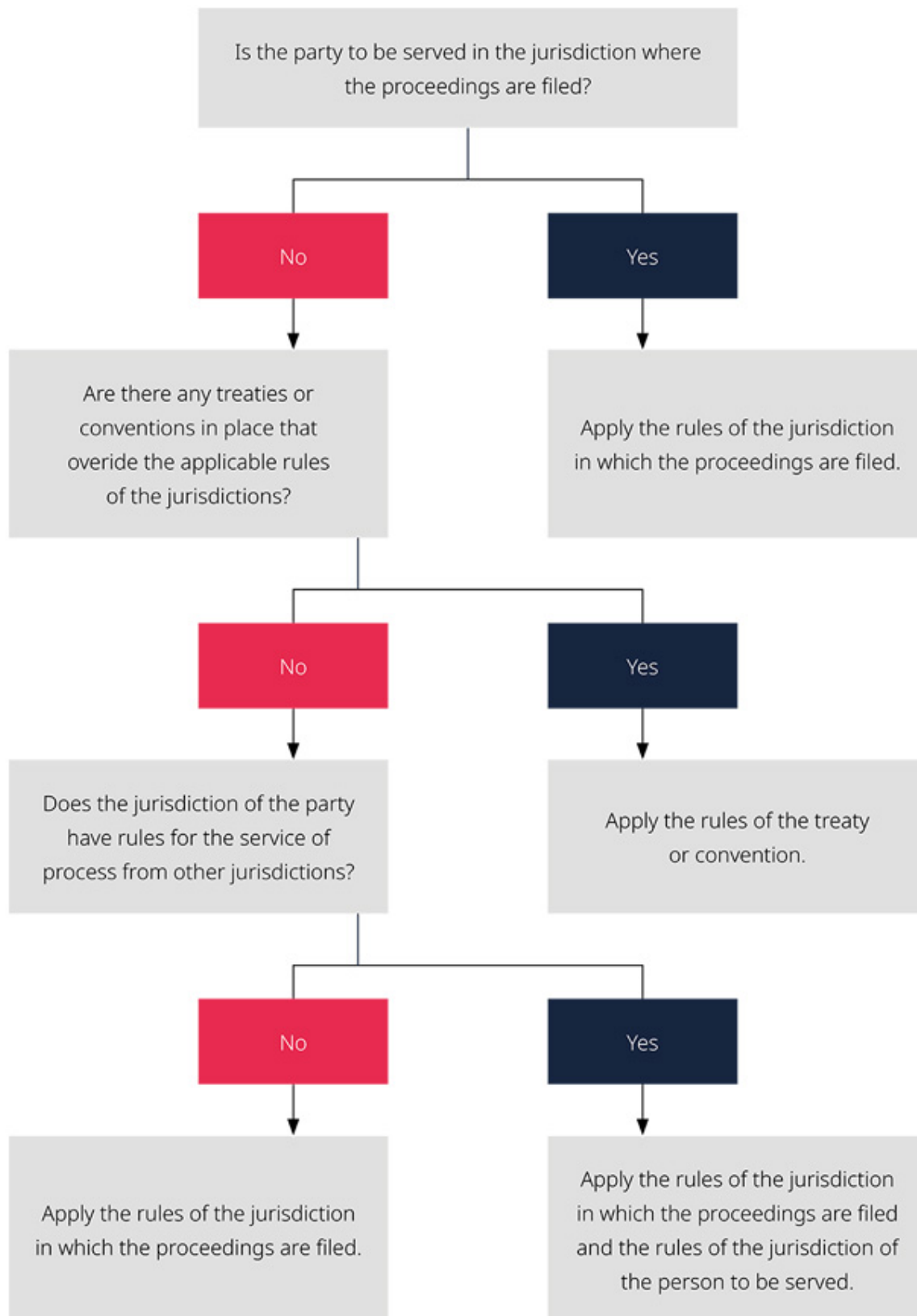
Where there are no treaties or conventions in place that govern cross-jurisdiction service, two final questions will need to be addressed:

- What do the rules of the jurisdiction where the proceedings are filed provide regarding service outside the jurisdiction?
- What do the rules of the jurisdiction of the party to be served provide as to service from other jurisdictions?



## Appendix

### APPENDIX 1: CONSIDERATIONS FLOWCHART FOR SERVICE IN CONNECTION WITH COURT PROCEEDINGS A



# Jurisdictional challenges

## General overview

### JURISDICTION

Jurisdiction is the authority granted to a formally constituted legal body or forum (ie court or arbitral tribunal) to administer and decide legal matters. Jurisdiction clauses in contracts usually specify the court or tribunal which will have (exclusive or non-exclusive) jurisdiction to determine the disputes that may arise out of, or in connection with, the contract.

Jurisdictional challenges can play a significant role in the progress made by parties in resolving their disputes. They can be costly and time-consuming to resolve, which can lead to delays in dealing with the substantive dispute, and increase the acrimony in an already contentious setting. It is therefore vital that parties give proper thought at the point of entering into an agreement as to the forum in which they wish disputes to be heard. Any contractual provisions should accurately reflect their wishes, ensuring that any jurisdictional challenges which may be brought are quickly and easily dismissed - allowing the parties to focus their efforts on resolving the substantive claims.

### CHALLENGING JURISDICTION

Jurisdictional challenges can be raised by any of the parties. Challenges are sometimes used in an attempt to delay and/or to frustrate the proceedings. If the basis for challenge is inconsistent with a party's previous position, the court or tribunal should decide whether the party making the challenge is deemed to have waived its right to challenge (because there is no good reason for its delay in bringing the challenge). Where a court or arbitral tribunal itself identifies a jurisdictional issue which the parties have not raised, in some situations it may be appropriate for the court or tribunal to do so on its own initiative.

### GROUND FOR JURISDICTIONAL CHALLENGES

Generally, parties may challenge the jurisdiction of a particular court or tribunal on the ground that the jurisdiction clause in their contract was invalid. The technical basis for claiming such invalidity will depend upon the provisions of the relevant laws.

## Onshore litigation

### INTRODUCTION

In the United Emirates (UAE), Article 20 of the UAE Federal Law No. 11 of 1992 ("the Civil Procedure Law") states that "*With the exception of actions in rem relating to real property abroad, the courts shall have jurisdiction to hear actions brought against nationals and claims brought against foreigners having a domicile or place of residence in the State.*" Claims will usually be brought in the courts of the Emirate in which the relevant defendant resides. Article 21 then sets out the circumstances in which the UAE onshore courts have jurisdiction to hear actions against foreigners who do not have a domicile or residency in the state.

The UAE onshore courts will not generally uphold an agreement which gives jurisdiction to a foreign court in circumstances where they would otherwise have jurisdiction. This would include, for example, disputes involving the ownership of property situated within the UAE, a contract that was executed and/or largely performed in the UAE, and/or a dispute in which a UAE national or resident is a defendant. In circumstances where there is a dispute between the parties as to the competent UAE court, the Union Supreme Court rules on any conflict – often staying ongoing proceedings pending its decision.

### JURISDICTION WITHIN THE UAE (AND CHALLENGING A PARTICULAR EMIRATE'S JURISDICTION)

The starting point is that (unless the contract contains an exclusive jurisdiction clause in favor of a particular Emirate's court) the place of residence of a defendant will dictate which Emirate's court has jurisdiction over a dispute in the UAE. There are certain circumstances which may cause this general rule to be varied. For example, in real estate disputes, the court of the Emirate where the property is situated can take jurisdiction. A litigant filing a claim in a particular court may be met by a counterparty challenging the jurisdiction of that court, arguing that the court of a different Emirate should have jurisdiction over the dispute (for example, where a contract has been executed in another Emirate).

### CHALLENGES SEEKING TO ASSERT THE JURISDICTION OF THE DIFC COURTS

Generally, choosing the "Dubai Courts" in a dispute resolution clause will mean that the Dubai onshore courts are intended to take jurisdiction over any dispute under the relevant agreement. However, this wording will not preclude an argument being raised that it was intended that the Dubai International Financial Centre (DIFC) courts could have jurisdiction. Therefore, particularly in circumstances where one or more of the parties are based in the DIFC; hold assets in the DIFC; or where the contract is executed or performed (in

whole or part) in the DIFC, the parties should ensure (assuming that this is what they wish) that they make clear that it is the Dubai onshore courts, and not the DIFC courts, which have jurisdiction over their dispute. In 2016, a Joint Judicial Committee was established by the Government of Dubai to resolve conflicts of jurisdiction between the Dubai onshore courts and the DIFC courts.

### CHALLENGES SEEKING TO ASSERT THE VALIDITY OF AN ARBITRATION AGREEMENT

As mentioned above, the UAE onshore courts are often reluctant to cede jurisdiction over a dispute which has a connection with the UAE to a foreign court. Historically, the UAE onshore courts have dealt with many cases by exercising jurisdiction, notwithstanding attempts by the parties to "contract out" of the national courts by agreeing to submit exclusively to the courts of another jurisdiction. The UAE onshore courts have ignored such agreements as a matter of public policy, and relied on the jurisdiction conferred by Articles 20 and 21 of the Civil Procedure Law. As a result, parties should be aware that the only effective method permitted by UAE law to "contract out" of the jurisdiction of the UAE onshore courts is for the parties to execute a valid arbitration agreement. They will, however, need to ensure that they fully comply with all technical requirements under the relevant law in drafting such an agreement, to avoid the jurisdictional challenges set out below.

## Offshore litigation

In 2011, the jurisdiction of the DIFC courts was significantly expanded through the promulgation of Dubai Law No. 16 of 2011, which permitted contracting parties to refer their civil and commercial disputes to the DIFC courts irrespective of whether their contract had any nexus to the DIFC (as long as that agreement was clear and in writing).

Under Rule 12.1 of the Rules of the DIFC Courts (RDC), a defendant who wishes to dispute the court's jurisdiction "*may apply to the Court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.*" A defendant wishing to exercise this right must file an acknowledgement of service in accordance with Part 11 (which will not waive their right to dispute the Court's jurisdiction (see RDC 12.2-3)). Unless jurisdiction is disputed within 14 days of filing the acknowledgement, the defendant will be treated as having accepted the court's jurisdiction (see RDC 12.5). By way of example as to the possible grounds on which jurisdiction may be challenged, a party may seek to rely on an arbitration agreement, or may claim that another court has jurisdiction over the dispute.

The Abu Dhabi Global Market (ADGM) is an international financial free zone in Abu Dhabi. The ADGM Courts were established in 2015, and became fully operational in 2016, offering an independent common law framework which is broadly modelled on the English judicial system. Rule 38.1 of the ADGM Court Procedure Rules largely mirrors that of Rule 12.1 of the RDC mentioned above. Under Rule 38(1) of the ADGM Court Procedure Rules, a defendant wishing to dispute the court's jurisdiction "*may apply to the Court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.*" A defendant wishing to do so must first file and serve an acknowledgement of service. Any application disputing jurisdiction must be made within 28 days after filing and serving the acknowledgement of service, and be supported by written evidence (Rule 38 (4)).

## Arbitration

### INTRODUCTION

An arbitral tribunal's jurisdiction to determine the merits of a dispute arises out of a valid and enforceable arbitration agreement, which must be broad enough in scope to encompass the claims made by the parties. Once arbitrators have been appointed to determine a given dispute, their jurisdiction usually subsists until they render a final arbitral award. However, should one or more of the parties challenge the arbitral tribunal's jurisdiction during the course of the proceedings, their authority may become an issue.

The fact that a party has challenged the arbitral tribunal's jurisdiction does not prevent it from determining whether it has jurisdiction. *Kompetenz-Kompetenz* is a universally accepted principle in modern international arbitration (which is recognized under Article 19 of the Federal Law No. 6 of 2018 on Arbitration (the "**Arbitration Law**")). This principle recognizes that arbitrators have the inherent power to determine the nature and scope of their own jurisdiction.

Challenges to an arbitral tribunal's jurisdiction can sometimes be used for purely tactical reasons – to delay proceedings and/or cause the opposing party to incur greater costs through defending the application. Although such challenges are usually made at the beginning of the arbitral process, they can arise at any time throughout the arbitration, and even after an arbitral award has been rendered. The majority of national laws and arbitration rules, however, provide that a party seeking to challenge the arbitrators' jurisdiction should raise their objection at the outset or as soon as they are aware of the grounds for challenge.

### TYPES OF JURISDICTIONAL CHALLENGES

A jurisdictional challenge can be made:

- in respect of a party - eg a party is not a party to the relevant contract or clause;
- in respect of the arbitration agreement itself - eg the clause is void or invalid; or

- in respect of a claim - eg the claim does not fall within the scope of the dispute resolution clause/is not arbitrable.

### DEALING WITH JURISDICTIONAL CHALLENGES

Tribunals have broad discretion as to the timing and process by which they deal with a jurisdictional challenge. If they decide to reject the challenge, and confirm that they do have jurisdiction, they can either issue their decision as an award or a procedural order. Tribunals can either determine such challenges as a preliminary matter or deal with it as part of their final award on the merits. If they consider that they do not have jurisdiction, the tribunal should issue a final arbitral award or (depending on the circumstances) a decision declining to decide the case for lack of jurisdiction.

### OFFSHORE ARBITRATION

The UAE currently has one offshore arbitral institution in Dubai, the DIFC-LCIA Arbitration Centre (DIFC-LCIA), which is a joint venture between the DIFC and the London Court of International Arbitration. Under Article 23.1 of the DIFC-LCIA Rules, the arbitral tribunal "*shall have the power to rule on its own jurisdiction, including any objection to the initial or continuing existence, validity or effectiveness of the Arbitration Agreement*". The article makes clear that, for this purpose, an arbitration clause is to be treated as an independent agreement to the agreement it is contained within.

Article 23.2 of the DIFC-LCIA Rules provides that any challenge to the arbitrators' jurisdiction should be raised as soon as possible, but not later than the service of the Statement of Defence (if the respondent is submitting the challenge) or service of the Defence to Counterclaim (if the claimant is submitting the challenge). Otherwise, a party is deemed to waive their right to challenge jurisdiction. However, the arbitral tribunal may admit an untimely plea if it considers the delay to be justified in the particular circumstances.

Article 23.3 of the DIFC-LCIA Rules provides that the arbitral tribunal may rule on any jurisdictional challenge in an award on jurisdiction or later in an award on the merits, as it considers appropriate.

Further, Chapter 4 of the DIFC Arbitration Law (2008) contains provisions as to the jurisdiction of the arbitral tribunal. These provisions support the DIFC-LCIA Rules above, and confirm (in Article 23 of the law) that: (i) the arbitral tribunal may rule on its own jurisdiction, including any objections relating to the arbitration agreement itself (which for this purpose is deemed to be independent of the other terms of the contract it is contained within); (ii) any plea must be raised before the submission of the Defence (with the fact that a party has participated in appointing an arbitrator not precluding them from raising any plea); (iii) a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings (a later plea may be considered if the delay is justified); and (iv) the arbitral tribunal may rule on a plea either as a preliminary question or in an award on the merits.

RDC 43.47 provides that "*an arbitration claim for the determination of a preliminary question as to the substantive jurisdiction of the Arbitral Tribunal under Article 23(3) of the Arbitration Law must be made within 30 days after receipt of notice of the ruling by the Arbitral Tribunal as a preliminary question that it has jurisdiction.*"

The other offshore arbitration centre based in the UAE is in Abu Dhabi, in the ADGM. This is a hearing centre rather than an arbitral institution. The ADGM has agreed with the International Court of Arbitration of the International Chamber of Commerce (ICC Court) to launch a Middle East representative office in the ADGM, but any arbitrations conducted in the ADGM using the ICC Rules will be administered from the ICC's Paris base. This is in contrast with the joint venture set up in the DIFC between the DIFC and LCIA.

