



# Dispute Resolution in the Middle East

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APPEALS

# 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.





