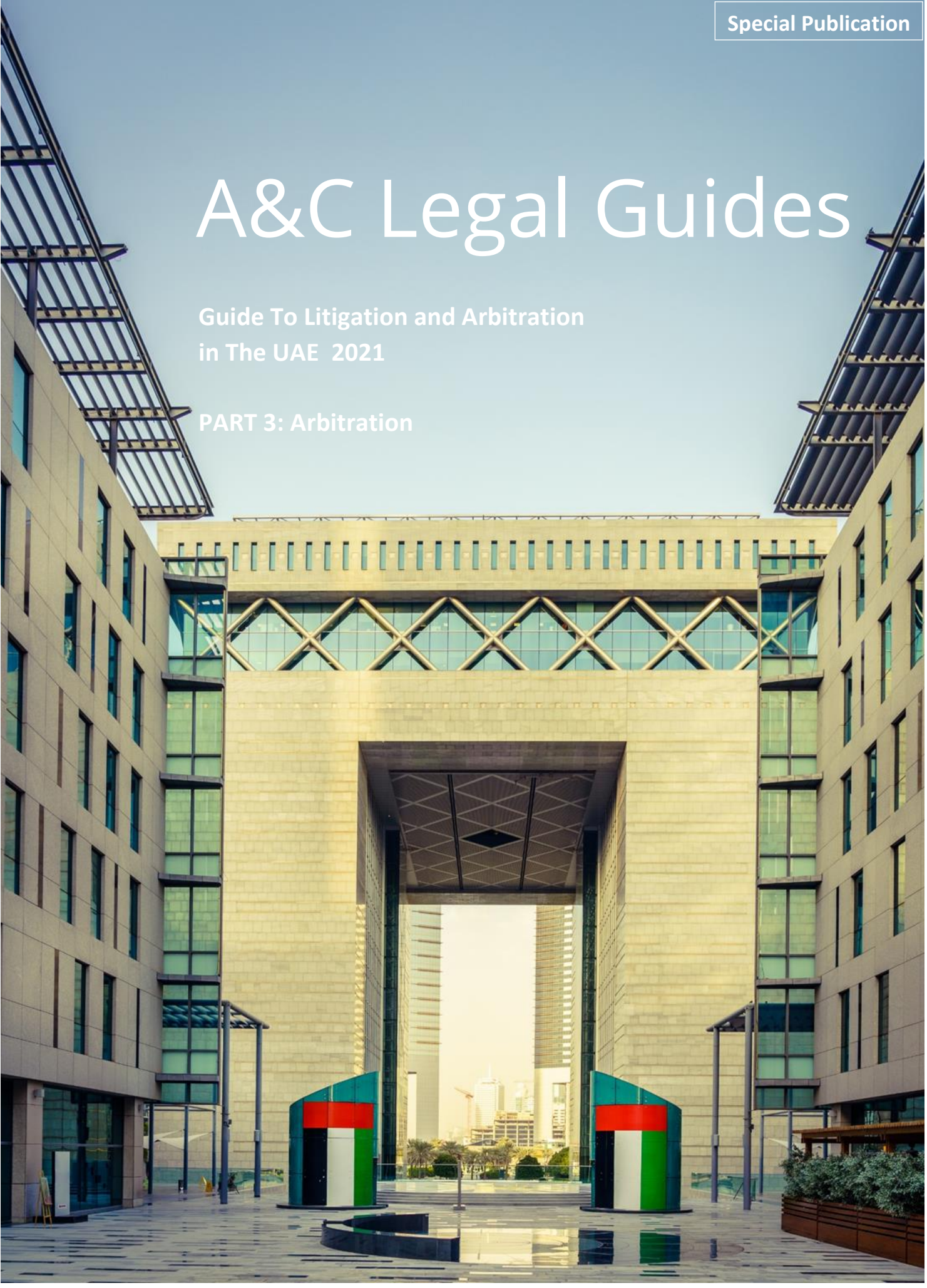
Special Publication

A&C Legal Guides

Guide To Litigation and Arbitration in The UAE 2021

PART 3: Arbitration



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Preface

This guide has been written as an aid to provide users and potential users of legal services with an overview of the legal processes within the United Arab Emirates (UAE) which may be available in any given situation. Depending on the contract and/or place of business a dispute will either be decided within the Civil Law process in onshore UAE or the common law process to be found offshore within the free zones of Dubai International Finance Centre (DIFC) or Abu Dhabi Global Markets (ADGM). Additionally, many contracts provide for arbitration which removes jurisdiction from the Courts. This guide allows the user to understand the different processes that are available with the UAE and to consider which of the legal processes will be or are likely to be applicable to their contract and/or dispute.

