



Dispute Resolution in the Middle East

CASE MANAGEMENT

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.^[1]

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.

[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.