Parties can agree to apply the rules of any arbitral institution to arbitrations conducted in the ADGM. In considering jurisdiction challenges, parties should look to the rules governing their proceedings, as well as the ADGM Arbitration Regulations 2015. Under those regulations, the tribunal has the power to rule on their own jurisdiction (see Article 24 (1)). Under Article 25, an objection that the tribunal lacks jurisdiction "*must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction*". Any objection during the course of the proceedings that the tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.

In either case, the tribunal may rule on an objection as a preliminary question or in an award on the merits (Article 25 (3)).

### ONSHORE ARBITRATION

There are various "technical" grounds on which an arbitration clause can be declared invalid under UAE law, thereby denying the arbitral tribunal jurisdiction over a particular dispute. While such arguments may be raised in arbitrations seated in the DIFC, they are more likely to find traction in an arbitration seated in onshore Dubai (whether under the rules of the Dubai International Arbitration Centre (DIAC), another arbitral institution or in an ad hoc arbitration). Jurisdictional challenges typically address whether:

- the arbitration agreement exists (ie whether the relevant contract entered into by the parties contained an agreement to arbitrate);

- the arbitration agreement is pathological (ie whether an arbitration agreement is incomplete, ambiguous, incoherent or contradictory – for example, where a clause erroneously described a non-existent arbitral institution or named a deceased arbitrator); and
- the arbitration agreement was made in the required form (ie whether the arbitration agreement satisfies the requirements which arise from the law governing the arbitration agreement or the law applicable to the relevant party). For example, in onshore Dubai, among other things, the arbitration agreement must be in writing (Article 7(1) of the UAE Arbitration Law) and signed by a person capable of binding the party in question to arbitration.

Other points to note include:

- Article 8 of the UAE Arbitration Law provides that, if a dispute (regarding which there is a valid arbitration agreement) is brought before the UAE courts, as long as one party to the dispute pleads the existence of an arbitration agreement in relation to that dispute prior to filing any demand or defence before the court, that court must reject the court case.
- Article 43 of the UAE Arbitration Law provides that if, during the course of an arbitration, a preliminary issue which is outside the jurisdiction of the arbitrators arises; a challenge has been filed that a document is forged; or criminal proceedings have been taken regarding such forgery (or for any other criminal incident), the arbitrator may continue with the arbitration if it finds that disposing of the matter or forgery or criminal act is not necessary for settling the subject matter of the dispute (otherwise the arbitrator shall suspend the proceedings until a final judgment on the issue has been issued).

The DIAC is the principal arbitral institution in onshore Dubai. In terms of the DIAC's rules relating to jurisdictional challenges, Article 6.3 provides that a party's jurisdictional challenge *"...shall be raised not later than in the statement of defence or, with respect to the counterclaim, in any reply to the counterclaim."* Article 6.4 states that *"In general, the Tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the Tribunal may proceed with the arbitration and rule on such a plea in the arbitral award."*





# Default judgment

## General overview

Default judgment is the term given to a judgment made by an administrative act, rather than a judgment reached following a full trial. Typically, a default judgment is reached following a failure by one party to comply with a fundamental procedural requirement.

The key question is whether the particular triggering procedural requirement has been satisfied, rather than looking at an assessment of the merits of the relevant underlying submission or claim. Under many rules of civil procedure (in litigation), a default judgment may occur where the defendant fails to file an acknowledgement of service or a defence within the time limits set down (or indicating in these documents that the proceedings are not being contested).

Default judgment is distinct from "summary judgment", where a party applies for a claim to be determined at an early stage of the proceedings, without the need for a full trial of the issues and a hearing of evidence, on the basis that the claim or defence has "no real prospect" of success and there is no other reason why the matter should be disposed of at trial.

As a general rule, default (and summary) judgment are not remedies that are available to arbitral tribunals (as distinct from the courts), although it is possible for arbitral rules (or for the parties' agreement) to provide such specific powers.

When choosing which dispute resolution mechanism to incorporate into any agreement, thought should be given to the risk that the other party may refuse to engage with the process. This is an issue that will often only become relevant where a dispute has already arisen, although where possible thought should be given to the availability of default judgment at the outset when considering the appropriate dispute resolution mechanism.

## Onshore litigation

The onshore courts of the Gulf Cooperation Council (GCC) states, in general, have similar rules and procedures regarding obtaining default judgment. These rules appear in their respective civil procedure laws, save for Saudi Arabia, where they appear in the law of procedure before the Sharia Courts.

## Offshore litigation

There are three main offshore courts within the GCC (the Dubai International Financial Centre (DIFC) Court, Abu Dhabi Global Market (ADGM) Court and Qatar Financial Centre (QFC) Court) and they differ in their approaches to obtaining default judgment. The Rules of the DIFC Courts (RDC) are very similar in substance to the English civil procedure rules, and the ADGM Rules include comparable but much less detailed provisions. There is no mechanism for obtaining default judgment under the current rules of the QFC Court.

Using the DIFC Court as an example, the RDC allows a claimant to apply for default judgment where the defendant has missed the time limit to acknowledge the claim against them, or has acknowledged the claim but failed to file a defence. Accordingly, default judgment will not be available where the defendant has fully satisfied the claim on which the claimant is seeking judgment (including costs) or has fully admitted the claim but requested time to pay the amount due. If the defendant has applied to have the claim struck out or assessed for immediate (ie summary) judgment, the claimant will not be able to obtain a default judgment; the defendant's application must be disposed of first. The claimant must provide the court with satisfactory evidence that the claim is eligible for default judgment as part of its application.

Default judgment may be granted in a claim for either a specified or unspecified sum of money. Where the claim is for a specified amount, the claimant may specify whether he would like the judgment debt to be paid in whole or, if not, the times and rate at which it is to be paid in instalments. Where the sum has not been specified, the court will decide the value of the claim. The court may also choose to award the claimant interest and costs. In the DIFC Court it is customary for a default judgment award to be granted in US dollars. Where the claim is for an amount in another currency, the judgment will expressly allow for payment in that currency or in the equivalent US dollar sum.

Once default judgment has been granted, the defendant has no right to appeal the court's decision. However, the defendant may apply to the court to have it set aside or varied. The court must set aside any decision wrongly entered into; that is, where the court did not correctly comply with the relevant provisions of the RDC. RDC 14.2 provides that the DIFC Court also has broad discretion to set aside or vary a judgment "*on such conditions as it sees fit*". This usually applies where the defendant has a real prospect of successfully defending the claim, were it allowed to proceed, or where it appears to the court that there is some other good reason to set aside or vary the judgment – often where new information has been brought to its attention. It is important to act promptly, as the court will consider whether the party seeking to set aside the default judgment has made the application in good time.

## Arbitration

The task of an arbitral tribunal is to make a determination of the issues in the case before it. As such, where either party fails to engage with the arbitral process, for example by failing to serve and file a response to a Request for Arbitration within the relevant time limit or failing to file and serve a Statement of Defence within the relevant time limit, a tribunal will usually continue to the conclusion of the arbitral process rather than issue a pre-emptive final (or default) arbitral award against that party in default - though it may shorten timescales if the claimant requests it to do so.

This accords with the that parties be given a full or reasonable opportunity to put their case (even if they do so very belatedly). This contrasts with proceedings before a court, where the judge is given more effective powers to proceed in the absence of a reluctant party. Therefore, if the availability of judgment in default is attractive to a party (for example, if it is considered likely that the counter-party will not participate in the process), then arbitration may not be the preferred option, given the tribunal's obligation to give the counter-party a reasonable opportunity to participate and to determine the case on the merits.

Parties to arbitration should be aware that – under the institutional rules of the DIFC-LCIA, Dubai International Arbitration Centre (DIAC) and International Chamber of Commerce (ICC) – if the respondent fails to serve and file a response to a Request for Arbitration, this will not preclude the respondent from denying any claim or from advancing a counterclaim in the arbitration.



# Interim and conservatory measures

## General overview

Interim and conservatory measures, which are also referred to as interim remedies, precautionary measures or provisional relief, are orders of a court or arbitral tribunal that are usually granted at an early stage in the proceedings, or before the merits of a dispute are examined. These are distinguished from final remedies which ordinarily form part of the final judgments, orders or arbitral awards that dispose of a dispute. There are a wide range of these orders; they usually act to maintain the status quo between the parties. Examples of such orders include:

- freezing, attachment or other orders that prevent the dissipation of assets; and
- orders requiring the collection, disclosure and preservation of evidence.

Interim measures can also be stand-alone in their nature. An example of such a measure is an anti-suit injunction, which prevents or restricts a party's ability to commence or continue legal proceedings in a particular forum.

Depending on the forum of the proceedings, the interim remedies potentially available to a party will differ vastly. Therefore, when drafting dispute resolution clauses, and throughout the life of a dispute, there are a number of considerations that should be borne in mind in respect of interim remedies, including:

- their availability generally and the types potentially available;
- their enforceability outside the jurisdictions in which they are granted; and
- costs implications.

These considerations are inter-linked and the reasoning behind them is fairly straightforward. By way of example, in instances where all of the assets of a contracting party are located outside the jurisdiction, or out of the immediate reach of the other contracting party, a serious consideration when drafting a dispute resolution clause, or when the likelihood of a dispute becomes apparent, is the ability to ring-fence those assets to prevent their dissipation.

Furthermore, and although not covered in this volume, an important consideration in respect of interim remedies is their enforceability outside the jurisdiction in which they are granted. For example, a party may obtain an order from the Dubai International Financial Centre (DIFC) courts against a party or assets located outside the DIFC, for example in onshore Dubai or even outside the United Arab Emirates (UAE). An assessment will need to be made as to the enforceability of such an order. There is often little point in obtaining an interim remedy that is unlikely to be enforced in the jurisdiction where it is ultimately needed.

Finally, and in relation to costs, a party must be careful in deploying any application for an interim remedy. Being unsuccessful in such an application, or arriving in a scenario where it transpires that an application has been wrongfully granted, may have serious costs consequences. By way of example, parties who are successful in obtaining freezing orders from the DIFC courts are generally required to provide a cross-undertaking in damages should they be unsuccessful in their case. Similarly, in onshore litigation, an applicant for a precautionary attachment must post an indemnity letter with the court. Furthermore, a party which has wrongfully had a precautionary attachment levied against it and suffered loss as a result, may bring a claim in damages against the applicant.

This volume will provide a summary of the availability and types of interim remedies before the various courts of the UAE and arbitration proceedings seated in the UAE.

## Onshore litigation

By way of example, recent amendments to the UAE Civil Procedure Law allow the filing of payment orders.

Pursuant to articles 62 and 63 Law No. 57 of 2018, a creditor could file an ex-parte application before the UAE courts, and request the issuance of a payment order for an outstanding debt. Under these provisions, a payment order is a process by virtue of which a party that has strong written evidence of a quantified debt, which debt has been acknowledged and accepted by the debtor, may request the court to issue an order against the debtor for the payment of such debt.

In order to obtain such a payment order, the creditor would need to provide the court with sufficient evidence that the debt is correct, confirmed in writing, due and payable. Procedures relating to payment orders are, in comparison to the usual civil procedures, truncated.

Article 62 Law No. 57 of 2018 No. 57 of 2018, provides the following conditions for seeking a payment order:

- a. a written acknowledgment of the debt by the debtor;
- b. the amount of the debt to be specified; and
- c. the debt to have arisen from a commercial contract.

Also, the Civil Procedure Law provides a provisional form of relief which empowers a UAE court to "attach" or temporarily freeze the assets of a party. Such orders are referred to as "provisional attachment orders" or "precautionary attachments". Volume Three, Chapter Two of the Civil Procedure Law deals with attachments generally and sets out a party's ability to apply for precautionary attachments and the requirements of such an application.

Under the Civil Procedure Law, in order for such an application to be successful, a UAE court will need to be satisfied that:

- the applicant has a prima facie case against the party which the attachment is sought; and
- there is a risk of dissipation of the assets which are to be attached which would prevent the applicant from being able to enforce any judgment debt.

The granting of a precautionary attachment is a matter for the court's discretion, and it is for the applicant to prove that the relevant requirements have been satisfied. Under the Civil Procedure Law, a UAE court has the power to require the applicant to provide any additional or further evidence it deems necessary in making its judgment. The Civil Procedure Law further requires the applicant to file a substantive claim within eight days from the date on which the attachment is imposed.

As to jurisdiction, the UAE courts will generally have jurisdiction to issue precautionary attachment orders even where they do not have jurisdiction to entertain the substantive dispute, for example, where the contract out of which the dispute arises is subject to arbitration.

It is also worth noting that precautionary attachments do not give rise to, or create preferential rights or liens over, the attached asset in favor of the creditor that has applied for and/or obtained them.

## Offshore litigation

The ability to grant and apply for interim remedies is enshrined in the court laws and procedural rules of both the Dubai International Financial Centre (DIFC) Court (RDC) and Abu Dhabi Global Market (ADGM) court. Whilst the ADGM courts are in their infancy, the DIFC courts have either granted or heard applications for various interim remedies, including:

- freezing orders (including worldwide freezing orders);
- disclosure orders;
- anti-suit injunctions; and
- interim payment orders.

The RDC and rules of the ADGM court provide that they are able to grant a number of interim remedies, including:

- interim injunctions;
- interim declarations;
- property preservation and inspection orders;
- orders for the sale of property;
- freezing orders;
- disclosure and search orders; and
- interim payment orders.

Although the legal framework for interim remedies for the DIFC and ADGM courts are similar, due to their shared common law roots, the RDC are currently more extensive. The RDC set out a number of additional procedural and substantive requirements in respect of interim remedies, including:

- the requirements for applications for interim remedies where there is no related claim;
- the requirements for contents and form of freezing orders and search orders;

- the status of interim remedies where claims are stayed or struck out; and
- detailed requirements for the application and procedure for interim payments.

Before entertaining any substantive application for interim relief, the party seeking an interim remedy from either the DIFC or ADGM courts will first need to establish that the relevant court has jurisdiction under its relevant jurisdiction rules. When deciding the substantive application, DIFC court case law illustrates that the court's approach generally follows the principles for obtaining equitable relief in the English courts. The applicable tests are different depending on the relief sought; however, for freezing orders, those elements include:

- the existence of assets in the jurisdiction and the real risk of the dissipation of assets;
- a good arguable case;
- whether there is a serious question to be tried;
- whether damages would be an adequate remedy; and
- the balance of convenience between the parties.

## Arbitration

As above, interim relief can be obtained from courts even where there is a valid arbitration clause, for example where a tribunal has not been constituted or in cases of exceptional urgency.

The ability to apply for and obtain interim remedies from the arbitral tribunal will depend on where the arbitration is seated.

In circumstances where the arbitration is seated onshore in the UAE, Federal Law No. 6 of 2018 on Arbitration (the **"Arbitration Law"**) will apply. The Arbitration Law grants wide-ranging powers to arbitral tribunals to order the parties to take precautionary measures which it considers necessary. These powers centre around:


- maintaining, or reinstating, the status quo;
- preserving evidence and property; and
- ordering parties not to take particular action.

The Arbitration Law also provides various mechanisms for the enforcement of these orders through the onshore UAE courts. That said, whether or how certain types of interim relief (such as prohibitory injunctions) can and will be enforced remains unclear as the Arbitration Law has only recently come into force.

In respect of arbitrations seated offshore in the DIFC and the ADGM, their respective arbitration laws (each of which are based on the UNCITRAL Model Law) will apply. However, each of the DIFC and ADGM arbitration laws empower arbitral tribunals to order interim measures, unless the parties have expressly agreed otherwise.

## EMERGENCY ARBITRATORS

In certain circumstances where parties are subject to a valid arbitration agreement and urgent interim or conservatory measures are required prior to the constitution of the arbitral tribunal, it may be possible for an emergency arbitrator to be appointed pursuant to the institutional rules applicable to the arbitration (eg Article 29 of the International Chamber of Commerce Rules of Arbitration) in order to consider any application for such relief.





