



Dispute Resolution in the Middle East

DOCUMENT PRODUCTION

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.