# Case management

## General overview

Case management is the process through which the court or arbitral tribunal and, to a lesser extent, the parties control the dispute resolution process by the application of specific rules. It comprises a series of events during the lifecycle of a case. The way in which proceedings are managed has a direct impact on the time spent and costs incurred by the parties. Whether proceedings are managed efficiently often depends on both the approach taken by the court or arbitral tribunal and the motivations of each party.

Case Management is best achieved when both parties and the court (or arbitral tribunal) seek early agreement of procedural directions (or the arbitral timetable), usually through a CMC held at the outset of the proceedings. In the event that parties are not in agreement, or one party (usually the defendant) resorts to delay tactics, courts and arbitral tribunals have many rules at their disposal to ensure that the proceedings are run efficiently and fairly. The claimant should be prepared to act proactively to ensure that a procedural timetable is produced and adhered to.

This volume discusses the use (and misuse) of case management within litigation and arbitration.

## Onshore litigation

In most onshore courts in the Gulf Cooperation Council (GCC) states, judges at first instance have wide-ranging case management powers. The timetable for cases is largely dictated by the courts, and neither party has much control over the pace of the timetable or procedure.

The onshore courts of most GCC states provide for the establishment of a Case Management Office (CMO) to manage cases. By way of example, in the United Arab Emirates (UAE) UAE Federal Law No. 11 of 1992 and in Qatar, Civil Procedure Law No. 13 of 1990 provide for the establishment of a CMO. By contrast, in Kuwait, whilst the Kuwait Federal Law No. 11 of 1992 does not establish a formal CMO to manage cases, this prescribes procedures whereby the court clerk will undertake responsibility for these functions. The position is also different in Saudi Arabia, whereby several court departments will undertake the multiple case management tasks.

The CMO (or relevant department) will generally be responsible for registering cases, serving notices, exchanging memoranda, documents and expert reports among the parties.

Once the claimant has filed its statement of claim with the CMO (or relevant department), the parties should be summoned to appear before the judge within set time limits. For example, in the onshore UAE courts, the parties should be summoned 10 days after service on the defendant(s) is completed. In practice, we treat this timetable to be indicative.

No set time periods are set in Kuwait and Saudi Arabia, with the timetable wholly dependent upon the relevant court's availability.

In Bahrain, the court clerk, acting as the CMO, will deliver a copy of the complaint to the defendant one day after the filing of the case. The defendant then has 10 days to submit the defence and any supporting documents. In contrast to the above, there is no fixed timetable as to when the parties will appear before a judge.

## Offshore litigation

### INTRODUCTION AND OVERRIDING OBJECTIVE

Similar to the Civil Procedure Rules (CPR) of England and Wales, the Dubai International Financial Centre (DIFC) courts and the Abu Dhabi Global Market (ADGM) courts have an active duty to manage cases and further the overriding objective. The overriding objective is to enable the courts to deal with cases justly and proportionately (having regard to the amounts at stake and the complexity of each case). The intention is also to ensure that the courts are accessible, fair and efficient.

The case management powers of the courts are respectively provided under Part 4 of the Rules of the DIFC courts (RDC) and Part 12 of the ADGM Rules (read with Practice Direction 5).

In the DIFC courts, the claimant applies, or the court on its own initiative calls, for a case management conference (CMC):

- for a Part 7 claim, within 14 days of the date when all defendants who intend to file and serve a defence have done so; and
- for a Part 8 claim, within 14 days of the date when all defendants who intend to serve evidence have done so.

In the ADGM courts, the CMC happens electronically or telephonically within 14 days of the filing of the defence.

## DOCUMENTS TO BE FILED AHEAD OF CMC

In the DIFC courts, the claimant has to serve a case management bundle (Bundle) at least seven days before the CMC. The Bundle is comprised of various documents, including the Case Management Information Sheet (which all parties are required to file). This is a standard form found at Schedule A to Part 26 of the RDC and records the parties' intentions (and any discussions they have had) regarding document disclosure, amendments to statements of case, preliminary issues, factual and expert witness evidence and trial dates. The form requires the parties to confirm whether any alternative dispute resolution procedures have been considered by the parties and their legal representatives. The parties also have to file a case memorandum (ie, a short and uncontroversial description of what the case is about and a summary of the material procedural history of the dispute) and a list of issues (ie, an agreed list of important factual and legal issues). The claimant has an obligation to keep the Bundle updated as the case proceeds.

In the ADGM courts, the parties have to complete the Directions Questionnaire issued by the court officer and submit a list of issues.

## CMC

Both the DIFC and ADGM courts can fix a CMC at any time on its own initiative on at least seven days' notice to the parties, unless there are compelling reasons for a shorter period of notice. The court generally discusses the requirements of the case and seeks to make an order which includes a pre-trial timetable. Pre-trial timetables are generally agreed between the parties in advance of the CMC, or ordered by the court if no agreement can be reached.

## REVIEW OF PROGRESS

The pre-trial timetable includes a progress monitoring date and a pre-trial review to assist the court with further case management. A Progress Monitoring Information Sheet and a Pre-Trial Checklist is completed by each party at the time of the review.

## ORDERS AT CMC

Both the DIFC and ADGM courts have wide powers to make orders at the CMC. The RDC and ADGM Court Rules set out broad, non-exhaustive, lists of powers and the court can make an order on an application or of its own initiative. The courts are also empowered to order a party to pay a sum of money (or strike out a pleading) if any party fails to comply (without good reason) with a rule, practice direction or court order.

## Arbitration

In arbitration, arbitral tribunals lack the coercive powers that judges have in litigation. Accordingly, arbitrations are sometimes more difficult to manage, especially where a party seeks to delay the process.

Managing arbitral proceedings is predominantly achieved by the arbitral tribunal and the parties agreeing on the timetable for the dispute. Typically, a final hearing date will be fixed, and the parties and the tribunal will then work backwards to agree filing dates for pleadings, disclosure, witness and expert evidence and pre-trial logistics. This agreement is usually recorded in a procedural order. This procedural order cannot be enforced in a court, but it does have the sanction of the arbitral tribunal. Parties can be penalized with adverse costs orders for causing unnecessary or unjustified delays to the arbitral timetable.<sup>[1]</sup>

In the case of institutional arbitrations, the secretariat of the institution provides support in managing the process, including overseeing filing of pleadings, evidence, hearing and (most importantly) rendering of awards on time.

Early procedural hearings that fix the timetable at the outset assist with the planning and preparation of an arbitration and consequently save time, cost, and unnecessary arguments later on. The parties are then better equipped to resource personnel and estimate the costs required to reach each milestone. Arbitrators will also be required to check their busy diaries and commit in advance to hearing dates. The quicker and more efficiently the parties can get through the timetable, the quicker the outcome for everyone.

It is important that the parties are in a position to dictate their case management procedure in a way that suits their procedural needs. This feature works well when both parties are "on board". However, it will not work well when hostile counterparties use delay tactics, for example, tactical challenges of tribunal members and other interlocutory applications made on unmeritorious grounds. Additionally, parties from different parts of the world and different cultures will have varying expectations of how a dispute should be handled. In these circumstances, the tribunal will be key to ensuring the efficient management of a case and should impose specific directions where parties cannot agree on the procedure.

The tribunal's case management powers are set out in the various institutional rules governing the arbitration. Here are a few examples of those rules:

- DIFC-LCIA Arbitration Rules, Article 14, Conduct of the Proceedings: The parties "*may agree on the conduct of their arbitral proceedings and they are encouraged to do so*". Failing this, the tribunal "*shall have the widest discretion to discharge its duties*"; those duties being "*to act fairly and impartially as between all parties*" and "*adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute*".

- Qatar International Conciliation Arbitration Centre (QICAC) Rules, Article 25, Determination of rules of procedure: "*the parties are free to agree on the procedure to be followed by the Arbitral Panel in conducting the proceedings*" and "*failing such agreement, the Arbitral Panel may, subject to the provisions of these Regulations, conduct the Arbitration in such manner as it considers appropriate....*".
- Dubai International Arbitration Centre (DIAC) Rules, Article 17, General Provisions: The arbitral tribunal "*shall act fairly and impartially and ensure that each party is given a full opportunity to present its case*" and "*shall have the widest discretion to discharge its duties...*".

Unlike the DIFC-LCIA and QICAC Rules, the DIAC Rules provide for a mandatory Case Management Meeting and fixed timetable for the submission of documents, statements and pleadings (Article 22). The International Chamber of Commerce (ICC) rules also specifically provide for procedural hearings in the early stages of arbitration (Article 24(1)).

### COMMON CASE MANAGEMENT PROBLEMS

As can be seen from the above rules, when party autonomy fails and the way forward cannot be agreed, the arbitral tribunal is usually granted a wide discretion to manage the case as they see fit.

This discretion is less of a problem where there is an experienced, three panel, arbitral tribunal, abiding by tried and tested institutional rules. Problems are more likely to occur where there is an inexperienced, sole arbitrator managing an ad hoc arbitration.

Here are some examples of common case management problems and suggested solutions:

- **Arbitral tribunal seeks to avoid a CMC on the basis that it is an unnecessary expenditure of time and cost:** In these circumstances, the parties should try to agree their own directions and present them to the arbitral tribunal. If the respondent is refusing to cooperate, the claimant should apply to the arbitral tribunal, providing reasons why a CMC is necessary.
- **Arbitral tribunal fails to give directions on disclosure:** Disclosure can be one of the most time-consuming aspects of an arbitration and failure to provide clear directions can result in excessively wide, litigation style document production or disclosure obligations, which can cause unnecessary cost and delay. If it wishes to reduce the scope of disclosure, a party should propose that the internationally recognized IBA Rules on the Taking of Evidence 2010 should apply in the arbitration, or be used as guidance.
- **The parties fail to decide the hearing dates at the outset:** The claimant should be proactive in case management and should seek to agree the entire arbitration timeline at the beginning of the arbitration proceedings. Trial dates are difficult to agree on short notice, because of the number of people whose involvement is required.
- **Delay in producing the requisite power of attorney:** The parties should ensure that they can execute and notarize a power of attorney without undue delay and commence the proceedings without wasting time. Getting a power of attorney notarized can be time consuming if the signatory is outside the UAE as the power of attorney has to be in Arabic and legalized by the Embassy of the UAE in the signatory's country (see Volume 1 of this Guide, "[Powers of Attorney](#)").
- **One or both parties refuses to sign the Terms Of Reference:** The arbitral tribunal should order both parties to sign the Terms Of Reference and follow it in practice. However, the tribunal cannot compel a party to sign.
- **Repeated requests for time extensions by a party:** The arbitral tribunal should only grant an extension of time to a party where it is reasonable and just to do so. Any frivolous requests for extension to time should be strictly declined.

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**[1]** Some institutions, like the ICC, penalize arbitrators who take too long to deliver their award after all submissions have been made by the parties.

# Settlement

## General overview

This volume focuses on how settlement of a dispute can be achieved through Alternative Dispute Resolution (ADR) mechanisms in both the onshore and offshore jurisdictions of the United Arab Emirates (UAE). ADR is a collective term for the various means by which a dispute between parties may be amicably resolved without recourse to the determination of a court or, in the case of arbitration, an arbitral tribunal.

The use of formal ADR is a relatively new concept in the Gulf Cooperation Council (GCC) region. Nonetheless, there appears to be a growing willingness to engage in ADR, as well as an increase in the number of dispute resolution centres which offer ADR services, such as mediation.

A settlement is an agreement between parties to resolve a dispute in accordance with the terms agreed between them. There are a number of reasons why a party should consider settling a dispute. These include, (without limitation) the following:

- settlement allows parties to avoid the uncertainty of waiting for a judgment from a court (or arbitral award from a tribunal). In addition, an agreed outcome represents a solution acceptable to both parties, as opposed to an outcome from a court or arbitral tribunal (which will often be unfavorable to at least one party);
- reaching a settlement saves costs (including legal, expert, disbursements) and management time;
- in some instances, a settlement allows the parties to continue their commercial relationship; and
- the parties are likely to avoid any negative publicity or reputational damage by ensuring that their settlement agreement includes a confidentiality clause (whereas a court judgment may be publicly available).

A number of legal jurisdictions allow the concept of "without prejudice" communication. "Without prejudice" communication allows parties involved in settlement discussions to make concessions or settlement offers in the interest of resolving their dispute, without prejudicing their position before the court. The concept of "without prejudice" communications is recognized before the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM) courts. However, the concept of "without prejudice" communications is not recognized by the onshore courts of the Middle East. Consequently, communications and documents used for the purpose of the settlement process can be submitted before the onshore courts and relied on during court proceedings, if a settlement is not reached.

## Onshore litigation

### ADR IN THE ONSHORE COURTS

The UAE Civil Code, unlike the civil procedure rules in England and Wales, does not contain provisions relating to pre-action conduct, by which settlement is encouraged before commencing court proceedings.

The main institutions which offer ADR services in onshore UAE are the following:

- The Centre for Amicable Settlement of Disputes;
- The Reconciliation and Settlement Committee; and
- The Mediation Centre.

### CENTRE FOR AMICABLE SETTLEMENT OF DISPUTES

In Dubai, Law No. 16 of 2009 establishes a Centre for Amicable Settlement of Disputes ("Centre") which can hear the following:

- disputes which concern the partition of common property;
- disputes relating to debts (up to a maximum value of AED50,000);
- disputes where one of the parties is a bank; and
- disputes where the parties have agreed to refer the matter to the Centre in ongoing litigation, regardless of the value of the dispute.

Disputes which fall within the first three categories must be reviewed by the Centre before they may be filed at the relevant onshore Dubai courts. Disputes which are referred to the Centre are handled by a number of mediators (who review the facts) under the supervision of the concerned judge. While the Centre is handling the case, all limitation and prescription periods are put on hold.

There are numerous cost and time advantages to settling a dispute through the Centre. Disputes referred to the Centre are typically settled within one month from the date on which the parties appear before the Centre. This is significantly faster than the three tier process before the onshore Dubai courts, which takes 18 to 24 months (or longer on occasion). If a settlement is reached then a signed settlement agreement must be attested by a Dubai court judge. This can then be enforced immediately.

#### THE RECONCILIATION AND SETTLEMENT COMMITTEE

In the UAE, commercial disputes in the Federal Courts (this procedure does not apply for Dubai and Ras Al Khaimah) must be referred to a Reconciliation and Settlement Committee (Committee). The Committee facilitates settlement by way of a preliminary hearing whose purpose is to attempt to settle the dispute amicably. During the settlement hearing, documents can be filed, but as the purpose of the hearing is to settle the case, the filing of documents is unusual. The hearing before the Committee is not private and takes place in a room to which the public has access. Any documents or admissions made in the hearings before the Committee are not privileged and any agreement reached before the Committee is binding and enforceable (and often recorded in the minutes of the hearing, which are signed by the parties). If a settlement is not reached after the hearing, then the claimant can file a claim in the Court of First Instance.

#### THE MEDIATION CENTRE

The Mediation Centre opened in Dubai in May 2016. The Mediation Centre offers traditional Middle Eastern conciliation practices as well as modern mediation, as well as facilitating accredited mediation courses. The advisory board of the Mediation Centre consists of leading international and local lawyers, and representatives of prominent businesses.

### Offshore litigation

#### DIFC COURTS

Proceedings before the DIFC courts are conducted in accordance with the Rules of the DIFC courts (RDC). The RDC operate to promote an "*overriding objective*" which requires the DIFC courts to deal with cases justly, with a view to saving costs and dealing with cases in a proportionate manner and the litigating parties to assist the courts to achieve the overriding objective.

In contrast to the English High Court, there are no formal pre-action protocol procedures before the DIFC courts. However, the DIFC courts are required to further the overriding objective, which includes encouraging parties to use ADR procedures to settle their dispute before the commencement of litigation.

One way in which the DIFC courts encourage parties to settle their disputes is through Part 32 of the RDC. A Part 32 offer is an option under the RDC which permits parties to attempt to settle substantive claims (excluding costs) which has potential advantages and are explained below.

Parties may make a Part 32 offer at any stage before the commencement of proceedings and up to 21 days prior to the trial date. A Part 32 offer is made when it is served on the offeree and is accepted by serving the written notice of acceptance on the offeror and filing the notice with the court.

#### FORM OF PART 32 OFFER

An offer to settle which is made in accordance with Part 32 of the RDC must include the following form and content. It must:

- be in writing;
- state on its face that it is intended to have the consequences of Part 32;
- specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with RDC 32.28 to 32.33 if the offer is accepted;
- state whether it relates to the whole of the claim or to part of it, or to an issue that arises in it and, if so, to which part or issue; and
- state whether it takes into account any counterclaim.

#### TERMS OF THE SETTLEMENT

The terms of a Part 32 offer must comply with the criteria listed above. All other terms of the offer depend on the facts of the case. A Part 32 offer should be carefully drafted to deal with every detail of the proposed offer. Key issues which should be considered during negotiations and the drafting stage of any settlement agreement are the following:



- the scope of the claims to be settled;
- confidentiality clause stating that the terms of the settlement should be kept confidential between the parties;
- payment arrangements;
- legal costs; and
- disposal of court proceedings.

### **COST CONSEQUENCES OF ACCEPTANCE/REJECTION OF A PART 32 OFFER**

A Part 32 offer is an offer to pay a certain sum of money in settlement of the claim, which may be accepted by the claimant within 14 days from the date of the offer. If the Part 32 offer is not accepted and the claimant fails to obtain a judgment "*more advantageous*" than the Part 32 offer, the claimant will be liable for the legal costs (plus interest) of the proceedings from the date the offer was rejected.

A Part 32 offer is treated as "*without prejudice except as to costs*". This means that, if the offer is not accepted, it cannot be used or referred to during legal proceedings in relation to the claim, save as to the issue of costs.

### **ADVANTAGES OF A PART 32 OFFER**

The main advantages of a Part 32 offer are as follows:

- a Part 32 offer is a formal offer registered with the DIFC courts and must strictly follow the procedures laid down in the RDC;
- a Part 32 offer can be used to save costs and time in avoiding a full trial;
- the offeror of a Part 32 offer can exert pressure on the offeree to consider settling the dispute, as a rejection of a Part 32 offer may have serious cost implications for the offeree;
- a Part 32 offer does not prejudice a party's right to pursue litigation;
- a Part 32 offer can be made in whole or in part of the claimed amount and, if accepted, will result in a strike-out of the whole or part of the claim in accordance with the terms of the offer; and
- there is no limit to the number of Part 32 offers which can be made by either party before the commencement of the trial.

### **PART 18 OFFER - ADGM COURTS**

Like the DIFC, the ADGM is a financial free zone which is not subject to onshore UAE civil and commercial law. The ADGM has its own court system and the ADGM Court Procedure Rules 2016 make provision, in Part 18, for settlement offers. A Part 18 offer is similar to the Part 32 offer in the RDC. A Part 18 offer is treated as "*without prejudice save as to costs*" and "*may be made by a claimant or a defendant in respect of the whole, or part of, or any issue that arises in a claim, counterclaim or other additional claim or an appeal or cross-appeal from a decision made at a trial.*" A Part 18 offer must be made in accordance with the prescribed form stated in the ADGM Court Procedure Rules 2016.

Further, each of the DIFC and ADGM Courts will, at the stage of the proceeding at which a Case Management Conference is convened (see Volume 8 "**Case Management**"), ask the parties if they would like to stay the proceedings for a short period of time in which they can attempt to settle the dispute.

## **Arbitration**

### **DIFC-LCIA**

The DIFC-LCIA facilitates mediation under the DIFC-LCIA Mediation Rules (dated 1 August 2012). DIFC-LCIA mediation can be used where the parties have agreed to mediate existing or future disputes under the rules, or upon request by the parties. Once DIFC-LCIA mediation is agreed, the court appoints a mediator, having due regard for any nomination or criteria of selection agreed in writing by the parties. The commencement of mediation does not preclude the parties from initiating or continuing any arbitration or judicial proceedings in respect of the dispute which is subject to mediation.

### **INTERNATIONAL CHAMBER OF COMMERCE (ICC)**

The ICC has its own mediation rules (dated 1 January 2014) which contain comprehensive provisions for the appointment of a mediator and the mediation process. In an arbitration under the ICC Rules, the arbitral tribunal has various case management powers which it may use to assist with the settlement of a dispute. Appendix IV of the ICC Rules states that the arbitral tribunal may at any point in the proceedings inform or remind the parties that they are free to settle all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC Mediation Rules. Where agreed between the

parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable by law.

If a settlement is agreed before the arbitration has fully commenced, the settlement agreement will be documented. However, if a settlement is agreed after the file has been transmitted to the arbitral tribunal, the parties may request that the arbitral tribunal records the settlement agreement in the form of a consent award.

#### **DUBAI INTERNATIONAL ARBITRATION CENTRE (DIAC)**

DIAC does not provide mediation services. The DIAC Arbitration Rules state that the arbitral tribunal shall terminate the arbitration once a settlement has been agreed. If requested jointly by the parties, the arbitral tribunal shall record the settlement in the form of a written consent award, which will contain a statement clarifying that it is an award made by the parties' consent. Each party to the arbitration, including the tribunal, shall receive an original copy of the consent award.



# Document production

## General overview

Document production is a key element of any dispute. Whether a dispute is litigated or arbitrated, the overriding principle behind document production is to ensure that both sides are given an opportunity to present their cases in order to secure a fair and just outcome. Having said that, the requirements for document production vary widely depending on the legal system in which the dispute is conducted.

In many common law jurisdictions such as the UK or Australia, relatively onerous document production/disclosure rules prevail, pursuant to which parties to litigation will often be under an obligation to search for and produce a wide range of documents that are relevant to the case, including those which are unhelpful to their own position.

By contrast, the requirements for document production in civil law systems, such as the Middle East and continental Europe, are generally more limited, with the parties to litigation only producing those documents on which they intend to rely in the dispute and which are favorable to their own positions. This is one of the reasons why arbitration is often preferred as means of dispute resolution to litigation in the onshore courts where the parties have much more limited scope to procure relevant documents from the other party.

International arbitration has developed separate document production practices entirely of its own which generally seek to strike a balance between common law and civil law cultures. Subject always to the agreement of the parties on the rules which will apply to document production, many arbitral tribunals implement document production processes which are expressly or implicitly influenced by the IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules).

This volume summarizes the regimes applicable to litigation in the United Arab Emirates (UAE) for document production (both onshore and offshore), before considering in more depth the document production process that will typically apply in an arbitration and dealing with the considerations, both tactical and practical, that can arise.

## Onshore litigation

One of the key features of litigating in the UAE (and indeed in other civil law jurisdictions) is that the court mechanism for the disclosure of documents is much more limited than that which applies in common law jurisdictions. Parties to litigation in the onshore Dubai courts, for example, will usually only be required to produce those documents they rely on in support of their case. They are generally under no obligation to produce documents which are harmful to their case and/or support another party's case.

Pursuant to Article 18 of the UAE Federal Law No. 10 issued on 15 January 1992 on Evidence in Civil and Commercial Transactions, a party is only entitled to request that the court orders its opponent to produce a document in its possession if any of the following limited circumstances apply:

- if the law permits it;
- if the document is jointly held by the parties. A document is considered joint when it is for the benefit of both parties to the litigation or evidences their mutual obligations and rights; or
- if the opponent has based its claim on the document at any stage during the proceedings.

The absence of any meaningful method of procuring relevant documents from the other party can have a significant impact on the outcome of disputes litigated in the UAE. Businesses should keep that fact at the forefront of their thinking when considering the most appropriate forum for their disputes. It should also be borne in mind that the onshore UAE courts have rules of evidence which are significantly different to common law jurisdictions, and that primacy is given to original and certain other types of documents (for example, signed or official documentation). For this reason, a common tactic used to delay proceedings is to require the other party to provide original versions of all documents that they seek to rely on.

## Offshore litigation

In the UAE's offshore jurisdictions (the Dubai International Financial Centre (DIFC) in Dubai and the Abu Dhabi Global Market (ADGM) in Abu Dhabi), the position in respect of document production is more similar to the practice in international arbitration, which is considered in detail below.

In the DIFC courts, for example, pursuant to Part 28 of the DIFC Court Rules, each party is required to submit to the other parties:

- all documents available to it on which it relies, including public documents and those in the public domain, except for any documents that have already been submitted by another party; and
- the documents which it is required to produce by any Law, Rule or Practice Direction.

Pursuant to Part 13 of the ADGM Court Procedure Rules 2016, the default position is similar in that parties must give to all other parties "standard disclosure" of documents on which it relies. In this context, standard disclosure means disclosing all the documents on which a party relies. This default position can vary depending on the type of proceedings, the agreement of the parties or direction from the court.

After the initial stages described above, and in contrast to the onshore position, the parties are then given the opportunity to provide Requests to Produce Documents to their opponent (in the DIFC) or to make an application for "specific disclosure" to the court (in the ADGM court), in which they are required to precisely identify the documents requested and explain (among other things) why they are relevant and material to the outcome of the case (DIFC), or would assist the fair and efficient trial of the proceedings (ADGM court).

In the DIFC court, the requirements applicable to Requests to Produce Documents and the procedure for objections that follows essentially mirror the document production process in arbitration (as set out in detail below). In the ADGM court, the details of the process for making an application for specific disclosure are not expressly set out in the relevant Practice Direction, but it is possible that parties will attempt to follow a similar process to that of the DIFC court and international arbitration practice. In particular, specific reference is made in the Practice Direction to the ADGM court discouraging unfocused or disproportionate requests for further disclosure of documents.

## Arbitration

At an early stage in most arbitrations, the arbitral tribunal will convene a preliminary conference in order to agree both the procedural timetable of the arbitration and the Terms of Reference. As described above, the parties will either grant the arbitral tribunal discretion to determine the appropriate document production procedure or will agree the rules to apply. In exercising its discretion in the absence of agreement, the arbitral tribunal will generally seek to provide a fair means for resolving the dispute, while also limiting the scope of document production such that disproportionate cost and delay is avoided.

In most arbitrations, each party will produce the documents relied on in support of its case (ie, the claimant will exhibit the documents referred to and relied upon in its Statement of Claim and the respondent will exhibit the documents referred to and relied upon in its Statement of Defence). The procedural timetable will generally provide for the parties to exchange document requests, in which they require the other side to produce certain documents, after service of those initial pleadings.

As noted above, the IBA Rules are commonly used (either expressly or as guidance) by arbitral tribunals for document production. Article 3.3 of the IBA Rules provides that any document requests must contain:

- a detailed description of each requested document or category of document sufficient to identify it; and
- a statement:
  - as to how the documents requested are relevant to the case and material to its outcome;
  - that the documents requested are not in the possession, custody or control of the requesting party; and
  - setting out the reasons why the requesting party assumes the documents requested are in the possession, custody or control of another party,

(together the "IBA Requirements").

The intention behind the IBA Requirements is clear. In order to discourage any speculative or unreasonable approaches to document production, the parties are required to be as specific as possible when making their document requests. In practice, these requests will typically be in the form of Redfern Schedules.

## REDFERN SCHEDULES

Each side populates a table (called a Redfern Schedule) which sets out in relation to each individual document request the information specified in the IBA Requirements.

The Redfern Schedules will be populated over a period of time via a series of exchanges between the parties, pursuant to a process laid out in the procedural timetable. The parties will normally exchange their Redfern Schedules simultaneously. Each party will have the opportunity to submit objections in writing to each of the document requests identified in the Redfern Schedule. The parties may then reply to the other party's objections in their Redfern Schedule and, if necessary, apply to the arbitral tribunal for an order for

production. Finally, the arbitral tribunal will then be in a position to complete the Redfern Schedules by making any orders in relation to document requests where the parties disagree as to whether particular document requests should be complied with and, where applicable, specifying the time period for the production of documents responsive to those requests.

As mentioned above, it is important that the requesting party is as specific and detailed as possible in addressing each of the IBA Requirements, for example, by including key details such as names, dates, subject matter and document format in the request. Crucially, the requesting party must explain in detail the relevance and materiality of a document to the case (often by specific reference to the relevant pleading) and why it is believed to be in the "possession, custody or control" of the other party. As described in further detail below, the arbitral tribunal is far less likely to order the disclosure of a document if it is unable to see its relevance or materiality to the case or if it considers that the request itself is too widely drafted or disproportionate in the circumstances.

By contrast, when objecting to a document request, a party may argue that the requesting party has failed to satisfy the IBA Requirements and that it would be unnecessary, unfair or disproportionate to order it to search for or produce the documents requested. The objecting party will typically rely on one or more of the following grounds contained in Article 9 of the IBA Rules, pursuant to which the tribunal may refuse to order the production of a document:

- lack of sufficient relevance to the case or materiality to its outcome;
- legal impediment or privilege under the legal or ethical rules determined by the tribunal to be applicable;
- unreasonable burden to produce the requested evidence;
- loss or destruction of the document;
- grounds of commercial or technical confidentiality;
- grounds of special political or institutional sensitivity; or
- considerations of procedural economy, proportionality, fairness or equality.

Practically, when objecting to a document request, a party will often do so on the basis that the request does not relate to a narrow and specific category of documents or an identified named document.

If either party fails to comply with an order of the arbitral tribunal for the production of a document, the requesting party may invite the arbitral tribunal to draw adverse inferences against the other party in relation to the issue at hand.

### DOCUMENT MANAGEMENT SYSTEMS

External third-party providers of electronic document management software (for example Ringtail/Relativity) are increasingly being utilized by parties to assist them in complying with an order for the production of documents. Such systems allow users to access, analyze and review huge numbers of documents, as well as producing the documents on an electronic platform which reduces the burden on the receiving party of receiving large boxes and folders. Documents are securely hosted by these providers on an internet-based system that can be searched, categorized, coded and shared in a collaborative environment.

### TACTICAL CONSIDERATIONS

In practice, parties to an arbitration will often seek to use the document production process to gain a tactical advantage in the dispute. As a basic approach, the requesting party may use its Redfern Schedule as a tool to procure the production of certain key documents which are helpful to its own case and that it suspects are in the possession of its opponent. Conversely, parties sometimes seek to highlight the absence of evidence in support of certain elements of the opposing party's case by requesting documents that it knows do not exist.

Further, where one party has considerably greater financial resources at its disposal than its opponent, it is not uncommon for that party to attempt to use the document production process as a mechanism to drive up costs and delays with a view, for instance, to positioning itself favorably when it comes to settlement. By requesting a very large number of documents across numerous categories, that party seeks to present its opponent with the prospect of undertaking an onerous and costly search effort and incurring further legal costs in objecting to document requests.

However, any tactical advantage that might be gained from increasing the pressure on the other party in this way should be balanced against the risk that the arbitral tribunal will view an overly expansive set of document requests as an improperly motivated "fishing expedition". In those circumstances, there is a risk that the arbitral tribunal will look unfavorably upon the requesting party, including in relation to costs.



# Evidence

## General overview

The purpose of presenting evidence is (i) to ensure a party provides sufficient support for its case and (ii) to assist a court or an arbitral tribunal in determining disputed issues of fact or expert opinion. The rules relating to evidence are therefore important to understand. In short, effective evidence management can win cases and poor evidence management can lose them. Accordingly, parties should adopt best practices during their commercial dealings by maintaining comprehensive contemporaneous records that reflect their commercial dealings with their opponent, as well as how and when key events unfolded. Such an exercise can often make the difference between winning and losing a dispute.

Rules of evidence vary depending on the jurisdiction and whether the forum is common law or civil law-based. In common law systems, judges act as "referees" who administer rules of evidence, and render a "judgment". By comparison, in civil law jurisdictions, the judge or court-appointed expert takes a more active part in the conduct of the proceedings and in the presentation of evidence (including examining witnesses). Civil law jurisdictions are less bound by the same technical rules of evidence which characterize common law adversarial legal systems. In the Gulf Cooperation Council (GCC) states, onshore courts are founded on civil law systems, whereas offshore courts, such as the Dubai International Financial Centre (DIFC) Court, are based on common law principles. In arbitrations in the GCC states, parties from different cultural and jurisdictional perspectives are often pitted against each other; these contrasts are particularly stark where lawyers or arbitrators from different legal systems find themselves in the same case or arbitration.

This volume does not discuss document production. Please refer to Volume 12 "[Document Production](#)" for an overview.

## Onshore litigation

GCC states have standalone evidence laws. Federal Law No. 10 of 1992, as amended, is the "UAE Evidence Law".

### ADMISSIBILITY

Onshore courts are focused on establishing the facts necessary for determining issues between the parties. They are reluctant to be limited by any rules of evidence that might prevent them from achieving this goal. Accordingly, the UAE Evidence Law contains few rules on admissibility; admissibility standards focus on authentication of evidence. Thus, the UAE Evidence Law does not set out any rules relating to privilege or hearsay which might otherwise assist a party in resisting the inclusion of certain evidence in a case.

Despite broad admissibility standards, onshore courts also tend to be reluctant to order a party to produce documents (see Volume 10 "[Document Production](#)").

### BURDEN OF PROOF

In most GCC states, the burden of proof is not clearly linked to a specific or quantitative standard. For example, Article 1(1) of the UAE Evidence Law states that "*the plaintiff has to prove his right, and the defendant has to disprove it.*"

### METHODS OF PRESENTING EVIDENCE

Commercial disputes before the GCC onshore courts are characterized by limited, written documentary exchanges with little, if any, taking of witness evidence or oral advocacy. Informal oral advocacy occurs in more private sessions before court-appointed experts.

### EXPERT EVIDENCE

The UAE has a specialized law, Federal Law No. 7 On the Regulation of the Experts Profession Before Judicial Authorities, which applies in conjunction with the UAE Evidence Law.

Onshore UAE Courts are empowered to appoint one or more experts to advise on the evidence and any of the disputed legal issues. While the appointment of an expert may be made upon the application of one of the parties to the proceedings in some GCC jurisdictions (eg UAE, Kuwait), onshore courts usually appoint an expert or panel of experts on their own initiative. Such experts are frequently involved in advising on the key legal issues in a case.

Expert sessions, which are effectively "closed office" meetings, allow for informal oral advocacy and active party participation in the process leading up to the filing of the expert's report.

While the onshore courts are not bound by an expert's report, in practice conclusions set out in an expert's report are usually adopted by the courts. As a result, the expert process is often the most important stage of a dispute before the onshore courts, and the process should be planned accordingly.

## Offshore litigation

The DIFC, Abu Dhabi Global Market (ADGM), and Qatar Financial Centre (QFC) Courts base their laws of evidence on common law principles.

In the DIFC Court, evidence is governed by Part 29 (Evidence) and Part 31 (Experts and Assessors) of the Rules of the DIFC Courts 2016. Part 29 sets out how evidence is to be submitted, and the DIFC Courts may admit factual evidence, orally and through witness statements. In accordance with Part 29, the court may make an order that both sides must exchange witness statements by a specified date. These statements are important, as they will form the basis of the factual evidence that each witness will give. A witness who has provided a statement will be expected to attend the trial to be cross-examined on the contents of their statement. Part 31 sets out the rules in respect of expert evidence, and the DIFC Courts may also admit expert evidence, orally and through written expert reports, which should assist the court by providing an objective, unbiased opinion on matters within their expertise.

In the ADGM, Part 5 of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 set out the rules on admissibility, hearsay, witnesses, experts, preserving evidence, oaths and sanctions for contempt and false evidence. These rules are quite comprehensive. Evidence rules set out guidelines on hearsay and hearsay exceptions. The ADGM Court may admit both factual and expert evidence, orally or through witness statements. The ADGM Court is also empowered to compel competent witnesses, including spouses, subject to limited exceptions. The ADGM Court may also make preservation orders to preserve evidence.

Article 10.2.3 of the Qatar Financial Centre Civil and Commercial Court Regulations and Procedural Rules provide that the QFC Courts may admit evidence, both as to matters of fact and expert opinion, on such terms and in such form as it considers appropriate. Furthermore, pursuant to Article 27, the QFC Court has the power to give directions as to the provision of statements by witnesses of fact whom the parties propose to call at trial, the manner in which any witness evidence is to be given, whether the parties should be permitted to call expert evidence, the form and content of any experts' reports, and the number of experts who may be called. The QFC Court may also appoint an expert to assist it in its determination of the case. However, any expert who provides evidence before the QFC Court must understand that their duty is to assist the court on matters within their own expertise. The expert evidence must also be independent, and this duty overrides any obligations to the instructing party or to those by whom the expert is paid.

Broadly, these offshore jurisdictions are committed to providing clear, transparent and robust evidence rules. In practice, whilst there are some differences between each, all three set of rules are broadly very similar.

## Arbitration

### DISCLOSURE

The procedure for obtaining and submitting evidence plays an important role in international arbitration. While many international arbitrations involve at least some measure of disclosure, the availability and scope of disclosure varies widely among common law and civil law jurisdictions.

The *IBA Rules on the Taking of Evidence in International Arbitration 2010* (IBA Rules) provide a framework for the process and procedure for taking evidence in international arbitrations, and accommodates both common law and civil law approaches.

The IBA Rules can be incorporated into arbitration agreements, and supplement any institutional rules that apply according to the parties' agreement and applicable national laws. The IBA Rules provide a case-by-case framework for taking evidence efficiently. They are commonly adopted in international arbitrations, as they are particularly useful in dealing with witness evidence and document production. In practice, the IBA Rules are often incorporated as part of the arbitral tribunal's terms of reference or when the preliminary hearing and procedural timetables are set. Please see Volume 10 "**Document Production**" for further information.

### WITNESS EVIDENCE

Factual witness evidence may be submitted by the parties in international arbitration in support of their case, and provision for this is often made in the Procedural Order at an early stage of the proceedings. The usual practice is for witness evidence to be submitted in the form of a witness statement which stands as the direct evidence of that witness, and cross examination of that witness to be conducted at a hearing.

### EXPERT EVIDENCE

Expert evidence in international arbitration is an area where the differing approaches of the common and civil law are particularly apparent. The common law system involves the exchange of reports prepared by party-appointed experts, who are then cross-examined at an oral hearing, with a view to determining which party's case prevails. Such experts are usually required to produce independent reports which represent their own opinions, not the position of the party appointing them. By contrast, the civil law system usually involves a single independent expert appointed by the arbitral tribunal, as opposed to the parties

It is important for an expert witness to give an objective unbiased opinion. His or her overriding duty is to the arbitral tribunal. This duty overrides any obligation to the party from whom the expert has received instructions or by whom he or she is paid. He or she therefore needs to provide independent assistance to the tribunal in relation to the matters within their expertise. If the expert has a clear connection with the instructing party, then he or she may be accused of lacking independence, and their evidence may be given less weight as a result. Any material conflicts of interest should be declared at the outset of the proceedings.

The use of expert evidence in international arbitration is common practice. An arbitral tribunal is often chosen for its specialist knowledge or expertise, and the appointment of an expert to give evidence on specific issues can clarify and enhance the arbitral tribunal's understanding, and assist in its decision-making in respect of a dispute.

### INSPECTION

Inspections (for example, of a project site) are sometimes carried out by tribunals, often to give them a better understanding of the subject matter of the dispute. The parties are usually present at any such inspections.



# Preparations for trial

## General overview

This volume aims to set out some of the final steps that should be undertaken in preparation for trial. After months, or years, of dedicating time and resources to the dispute resolution process, the final stages of preparing for trial can often be a stressful time because the end is in sight, yet a number of uncertainties remain. Careful management of practical considerations will ensure that you are as well prepared for trial as possible and can focus on the substance of the hearing and other important matters, such as strategy.

## Onshore litigation

The final preparatory steps that must be taken into consideration when preparing for an onshore litigation hearing differ substantially from those that are necessary when preparing for an offshore litigation hearing or arbitration hearing.

### VENUE

Civil proceedings in the onshore United Arab Emirates (UAE) Courts are conducted in Arabic and are predominantly based on written pleadings, rather than oral testimony, so the format of the hearing is very different to an offshore litigation or arbitration hearing. In onshore litigation, the court will set a deadline for filing memoranda, and will adjourn proceedings for intervals of up to (approximately) four weeks in between these dates, with little involvement from the parties beyond their compliance with the filing deadlines. There is therefore no need to carry out the sort of logistical arrangements involving attendees and venue bookings that are often necessary for offshore litigation and arbitration hearings. Whilst it is possible for representatives from either side to attend the hearings, as these occasions involve little more than submitting written memoranda and obtaining the date for the next hearing, common practice is for local counsel to attend the hearings and report back with any updates on decisions rendered by the court.

### WITNESSES

As a, civil proceedings in the onshore UAE courts are largely conducted "on the documents"; whilst parties may seek the court's permission to provide oral evidence, this is not commonplace. The cross-examination of witnesses in civil proceedings is similarly rare and, when permitted, is strictly controlled by the judge. When a witness is asked to attend court and provide oral evidence, they will need to take an oath (the substance of which will be particular to their religion). If evidence is to be provided in a language other than Arabic, a court-appointed translator (who is usually an employee of the court) or a member of staff from the witness's embassy will be required to translate the evidence. Given the rarity of factual witnesses being required to provide oral evidence, there is often no need for witnesses to undergo the sort of familiarization training that is discussed in relation to offshore litigation and arbitration. In terms of expert evidence, the court will often appoint an expert to assist with technical matters, will base its judgment on the expert's report, and will not require the attendance of the expert.

### FINAL HEARING DOCUMENTS

The claimant must have all supporting documents prepared and translated to submit in Arabic. Local counsel should have their Power of Attorney in place before the first hearing. The documents submitted by the claimant will then be received by the respondent's local counsel, in order for a response to the submission to be drafted and prepared for the next hearing.

### NO TRIAL

In practice, there is no trial in onshore litigation. The court simply receives the final written submission or evidence from a party and notifies the parties that the matter is now closed so that the court can enter judgment.

## Considerations applicable to offshore litigation and arbitration

In contrast to onshore litigation, the final hearing in offshore litigation and arbitration is usually the centrally important point of the case and can last weeks. It therefore requires very careful preparation. There are a number of considerations that are applicable to both offshore litigation and to arbitration hearings, which are detailed below. Those preparatory considerations which are specific to one or the other forum are set out under separate headings below.

### PERSONNEL LOGISTICS

If those attending the hearing (legal team, factual witnesses, expert witnesses, translators) do not live in the same location as where the hearing is taking place, it may be necessary to arrange travel and accommodation for these personnel. It may also be necessary to consider whether anyone (counsel, lawyers, experts, etc.) requires documents to be shipped for the hearing, so that shipping can be arranged in advance. For those individuals that require accommodation, it is a good idea to ensure they are based close to the venue

where the hearing is taking place, and (if possible) within the same venue, as this avoids undue travel-related stress on the mornings of the hearing and aids pre-hearing and post-hearing briefing sessions. It is wise to ensure that a list is circulated containing the contact details (mobile numbers and email addresses) of all attendees and anyone that may need to be contacted at short notice.

### WITNESSES

In offshore litigation and arbitration, witnesses will be called to be cross-examined based on the content of their witness statement(s) and will be required to provide responses by way of oral testimony. Appearing at a hearing and giving oral testimony may be a daunting prospect for some individuals, and there are steps that can be taken to mitigate that anxiety, such as witness familiarization training. It is possible to instruct independent, specialist companies to provide this service (under English law, lawyers involved in a case are prohibited from "coaching" witnesses in preparation for the hearing). Training can be tailored based on the witnesses' needs but may entail an explanation of the hearing process, what is expected from the witness (how they should direct their answers, navigating a trial bundle, techniques for dealing with cross-examination, etc.) and a mock cross-examination. Often, the lawyers instructed will be able to recommend witness familiarization courses and assist with arranging this training.

### FINAL HEARING DOCUMENTS

Often in offshore litigation, such as in the Dubai International Financial Centre (DIFC) Courts (see Part 35.21 of the Rules of the DIFC Courts passed by the DIFC Authority (RDC)), and in arbitration, the claimant will be responsible for the preparation of the trial bundle. The purpose of the trial bundle is to collate all of the relevant material to which the parties wish to refer during the hearing, so that the proceedings can run as efficiently and smoothly as possible. The preparation of the bundle can be a time-consuming process, requiring the consensus of both parties; however, it is an important step and can impact the smooth running of the trial. The trial bundle may be in hard copy, electronic form, or a combination of the two. If an electronic bundle is used, consider whether it is necessary for anyone to receive training in advance of the hearing on how to use the electronic platform. In terms of other documents for the final hearing, it is likely that the procedural timetable or pre-trial checklist will already provide for the production of a *dramatis personae*, chronology and list of issues, but if it does not, consider proposing that the parties come to an agreement on these three items. These documents will greatly assist the court / arbitral tribunal during the proceedings.

### SETTLEMENT

Exploring settlement options, even at this stage, may save time and costs and has the benefit of reducing the uncertainties that are an inherent element of going to trial. Please see Volume 9 "[Settlement](#)" for further information.

## Offshore litigation

### PRE-TRIAL REVIEW

Part 26 of the RDC concerns Case Management, and Part 26.72 gives the court discretion to order a Pre-Trial Review, which is normally scheduled to take place between four to eight weeks before the date fixed for trial. Pre-Trial Reviews are often conducted by the trial judge, and attended by the legal representatives who are to appear at the trial. Prior to the Pre-Trial Review, the parties are required to try to agree to timetable for the trial (providing (as appropriate) for (a) oral submissions (b) factual witness evidence and (c) expert evidence) and must file a copy of the proposed timetable at least two days before the date of the Pre-Trial Review, identifying any differences of view between the parties. At the Pre-Trial Review, the judge may give directions regarding the conduct of the trial, and may set the trial timetable.

### LOGISTICAL ARRANGEMENTS

DIFC Court hearings will usually be conducted in the DIFC Court hearing room. The general rule is that DIFC Court hearings are public, unless the judge determines otherwise and so members of the public may be admitted to the hearing, where practicable. A similar rule, applies to hearings before the Abu Dhabi Global Market (ADGM) Courts. DIFC Court proceedings are recorded, unless ordered otherwise and the parties may request transcripts of the hearing recordings. The DIFC Court permits the attendance of translators where necessary to assist a witness with providing evidence.

### WITNESS AVAILABILITY

The DIFC Court and ADGM Court may allow a witness to give evidence via video link or by other means, so if a witness cannot attend the hearing in person it may still be possible for them to testify before the court.

### FINAL HEARING DOCUMENTS

The rules relating to trial bundles in DIFC Court proceedings are contained within the RDC at Part 35. These are generally more detailed and specific than the rules that apply to trial bundles in arbitration, as they set certain requirements for contents and organization. In particular, unless ordered otherwise, negotiations about the bundle should commence six weeks before the date fixed for trial, the trial bundle must be completed no later than 21 days before the date fixed for trial and a full set of trial bundles must be lodged with the

Listing Office at least 14 days before the date fixed for trial. In some cases, a special order for costs may be made against the party responsible for including unnecessary documents in the bundle. The use of IT at trial is encouraged (ie electronic bundles), but must be raised and agreed in advance, such as at the case management conference. The ADGM rules provide that the claimant must circulate the hearing bundle not less than seven business days before the commencement of the trial.

Often the court will set a timetable for the trial in consultation with the parties. However, if this does not happen, the parties will be required to submit a trial timetable. The parties may also be required to submit a reading list for the judge, skeleton arguments and legal authorities. The ADGM rules encourage, and sometimes require the parties to provide the court with an agreed list of issues to be litigated.

## Arbitration

### LOGISTICAL ARRANGEMENTS

Arbitration hearings are generally private, unless agreed otherwise (by way of example, see Article 28.3, Dubai International Arbitration Centre (DIAC) Rules 2007 and Article 19.4, DIFC-LCIA Arbitration Rules 2016). The DIFC-LCIA Arbitration Rules provide that a hearing may take place by video, teleconference, in person or a combination of all three (Article 19.2, DIFC-LCIA Arbitration Rules 2016). Often, one of the arbitral tribunal's early procedural orders will provide that the claimant is responsible for making the necessary bookings for the hearing, following consultation with the respondent. Where the hearing is taking place in person, bookings will often include hiring a venue for the hearing (quite often a large conference room in a hotel, with various breakout rooms), hiring the necessary IT equipment, instructing transcription providers (real-time is often the preference, but daily transcripts are an option) and translators, where necessary. It will be necessary to ensure the hearing room can accommodate all attendees and the preferred layout (which may be U-shaped or a more traditional trial set up, with the witness at one side). Usually half a day or a full day will be required to provide the technicians with enough time to prepare for the hearing. Refreshments are an additional consideration and cost that will need to be factored in.

### COSTS

In arbitration, the parties will often have agreed, in the Terms of Reference, to share the costs of the hearing arrangements (venue, transcription, translation, etc.) subject to the arbitral tribunal's decision on the allocation of costs. It will therefore be necessary for the parties to liaise when undertaking the initial preparatory steps: for example, the claimant may be expected to provide three quotes for the various bookings, including venue, translators, transcribers, etc. and to obtain the respondent's agreement to the proposed arrangements.

### WITNESS AVAILABILITY

The IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules), which are sometimes incorporated into the Terms of Reference, provide that, if a witness fails to appear for testimony, the arbitral tribunal has the discretion to disregard any witness statement by that witness. It is therefore important that witness availability is confirmed and communicated to the arbitral tribunal as promptly as possible, and that all necessary arrangements are taken to avoid the eventuality of statements being disregarded. This may include obtaining permission from the arbitral tribunal for the witness to appear via videoconference. The DIFC-LCIA Rules provide that the arbitral tribunal has discretion to determine the weight to place on the written testimony of a non-attending witness, including whether to exclude that witness's evidence, and the DIAC Rules provide that the Tribunal may make the admissibility of witness testimony conditional upon the witness providing oral testimony. In onshore-seated arbitrations, it will be important to agree the form of oath for each witness and to ensure that a copy of the relevant holy book is present in the hearing room.

### FINAL HEARING DOCUMENTS

The arbitral tribunal will determine, via the procedural timetable, when the trial bundle is due. The rules relating to hearing bundles for arbitration are generally more relaxed than the rules relating to bundles for court hearings; but it is important for the parties to maintain good communication channels between them so unnecessary delays are avoided and trial preparation is not disrupted.





# Trial

## General overview

This volume sets out some of the key features and steps during trial. After months, or even years, of dedicating time and resources to the dispute resolution process, the end is in sight. Careful management and preparation leading up to and during trial will ensure that parties are adequately prepared for trial and are focused on the hearing and other important matters. Preparation for trial is considered in further detail in Volume 12 "**Preparing for Trial**".

## Onshore litigation

The onshore courts of the UAE do not conduct civil trials, per se. All submissions are written by means of memoranda and submitted to the court. Proceedings take place by means of a series of "hearings", although no oral advocacy takes place. The hearings are attended by the parties' lawyers, who submit memoranda and supporting evidence depending on the stage that the case has reached at each hearing. The court can schedule as many hearings for submissions as it pleases until it is comfortable in making a decision on the case. The lawyers of any party can also request adjournments in order to review memoranda, or to seek instructions from their clients. It is in the court's sole discretion whether to agree to adjourn the matter, in which case a hearing will be "rescheduled" for a later date.

### SET-UP

There are three degrees of litigations in the onshore UAE Courts (1) First Instance Court; (2) Appeal Court; and (3) Cassation Court. The Court of First Instance has general jurisdiction over all judicial matters. The Court of Appeal is the second degree court and considers contested verdicts and judgments of the Court of First Instance. The circuit of this court is formed of three judges and presided by one of them. The Court of Cassation is the third and final degree court. This court looks at challenges on criminal, personal and civil rights verdicts and suits. The Circuit of Cassation Court is formed of a minimum of one superior and four other judges.

### OATHS

Religious oaths take place for oral testimony. The Dubai Court of Cassation states that as a rule the witness should "*swear by almighty God to tell the truth and nothing but the truth*". However, it is not necessary in some jurisdictions (such as Dubai) that the witness put their hand on a Holy Book.

### EVIDENCE

Oral submissions are rare in the onshore courts, although they are permitted in certain instances. Instead, the majority of evidence that is submitted is written, and must be in Arabic (see "**Translations**" section below). In the vast majority of onshore civil cases, the court appoints an expert to undertake the evidential, and even legal, investigation of the case. These experts are specifically mandated from a roll of court-approved experts who are professionals in various industries and fields, for example, accountancy, construction, technology etc. Once the court appoints an expert, and issues their mandate and scope of work, the expert will summon the parties, usually to their offices, in order to receive the case papers and any memoranda to be submitted. Whilst the expert meetings are principally set for the expert to raise any queries or questions they may have in relation to the dispute, it is also effectively the best opportunity for local counsel and legal representatives of each party to advocate and argue their grounds orally, and on an ongoing basis. As they are meetings, rather than hearings, the expert tends to simply moderate whatever comments or arguments either side has to provide, informally. The expert will issue a first draft of their report typically after around three to four meetings with the parties, after which the parties will have a formal opportunity to give written comments to seek any amendments that they consider are required. The expert will issue their report to the court, at which point the parties will, again, have the opportunity to submit any comments they may have on the findings presented in the report. In the majority of cases, unless compelling reasons are provided by either party for the contrary, the expert's findings will be upheld *in toto* by the court. These findings are both evidential and legal in their nature. Should the court accept any compelling arguments as to why the report is in error, which is a rare occurrence, it may return the mandate back to the expert, or appoint another expert to undertake the task.

### TRANSLATIONS

Documents and evidence must be in Arabic. Should any evidence require a translation into Arabic, the document must be translated, and stamped, by a translator who has been certified by the Ministry of Justice as a sworn legal translator. It should be noted that there is no law protecting the confidentiality of documents in the onshore UAE Courts. Therefore, even if a document is marked "privileged" or "confidential", it will still be taken into consideration if submitted.

## Offshore litigation

The general rule is that Dubai International Financial Centre (DIFC) Court hearings are public, unless a judge determines otherwise. A similar rule applies in respect of hearings before the Abu Dhabi Global Market (ADGM) Courts.

#### SET-UP

**DIFC Court** - Court hearings are usually conducted in the DIFC Court within a court hearing room. The trial will be attended by a single judge in the Court of First Instance and by at least three judges (none of whom may have heard the matter in the Court of First Instance) in the Court of Appeal, with the Chief Justice or the next most senior judge presiding.

**ADGM Court** - Court hearings are usually conducted in the ADGM Court within a court hearing room. The trial will be attended by a single judge in the Court of First Instance and by at least three judges in the Court of Appeal.

#### COURT ETIQUETTE

When court is in session, all parties must bow towards the judge when entering and leaving the court room. Parties must refrain from using their phone during session (especially if the matter is confidential) and refrain from eating. All parties must ensure that they are prompt on arrival to the court room at the start of each day and after any breaks.

#### ATTENDANCE SHEET

During each session, an "attendance sheet" records attendance for the court record.

#### PROCEDURE

At the beginning of the hearing, Counsel for both parties will usually provide an introduction to the matter, summarizing the key claims and defences. This will lead into witness evidence, followed by expert evidence. At the end of a hearing, Counsel will usually summarize their main arguments again. This will potentially be the last opportunity each party has to make their arguments.

#### OATHS

Oaths and affirmations in the DIFC Courts may be sworn before: a judge or the Registrar; a qualified lawyer; any person authorized to administer oaths in the UAE; or any other person authorized to administer an oath in the jurisdiction in which the affidavit is sworn.

#### TRANSCRIPTION

Hearings in the DIFC and ADGM courts are recorded and the parties may request that transcripts be prepared (at a cost). In many instances, hearings are also video recorded and subsequently uploaded to the DIFC Courts' dedicated YouTube channel.

#### WITNESSES

In the DIFC Courts, a witness can be examined before a hearing takes place and this process is referred to as a "deposition". This "deposition" may then be used in a hearing. However, usually, witnesses give their evidence by way of a written witness statement (as considered in greater detail in Volume 11 "[Evidence](#)"). A witness may be cross-examined on his or her witness statement and subsequently re-examined by Counsel for the party for whom the witness appears in relation to the content of his cross-examination. The judge may also have questions for each witness. The same applies in the ADGM Courts.

#### EXPERTS

In proceedings in both the DIFC and ADGM Courts, the parties may each appoint an expert (or multiple experts) to prepare independent expert reports for the purpose of proceedings (as considered in greater detail in Volume 11 "[Evidence](#)"). It is the duty of the experts to assist the court on matters within their expertise. Appointed experts usually give their evidence in advance by way of a written report submitted to the court. During the hearing, experts may then be cross-examined by the opposing party and subsequently re-examined by Counsel for their own appointing party. Again, the judge may have questions.

#### FOREIGN LANGUAGE

The DIFC and ADGM courts permit the attendance of translators where it is necessary to assist the witness (or expert) in providing evidence. Hearings are conducted in English.

## Arbitration

Hearings are usually held in private. Only the arbitral tribunal, parties and their representatives are allowed to attend, unless the parties and arbitral tribunal agree otherwise.

#### SET-UP

The arbitral tribunal is usually comprised of either (a) a sole arbitrator and secretary; or (b) three arbitrators. A tribunal secretary may also be present.

#### TIMING

A pre-hearing timetable is agreed with strict timings. Parties and their Counsel should always be punctual.

#### ATTENDANCE SHEET

At the beginning of each hearing day, an attendance sheet may be circulated by the tribunal secretary to record the names of all attendees.

#### OATHS

It is often preferable for witnesses giving evidence in offshore seated arbitrations to swear an oath (or affirmation), particularly if the award is likely to be enforced in onshore Middle East jurisdictions. In onshore seated arbitrations in the Middle East, witnesses must swear an oath (not an affirmation) and, if they do not, there is a risk that an award may be set aside.

#### TRANSCRIPTION

At the discretion of the parties, arbitration hearings may be recorded with the use of transcription services. A transcript will be made available at the end of each day which records, verbatim, everything that is said during the course of the hearing. It is also possible to procure live transcription, audio and video services in order that the hearing can be followed remotely.

#### PROCEDURE

At the beginning of the hearing, Counsel will usually provide an introduction to the matter, summarizing the key claims. This will lead into witness evidence followed by expert evidence. At the end of a hearing, Counsel will usually summarize their main arguments. This may be the last opportunity each party has to support their arguments, although the arbitral tribunal may provide for written closing submissions to be filed subsequently.

#### WITNESSES

In international arbitrations, witnesses will be called to be cross-examined based on the content of their witness statement(s). Witnesses will be required to provide responses by way of oral testimony. The claimant will usually call its witnesses first to be questioned. When the witness has been questioned by the opposing party, he or she may then be re-examined. This provides an opportunity to clarify any evidence given during cross-examination. Please note that some arbitrators (or parties) prefer that witnesses are only present to give their own evidence and not to attend other parts of the hearing.

#### EXPERTS

In international arbitrations, experts will be called to be cross-examined on the content of their expert reports. Experts will be required to provide responses by way of oral testimony in the same manner as factual witnesses (see above).

#### FOREIGN LANGUAGE

An arbitral tribunal will, if required, usually permit the attendance of translators where it is necessary to assist the witness (or expert) in providing evidence.

#### DOCUMENT MANAGEMENT SYSTEMS/ELECTRONIC HEARING BUNDLES

External third-party providers of electronic document management software are increasingly being utilized by the parties leading up to trials. For example, Opus 2 Magnum is a cloud-based, electronic document management and paperless hearing tool which can be used prior, during and after the trial. In a typical application, the platform would be primarily used to store the hearing bundle and transcripts in a searchable, electronic format. It also offers a useful search feature, hyperlinking of documents (both hidden and open) and the ability to highlight and share comments within client, legal and expert teams.



# Appeals

## General overview

The avenues for appeal of decisions in the United Arab Emirates (UAE) depend upon whether the dispute is being heard in court (onshore or offshore) or arbitration proceedings. In arbitration proceedings, in theory at least, it is not possible to challenge the arbitral award of an arbitral tribunal on substantive grounds and an arbitral award can only be set aside in very limited circumstances. If the dispute is being heard in court proceedings, appeal procedures vary depending upon whether proceedings are onshore or offshore. It is essential that parties are alert to the prescribed timeframes for appeals in the courts to avoid the risk of being time-barred from making an appeal.

## Onshore litigation

Onshore, the civil court system of the UAE (and most other onshore courts of the Middle East) consists of three tiers: the Court of First Instance, the Court of Appeal and the Court of Cassation. Once a judgment has been delivered by the Court of First Instance, either party has the right to appeal to the Court of Appeal. It is not necessary to obtain permission to do so. Appeals can be made on factual or legal grounds and must be filed within 30 days of the date of the Court of First Instance judgment. The Court of Appeal (comprising three judges) will then hear the substantive dispute again and the parties are permitted to introduce additional evidence.

Except in the Emirate of Ras Al Khaimah, there is a right of further appeal from the Court of Appeal to the Court of Cassation on a point of law. The Court of Cassation is the highest court of appeal and hears appeals from Court of Appeal decisions. Five judges sit in final determination in the Court of Cassation and its decisions are final. The Court of Cassation does not consider the substantive merits of a dispute, but only matters of law. Permission to appeal is not required to appeal to the Court of Cassation. The time limit for filing an appeal with the Court of Cassation is 60 days from the date that judgment is delivered by the Court of Appeal. This time limit can be extended in certain circumstances.

The Court of Cassation can either give final judgment or remit the matter back to the Court of Appeal for further findings. If the case is remitted back to the Court of Appeal, further substantive hearings will follow in the Court of Appeal, followed by a further judgment. The parties will again have a right to appeal to the Court of Cassation on a point of law against that judgment. All decisions of the Court of Cassation are final and are not subject to appeal.

The Emirate of Dubai has its own Court of Cassation. In all Emirates other than Dubai and Ras Al Khaimah, the final appeal will be to the federal Supreme Court located in Abu Dhabi.

In terms of timeframes, an applicant can expect a decision within 12 to 18 months of lodging an appeal with the Court of Appeal. Should that decision subsequently be appealed to the Court of Cassation, it can take a further 12 to 18 months for a final decision.

## Offshore litigation

Offshore, the common law court system consists of two tiers: the Court of First Instance and the Court of Appeal. The applicable rules in relation to appeals are set out in the relevant rules of the Dubai International Financial Centre (DIFC) Court and the Abu Dhabi Global Market (ADGM) Court.

### DIFC COURT

Part 44 of the Rules of the DIFC Courts (RDC) governs the appeal process. Subject to limited exceptions, permission to appeal must be obtained in order to appeal Court of First Instance decisions to the Court of Appeal. The application for permission to appeal may be made: (i) to the Court of First Instance at the hearing where the judgment was made; or (ii) to that court or the Court of Appeal in a subsequent appeal notice. If permission is sought by way of an appeal notice, that appeal notice must be filed either within the period directed by the lower court or, if no such direction was provided, within 21 days after the date of the decision of the lower court that the appellant wishes to appeal. If the lower court refuses permission, a further application for permission can be made to the Court of Appeal within 21 days of the lower court's refusal.

Permission to appeal is only granted where the court hearing the application considers that the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard.

In accordance with Part 44 of the RDC, save in limited circumstances, each Court of Appeal hearing is limited to a review of the decision of the Court of First Instance (rather than a re-hearing of all of the facts and evidence). Unless it orders otherwise, which it may do in exceptional circumstances if new and compelling evidence is discovered, the Court of Appeal will not accept oral evidence or evidence which was not put before the lower court.

On hearing an appeal from the Court of First Instance, the Court of Appeal may:

- make or give any order that could have been made or given by the Court of First Instance;
- annul or set aside a decision;
- require or prohibit the taking of a specific action or of action of a specified class;
- make a declaration of facts; or
- make any other order that the Court of Appeal considers appropriate or just.

Importantly, in accordance with Part 44.153 of the RDC, no further appeal lies from a decision of the Court of Appeal.

### ADGM COURT

Part 25 of the ADGM Court Procedure Rules 2016 governs the appeal process. Similar to the RDC, permission must be obtained from a decision of a judge in the Court of First Instance in order to appeal to the Court of Appeal. In order to obtain such permission, an application may be made to the Court of First Instance within 14 days after the date when the decision to be appealed was made. Should the Court of First Instance refuse an application for permission to appeal, a further application for permission to appeal may be made to the Court of Appeal within 28 days from the date of the refusal. All applications for permission to appeal are considered by a panel of three judges without a hearing. The panel may grant or refuse permission to advance all or any of the grounds of appeal or invite the parties to file written submissions within 14 days in relation to the grant of permission. Permission to appeal may only be granted where the panel considers that the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard.

On hearing an appeal from the Court of First Instance, the Court of Appeal may:

- affirm, set aside or vary any order, judgment or decision made or given by the Court of First Instance;
- refer any claim or issue for determination by the Court of First Instance;
- order a new trial or hearing;
- make orders for the payment of interest; or
- make a costs order.

The Court of Appeal will not reopen the final decision of any appeal unless it is necessary to do so to avoid a real injustice, or the circumstances are exceptional and make it appropriate to reopen the appeal and there is no alternative effective remedy.

## Arbitration

### ONSHORE

In accordance with the UAE Arbitration Law (Federal Law No. 6 of 2018), it is not possible to appeal the award of an arbitral tribunal on substantive grounds. The parties may, however, apply to the local Court of Appeal for the award to be set aside. In onshore seated arbitrations, the award may be set aside, as set out in Article 53 of the Arbitration Law, if:

- there was no valid arbitration agreement;
- a party executing an arbitration agreement did not have full legal capacity to do so;
- a party was unable to present its defence due to lack of notification or any other violation of the tribunal;
- the award failed to apply the governing law agreed between the parties;
- the constitution of the tribunal was in violation of the law and/or the procedure agreed by the parties;
- the arbitration procedures were invalid in a manner that affects the arbitral award;
- the award had become time barred;
- the award disposed of matters which were not covered by the arbitration agreement;
- the dispute was or became non-arbitrable; and/or
- the award contravenes public order or public morality.

In considering a party's application for annulment of an award, the onshore courts should not, in theory, consider the substantive aspects of the arbitral award. However, in practice, at times the courts have in the past been willing to do so. It remains to be seen whether this practice will be permitted to continue under the UAE Arbitration Law.

In the past, the court's application of the grounds for annulment has created difficulties for those seeking to enforce arbitral awards, and has enabled defendants in the region to challenge seemingly valid arbitral awards based on spurious procedural arguments relating, for example, to trivial errors of process under local laws. It remains to be seen whether the Court of Appeal will apply the new grounds for annulment (most of which are contained in other international arbitration laws) narrowly, or will continue to apply them widely.

In particular, the Arbitration Law has retained the general provision that enforcement of awards may be refused if they contravene public order or morals of the UAE, which has been used in the past as a "catch-all" provision to justify the inclusion of numerous grounds for challenge. Public policy considerations have also played a significant and, for those seeking to enforce, concerning role in the UAE courts' approach to the enforcement of domestic arbitral awards. In the 2012 case of *Baiti Real Estate Development v Dynasty Zarooni Inc.*, the Dubai Court of Cassation annulled three Dubai International Arbitration Centre (DIAC) awards on the basis that, pursuant to certain local laws, the matter concerned "public order" and so fell within the exclusive jurisdiction of the Dubai Courts. Whether this decision will be applied broadly and to the detriment of award creditors in the region is as yet unclear, not least because there is no concept of binding precedent in the UAE.

#### OFFSHORE - DIFC

In offshore seated arbitrations it is not possible to appeal the award of an arbitral tribunal on substantive grounds. Further, the grounds for refusing recognition and enforcement of an award are more limited. In accordance with Article 44 of the DIFC Arbitration Law (DIFC Law No. 1 of 2008) an arbitral award may only be set aside by the court if:

- the party the application provides proof that:
  - the party to the arbitration agreement was, under the law applicable to it, under some incapacity; or the arbitration agreement is not valid under the law which the parties have subjected it or, if not specified, the law of the State or jurisdiction where the award was made;
  - the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
  - the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;
  - the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, if not specified, the law of the State or jurisdiction where the award was made; or
  - the arbitral award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that arbitral award was made; or
- The DIFC court finds that:
  - the subject matter of the dispute is not capable of settlement under the laws of the DIFC; or
  - the recognition or enforcement of the arbitral award would be contrary to the public policy of the UAE.

#### OFFSHORE - ADGM

Chapter 8 of the Arbitration Regulations 2015 is the relevant provision dealing with challenging of arbitral awards in the ADGM. In accordance with Article 53 of that chapter, applications to set aside an arbitral award must be made within three months of the date the arbitral award is received or the date when the applicant was notified of the arbitral award. The grounds to set aside an arbitral award are limited and the court considering an application must not undertake a merits review of the arbitral award either on law or facts. An arbitral award may only be set aside by the court if:

- the party the application provides proof that:
  - the party to the arbitration agreement was, under the law applicable to it, under some incapacity;
  - the arbitration agreement is not valid under the law which the parties have subjected it or, if not specified, the ADGM;
  - the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;



- the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or if not specified, the law of the ADGM; or
- the arbitral award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that arbitral award was made; or
- The ADGM court finds that:
  - the subject matter of the dispute is not capable of settlement under the laws of the ADGM; or
  - the recognition or enforcement of the arbitral award would be contrary to the public policy of the UAE.

Save for the grounds detailed above, there is no option for further recourse or appeal to the court against an arbitral award made in an arbitration which is seated in the ADGM.

In accordance with Article 54 of the Arbitration Regulations, the parties may also, by an express statement in the arbitration agreement or by subsequent written agreement, waive fully the right to bring an action for setting aside or they may limit it to one or several of the grounds listed above.



# Enforcement

## General overview

This volume deals with the various options available for the enforcement of court judgments and arbitral awards (both foreign and domestic) in the United Arab Emirates (UAE) and addresses the difficulties that parties may typically face when attempting to enforce in this complex region.

Enforcement is of fundamental importance and should be considered at the very outset, ie when negotiating the contract or otherwise entering into a business relationship. Agreeing a contract with an appropriate and clear dispute resolution mechanism can be the difference between enforcement being straightforward and quick, or enforcement being nearly impossible. Given the potential risks of obtaining a judgment or arbitral award that cannot be enforced, the enforcement position should be carefully considered before any dispute resolution mechanism is finalized and any claim is initiated, or before any positive steps are taken to defend such a claim.

When considering enforcement action in the UAE, judgment and arbitral award creditors should be wary of the increased cost and delay that such action is likely to entail relative to other jurisdictions. Broad rights of appeal and the fact that legal fees are largely not recoverable in onshore litigation are factors which contribute significantly to the risks and uncertainties of enforcing in the region. Of course, costs and delays at the enforcement stage will normally be especially unpalatable to the creditor because they will be additional to those already incurred in successfully pursuing the substantive claim. In problematic cases, it can cost substantial sums and take up to two years or more to have a judgment or arbitral award recognized in the UAE. Only at that stage will the creditor be in a position to embark on the execution action which, depending on the nature of the debtor's assets in the region, can take a further five to eight months.

Having said this, the enforcement landscape in the UAE is clearly changing, and changing for the better. The introduction of a new arbitration law, UAE Federal Law No. 6 of 2018 (the "Arbitration Law"), which came into force on 16 June 2018, has also clarified the procedural grounds to challenge enforcement of an arbitral award before the onshore UAE courts.

There have also been DIFC Court judgments which suggest that it is permissible for it to be used as a "conduit" jurisdiction for the enforcement of foreign arbitral awards in onshore Dubai and the wider UAE. This new approach, however, should be treated with caution. There is, after all, no long-running or established track record of creditors successfully achieving enforcement against assets held in onshore UAE via the DIFC Courts. The establishment of a Joint Judicial Committee by the Government of Dubai on 9 June 2016 to review and resolve "conflicts of jurisdiction" between the DIFC Courts and the Dubai Courts also appears to have created another "roadblock" to enforcement by this method. Whilst there are certainly encouraging signs, there remains a considerable degree of uncertainty around the enforcement regime in the UAE, which is complex and constantly developing, meaning that parties looking to enforce in the region will generally have to pay a high price, both in terms of time and money. In these circumstances, it is important that judgment and arbitral award creditors:

- consider the difficulties of enforcement in the UAE from the outset of any action;
- ensure that the arbitration process and award(s) do not themselves raise issues in a later enforcement action;
- evaluate on a commercial and realistic basis the cost-effectiveness of any enforcement action before committing substantial resources towards it;
- consider whether there are assets in other jurisdictions against which enforcement action could be taken; and
- instruct legal counsel with both an in-depth understanding of the interplay between the UAE's onshore and offshore jurisdictions and a wealth of experience in applying their differing enforcement regimes in practice.

## Onshore litigation

This section of the volume focuses on the enforcement of domestic and foreign judgments in onshore UAE, which consists of the federal judicial system in place in the Emirates of Abu Dhabi, Ajman, Fujairah, Sharjah and Umm Al-Quwain as well as the separate court systems retained by Dubai and Ras Al Khaimah.

At this stage, an award creditor will also want to consider the position in relation to any assets that were the subject of an earlier attachment order obtained prior to commencement, or during the course of, the proceedings. Such orders are considered in detail in Volume 7 of this Guide "[\*\*Interim and Conservatory Measures\*\*](#)".

## ENFORCING ONSHORE JUDGMENTS

A judgment of the onshore courts cannot be enforced in the UAE's onshore jurisdictions unless it is final (ie not subject to any right of further appeal) and has been certified by the Execution Court.

If the judgment is not satisfied the judgment creditor can apply to the Execution Court to enforce the judgment against the debtor. An execution fee (which in Dubai is 1 percent of the monetary value claimed, but varies depending on the Emirate in which enforcement is taking place) will be payable at this stage. A court bailiff will then serve a notice on the judgment debtor requiring it to pay the amount owed (or otherwise satisfy the court's order) within 15 days, failing which the judgment creditor may apply to the Execution Court requesting that it take any of the following enforcement steps:

- attach and sell any of the debtor's assets and bank accounts in the jurisdiction;
- sell (by following a prescribed and often lengthy auction process) any assets that were attached by the court prior to commencement of the action;
- release any amount deposited with the court as security against the claim;
- serve notice on any guarantor who has guaranteed the debt that it is now payable;
- write to banks (and/or other private or public sector departments or institutions, as appropriate) to enquire about any assets held by the judgment debtor in the jurisdiction; and/or
- grant the judgment creditor an order to search for the debtor's assets.

However, there are many grounds on which a judgment debtor may apply to the court challenging the execution proceedings. In this event, there will often be several hearings before the case is reserved for judgment, causing further cost and delay. Moreover, the outcome of the challenge proceedings may be appealed and the appeal process (which should be limited to the enforcement action and should not address the merits of the underlying case) will suspend any enforcement action.

Unfortunately for those seeking to enforce, an appeal is often used as a means to delay execution and, ultimately, prevent the judgment creditor from receiving payment.

### ENFORCING FOREIGN JUDGMENTS

The UAE is party to a number of treaties and conventions which relate to judicial cooperation and affect the enforcement of foreign judgments in the country. Two notable examples are the *Riyadh Arab Agreement for Judicial Co-operation* and the *GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications*, which create reciprocal enforcement obligations between the signatory states and, where applicable, will (at least in theory) ease the path to enforcement. However, the reality is that, even where one such agreement applies, the enforcement of a foreign judgment in the onshore UAE courts is rarely straightforward.

Procedurally, the party seeking enforcement should file a petition for an execution order with the relevant enforcement judge by producing a duly certified and legalized copy of the foreign judgment, together with proof that it is enforceable under the law of the country of origin. Difficulties tend to arise because the applicable treaty will contain its own conditions for enforcement and the local judicial authorities are empowered to analyze those conditions and consider their application in each case, leaving considerable scope for unpredictable (and unhelpful) decisions.

Where no treaty applies then in theory, pursuant to articles 85 to 88 of the recent amendments of the UAE CPL, judgments and orders passed in a foreign country may be executed within the UAE under the same conditions provided for by the laws of the foreign state, so long as the following conditions are satisfied:

- the onshore UAE Courts do not have exclusive jurisdiction over the substantive dispute;
- the judgment or order was issued by a competent court under the law of the foreign country;
- the defendant in the foreign proceedings was summoned and duly represented;
- the judgment or order is final and binding pursuant to the law of the foreign country; and
- the judgment or order is not inconsistent with that of a court in the UAE and does not contradict any moral code or violate public order in the UAE,

(together the "CPL Conditions").

The CPL Conditions, however, are difficult to satisfy and leave considerable scope for unhelpful judicial intervention. While the court should not examine the merits of the underlying case, in practice, the judgment debtor will often exploit the breadth of the CPL Conditions during an appeal in an attempt to re-litigate the issues already decided in the substantive dispute. In practice therefore, in

circumstances where no treaty applies, a foreign judgment is highly unlikely to be enforced and therefore a judgment creditor will find himself having to start proceedings from the very beginning in the onshore UAE courts.

## Offshore litigation

This section of the volume deals with the enforcement of domestic and foreign judgments in the Dubai International Financial Centre (DIFC).

### ENFORCING LOCAL JUDGMENTS

The broad rights of appeal available in the UAE's onshore jurisdictions can be obstructive to a creditor's enforcement action. In the DIFC, however, rights of appeal are more limited and, unless the lower court orders otherwise, an appeal will not stay its decision. Helpfully for the creditor, this means that, irrespective of any subsequent appeal, the DIFC Court's judgment on enforcement will be considered final and the enforcement action can proceed unhindered.

In Dubai, there is a reciprocal protocol of enforcement between the courts of the DIFC and onshore Dubai contained in Dubai Law No. 12 of 2004 (as amended by Dubai Law No. 16 of 2011) (the "Judicial Authority Law"), pursuant to which a judgment of the Dubai Courts can, subject to certain procedural formalities being met, be enforced in the DIFC as if it were a DIFC Court judgment. It also works in the opposite direction, such that a DIFC Court judgment can be enforced in Dubai in the same way and is a tried and tested method of enforcing domestic judgments in the UAE. As at 2 July 2014, there had been 61 apparently successful enforcement actions between the DIFC and onshore Dubai courts between 2008 and 2014.

In Abu Dhabi, the Abu Dhabi Global Market Courts ("ADGM Courts") has also executed a Memorandum of Understanding ("MoU") with the Abu Dhabi Judicial Department ("ADJD") for the reciprocal enforcement of their judgments, decisions and orders and the arbitral awards ratified or recognized by them.

### ENFORCING FOREIGN JUDGMENTS

In addition to the various treaties to which the UAE is a party (which also bind the DIFC Courts), the DIFC Courts have themselves signed helpful memoranda relating to reciprocal enforcement with certain foreign courts and authorities. For example, the DIFC Courts have entered into such arrangements with the Commercial Court (Queen's Bench Division) of England and Wales, the Supreme Court of Singapore and the Federal Court of Australia.

Unlike with the onshore courts of the UAE, there is a presumption in the DIFC Courts that a foreign judgment is conclusive and, as such, there is less of a risk of the court reopening the merits of the case at the enforcement stage. Further, by contrast to the CPL Conditions which apply onshore, the objections to enforcement that can be raised in the DIFC Courts are more limited and include the following:

- that the foreign court did not have jurisdiction to try the case;
- that the judgment is not for a liquidated sum of money (a foreign judgment can only be enforced if it is finally quantified); and
- that the judgment is not final and conclusive.

The prospects of success for a party seeking to enforce a foreign judgment in the DIFC (and the wider UAE) were affected significantly by the decision in *DNB Bank ASA v Gulf Eyadah Corporation and another*, in which the claimant sought to enforce an order issued by the English Commercial Court. The DIFC Courts dismissed an application by the defendants contesting the jurisdiction of the DIFC Courts and held that the foreign court judgment could be recognized and enforced within the DIFC.

This case confirmed that, once the DIFC Court recognizes and enforces a foreign order (pursuant to its more generous enforcement laws) and issues a fresh DIFC Court judgment or order in the same terms, that new judgment or order can then be enforced in onshore Dubai pursuant to the Judicial Authority Law. The Dubai Courts are not permitted to analyze the merits of the DIFC Court judgment.

On the face of it, it therefore appeared that, by enforcing via the DIFC Court, a judgment creditor could pursue assets held onshore without needing to comply with the more problematic onshore enforcement regime. However, the status of the DIFC as a possible "conduit" jurisdiction in respect of foreign arbitral awards is outlined further below. Given the recent developments in this regard, there is considerably uncertainty as regards the availability of the DIFC Court as a "conduit" for enforcement of foreign judgments in onshore UAE and this pathway to enforcement could be undermined by annulment proceedings brought by the foreign judgment debtor in the "onshore" Dubai Courts.

## Arbitration

This section of the volume addresses the enforcement of domestic and foreign arbitral awards in the UAE.

### ENFORCING DOMESTIC ARBITRAL AWARDS

The Arbitration Law repeals and replaces Articles 203 to 218 of the CPL, which previously governed arbitrations seated in onshore UAE.

Article 52 of the Arbitration Law states that an arbitral award made in accordance with the Arbitration Law has the same binding force on the parties as a court ruling. The award can be enforced directly before the UAE federal or local Courts of Appeal (rather having first to go through the Court of First Instance to receive ratification) and an enforcement order should be given by the Court within 60 days of a request for enforcement under Article 53. However, there are eight grounds on which an award debtor may apply to the court challenging the execution proceedings (Article 53) within 30 days from receipt of notification of the award (Article 54(2)). Those eight grounds are considered in Volume 14 "**Appeals**" of this guide.

In this event, the court may suspend enforcement proceedings for up to 60 days to give the Tribunal an opportunity to eliminate grounds for setting aside the award, where appropriate (Article 54(6)). Any remaining grounds will be referred to the Court of Appeal, which will review the submissions and evidence of the parties (typically at several hearings) before deciding whether to ratify or annul the arbitral award. In making this decision, the court should not consider the merits of the arbitral tribunal's findings and should only annul an award if one of the procedural grounds contained in Article 53 of the Arbitration Law is applicable.

As with the enforcement of judgments, the losing party is entitled to appeal the court's decision with a single round of appeal provided for in Article 54(1) to the Court of Cassation.

### ENFORCING FOREIGN ARBITRAL AWARDS

While it has historically been difficult to enforce foreign arbitral awards in the UAE, the landscape changed significantly when the country became a signatory to the *UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* or "the New York Convention" (NYC) in November 2006. Further, many of the bilateral or multilateral treaties to which the UAE is a party deal with the enforcement of arbitral awards and, where one of these is applicable, this may provide an alternative route of enforcement.

Since the accession to the NYC, there has been a steady transition towards a more "arbitration friendly" judicial approach in the UAE. It is now settled, for example, that the courts should apply the NYC's more liberal enforcement regime (as opposed to the CPL Grounds) when considering whether to enforce a foreign arbitration award. Pursuant to the NYC, the enforcement of a foreign award may only be refused on the following grounds:

- the parties to the arbitration agreement were under some incapacity or the arbitration agreement is not valid under the law to which the parties subjected it or the law of the country where the arbitral award was made;
- the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the proceedings, or was otherwise unable to present its case;
- the arbitral award deals with a difference not contemplated or falling within the terms of the submission to arbitration;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the parties' agreement or the law of the seat of arbitration;
- the arbitral award has not yet become binding on the parties or has been set aside or suspended by the courts at the seat of arbitration;
- the subject matter of the difference is not capable of settlement by arbitration under the law of the country where enforcement is sought (ie UAE law in this case); or
- enforcement would be contrary to the public policy of the state in which enforcement is sought (ie the UAE),

(together the "NYC Grounds").

While the applicable law differs, the practical process for the ratification of a foreign arbitral award is the same as for a domestic award (ie, as set out in Article 53 of the Arbitration Law and described above).

An example of the gradual shift towards a more "pro-enforcement" attitude in onshore UAE came with the recent Dubai Court of Cassation Commercial Appeal No. 693 of 2015, in which the respondent to arbitration proceedings commenced in London objected to enforcement in Dubai on the basis that (1) it was not properly served with notice of the arbitration proceedings and (2) the respondent's signatory to the agreement containing the arbitration clause was not properly authorized to bind the respondent.

Hearteningly for arbitral award creditors, the Court of Cassation dismissed these arguments and found that these technical questions fell to be decided according to the laws of the country that issued the arbitral award (in this case English law).

While there is clearly a positive trend in terms of the enforcement of foreign arbitral awards in the UAE, this positivity should be tempered by the reality that surprising and disconcerting judgments are still being handed down by the courts. As recently as March

2016, for example, the Dubai Court of Appeal refused to enforce an arbitral award rendered in London for the remarkable reason that it was not satisfied that the UK was a signatory to the NYC. However, this decision was corrected in the Court of Cassation.

### ENFORCEMENT OF ARBITRAL AWARDS IN THE DIFC

As with elsewhere in the UAE, enforcement of an arbitral award rendered by an arbitral tribunal seated in the DIFC begins with an application to the DIFC Courts for recognition of the award. The grounds for refusal pursuant to the DIFC Arbitration Law essentially mirror the NYC Grounds.

As with foreign judgments, the Judicial Authority Law appears to allow a foreign award creditor to enforce a DIFC Court order (recognizing and enforcing the foreign award) in onshore Dubai as if it were an order of the Dubai Courts. That the DIFC Court may be used as a "conduit" jurisdiction for the enforcement of domestic and foreign arbitral awards (and indeed, judgments) against assets held in onshore UAE was confirmed in the landmark case of *Banyan Tree Corporate PTE Ltd v Meydan Group LLC*.

It was confirmed in the *Banyan Tree* case that it is possible to enforce via the DIFC Court in this way even in circumstances where the award or judgment debtor has no connection whatsoever with the DIFC. More remarkably, despite being the supervisory courts over the underlying DIAC arbitration, the Dubai Courts subsequently refused Meydan's application to annul the award on the basis of *res judicata* (ie because the DIFC Courts had already decided to enforce the award).

This decision, together with a number of other recent rulings along the same lines, is an encouraging example of cooperation between the courts of Dubai and the DIFC and is indicative of the general trend towards a more enforcement friendly environment in the UAE. Notwithstanding the above, while the DIFC Courts have done a great deal to progress Dubai's reputation as a robust jurisdiction for the enforcement of arbitral awards, the establishment of a Joint Judicial Committee (the "Committee") by the Government of Dubai on 9 June 2016 to review and resolve "conflicts of jurisdiction" between the DIFC Courts and the Dubai Courts has provided award debtors with an simple defence against enforcement through the DIFC Courts - file annulment proceedings with the local "onshore" Dubai Courts.

While the Committee has recently dismissed two separate cases (*Gulf Navigation Holding PJSC v DNB Bank ASA*, and *Marine Logistics Solutions LLC and another v Wadi Woraya LLC and others*) where the award debtor sought to have the decision annulled on the basis that the DIFC Courts had issued a final and conclusive decision and there were no parallel proceedings in the "onshore" Dubai Courts, the Committee has also determined in two cases (*Daman Real Capital Partners Company LLC v Oger Dubai LLC* and *Dubai Water Front LLC v Chenshan Liu*) that where enforcement proceedings have been brought before the DIFC Courts and, in parallel, annulment proceedings before the "onshore" Dubai Courts, the "onshore" Dubai Court will be deemed the competent Court and that all enforcement proceedings before the DIFC courts must cease.

In summary therefore, the Committee has issued a number of decisions that appear to have severely restricted the power of the DIFC Court to act as a "conduit" jurisdiction for the enforcement of arbitral awards in onshore Dubai. The Committee's decisions, which are final, binding and un-appealable, have been issued in relation to four DIFC cases relating to the enforcement of arbitral awards in onshore Dubai and have confirmed that:

- the DIFC Courts cannot be used as a conduit jurisdiction for the enforcement of arbitral awards rendered in non-DIFC onshore Dubai in circumstances where there are parallel annulment proceedings on foot in the onshore Dubai Courts; and
- the Committee will not intervene to prevent the DIFC Courts being used as a conduit jurisdiction for the enforcement of foreign arbitral awards and court judgments in onshore Dubai in circumstances where there are no onshore proceedings on foot involving the same parties and relating to the same subject matter.

Presently, it would appear that, as long as there is no conflict of jurisdiction between the two Dubai-based sister courts, the conduit route of enforcement for foreign judgments and arbitral awards remains intact. However, the Committee's approach to the question of the DIFC Court's status as a conduit jurisdiction for foreign decisions has yet to be tested in circumstances where there are parallel proceedings on foot in both the onshore Dubai courts and the DIFC Courts.





# Costs

## General overview

A key element of any dispute is understanding the costs involved. It is not only important to budget for the potential spend, but also to understand:

- the constituent parts comprising the total costs of the dispute;
- when they are likely to be incurred; and
- the extent to which such costs may be recoverable.

The costs of a dispute do not only include legal fees (whether in respect of lawyers, counsel and/or advocates), but also include costs incurred in relation to:

- court, arbitrator and/or arbitration centre fees;
- expert reports and evidence (technical, legal or otherwise); and
- various disbursements (such as translation, document management, travel and accommodation expenses).

Therefore, when planning the pursuit of any claim, a costs/benefit analysis will be necessary. It is of course difficult, due to the uncertain nature of disputes, to predict the likely costs exposure, but in principle the exercise is useful nonetheless, especially in circumstances where parties are unable to recover their costs.

If costs are potentially recoverable, it is important from an early stage to keep clear records of the costs incurred. A party will need to determine what its total spend is over a period of time and ensure it is able to:

- budget accordingly; and
- evidence those costs when required.

## CLAIMING COSTS

One of the many considerations when drafting dispute resolution clauses is understanding whether the choice of jurisdiction for a dispute allows for parties to recover their costs incurred during a dispute.

In terms of recoverability, the short answer is that the costs of a dispute are not always recoverable and where they are recoverable, it may not be the case that all of them are. The recoverability of costs typically depends on a number of factors, including:

- the jurisdiction in which the dispute takes place;
- the degree of success of claims/defences; and/or
- the conduct of the parties in the dispute..

## Onshore litigation

There is no procedure for the recovery of legal fees in the onshore courts of the UAE. Typically, the court will grant the successful party the court and expert fees (if one is appointed by the court) it has incurred but no more than a token sum in respect of its legal costs.

## Offshore litigation

When it comes to the offshore courts, such as those in the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM), their respective procedural rules on costs provide procedures by which a party may recover its costs.

The Rules of the DIFC Courts (RDC) provide the Court with considerable discretion when it comes to making orders as to costs. However, the general rule is that the unsuccessful party will be responsible for settling the successful party's costs.

The RDC provide that the court is to have regard all the circumstances when making an order as to costs. This includes consideration of the degree of success of the cases of the parties, their conduct and any offers to settle. There is also potential for the DIFC Court to make no order as to costs – this is usually where it finds that the merits of each party's case are balanced.

The DIFC Court will assess the amount of costs due to the receiving party on either a standard or indemnity basis. Where costs are assessed on the standard basis, the court will:

- only allow costs which are proportionate to the matters in issue to be recovered; and
- resolve any doubt as to whether costs were reasonably incurred or reasonable and proportionate in amount in favor of the paying party.

On the other hand, where costs are assessed on an indemnity basis, any doubt as to whether costs had been reasonably incurred or reasonable and proportionate in amount is interpreted in favor of the receiving party. In other words, it is for the paying party to persuade the court that certain costs were not reasonably incurred.

Where the DIFC Court orders a party to pay costs, it may either make an immediate assessment (i.e., at the hearing itself) or order that a detailed assessment takes place. Detailed assessment proceedings involve a separate hearing, at which a party must present and defend a detailed bill of costs before the court and its opponent (who is entitled to raise points disputing the bill of costs). There are a number of things to consider before starting assessment proceedings, including the fact that assessment proceedings demand that a certain percentage of the costs are paid to the court as a fee. This fee is potentially recoverable from the paying party, along with any further costs (including legal and court costs) a party incurs in costs assessment proceedings.

It is also worth noting that the DIFC Court is empowered to issue an interim costs order in favor of a party. These costs orders will usually reflect 50 percent of the costs incurred by the party, or what the court believes is the minimum it will recover.

The ADGM Court procedure rules, although somewhat less extensive than the RDC on costs and their recovery, broadly follow the framework of the RDC.

## Arbitration

In respect of arbitrations that are seated onshore in the UAE, Article 46 of the UAE Arbitration Law (Federal Law No. 6 of 2018) provides arbitrators with the power to assess their own fees and the costs of the arbitration (including the costs of any expert(s) appointed by them) and to order that all or part of such fees and costs are borne by the unsuccessful party in the arbitration. However, the UAE Arbitration Law is silent on an arbitrator's ability to award any party's legal fees or other costs.

The Dubai Court of Cassation has directly considered, albeit under the previous legislative regime prior to the coming into force of the UAE Arbitration Law, the ability of arbitrators to award legal costs and ruled that arbitrators are only empowered to do so with the agreement of the parties. Given that the UAE Arbitration Law remains silent on the issue, we do not anticipate that the approach of the onshore courts will change. This agreement can be reflected in:

- the arbitration rules the parties have agreed to apply;
- the arbitration clause agreed by the parties; and/or
- the Terms of Reference agreed by the parties.

The position differs in arbitrations seated in the DIFC and the ADGM, which have their own arbitration laws. The arbitration laws of both the DIFC and ADGM empower arbitral tribunals to fix the costs of the arbitration. A definition of "costs" is included in each of these laws and includes:

- the fees of the arbitral tribunal to be stated separately as to each arbitrator;
- the properly incurred travel and other expenses incurred by the arbitrators;
- the costs of expert advice and of other assistance reasonably required by the arbitral tribunal;
- the travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- such other costs as are necessary for the conduct of the arbitration, including those for meeting rooms, interpreters and transcription services;
- the costs of legal representation and assistance of the successful party if such costs were claimed during the arbitration, and only to the extent that the arbitral tribunal determines that the amount of such costs, or a part of them, is reasonable; and
- any fees and expenses of any arbitral institution or appointing authority.