Whilst we hope that users of this guide will find it helpful in understanding the ways in which the legal processes can be used to resolve their disputes or to safeguard their position it is always advisable to discuss the dispute and best way to pursue or defend a claim with a suitable lawyer who understands not only the nature of the issue or dispute but also the processes which will have to be navigated. This will additionally provide the user with a clear idea of the costs involved and whether those costs may be recoverable or not. This in turn will lead to a commercial decision as to the way forward, be it litigation, arbitration, or settlement.

About the author

Robert Sliwinski,
Of Counsel
r.sliwinski@alsuwaidi.ae

Robert Sliwinski is a Barrister, Chartered Arbitrator, Accredited Adjudicator and Mediator, Quantity Surveyor and Dispute Board Member.

Robert has over 35 years' experience of the construction industry with particular emphasis on all forms of alternative dispute resolution. Robert specialises in all aspects of the property and construction representing parties as well as undertaking appointments as arbitrator, adjudicator, expert determiner, mediator and dispute board member.

As counsel Robert has represented clients in litigation within court system up to and including the Court of Appeal and in domestic and international arbitrations. Cases undertaken by Robert include legal and contractual interpretation, construction and engineering contracts, tort, development agreements and professional negligence. In a recent case heard by the High Court in London Robert was able to successfully argue that a construction company that was 'balance sheet' insolvent was solvent as defined by the Insolvency Act 1986.

As an arbitrator Robert has been involved in matters concerning professional negligence, property, landlord & tenant, delay analysis, costs, variations, defects, interpretation of contracts, repudiation, and many other aspects of contract in the areas of building, civil engineering, mechanical & electrical, waste water treatment and process engineering. He has most recently been joint arbitrator on a multi-million dollar case between a joint venture contractor and national government in a dispute involving the construction of an airport runway and as a member of an ICC panel arbitration also between a joint venture and a national government involving the construction of a major road project.

Robert has received over 400 appointments from the CIArb, CIC, AICA, CEDR, RICS and directly by the parties to act as the adjudicator. Robert's has also worked as an expert determiner and mediator covering a wide range of issues within the arenas of construction and engineering, professional negligence, contract, development agreements and landlord & tenant.

Robert works closely with the parties and their experts allowing his clients to understand each decision made and the effect on the overall dispute and process being employed. Robert believes that an informed client makes the best choices in furtherance of matter under consideration or of the dispute that is being pursued/defended.

Licenses, Memberships and Panels

- DIFC – LCIA
- Dubai International Arbitration Centre
- International Chamber of Commerce (UAE)
- Sharjah International Commercial Arbitration Centre
- Saudi Centre for Commercial Arbitration
- ArbDB Chambers in London
- The Chartered Institute of Arbitrators
- The Honourable Society of Middle Temple
- New York State Bar (USA)
- The Construction Industry Council
- The Law Society (2004 to 2010)
- Asian International Arbitration Centre
- Hong Kong International Arbitration Centre
- Federation Internationale des Ingenieurs-Conseils International (FIDIC)
- Technology & Construction Solicitors Association
- Technology and Construction Bar Association
- UK Adjudicators
- Royal Institution of Chartered Surveyors (1987 to 2018)
- Royal Society for the Encouragement of Arts, Manufacture & Commerce
- Asian Institute of Alternative Dispute Resolution
- Dispute Resolution Board Foundation
- Centre for Effective Dispute Resolution (CEDR)
- London Court of International Arbitration (LCIA)

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PART 3

4.0 Arbitration

4.1 Pre-Action Stage

In arbitration the steps to be taken pre-action are similar to litigation, be it onshore or offshore. Before commencing a claim in arbitration, it is imperative that a Claimant discuss the claim with their lawyer not only to obtain good legal advice but also to obtain clarity on the validity of an arbitration agreement and which arbitration centre should be used. If mistakes are made in respect of these issues it could prove to be very costly if it is found that any award of the Arbitration Tribunal is unenforceable.

The following matters should be ascertained before commencing a claim in arbitration:

1. The identity of the Respondent. Whilst this may appear obvious it is always wise to be sure of the Respondent's identity before issuing a claim in arbitration. Who is actually responsible for the loss which may have been incurred or is there a joint responsibility for the loss?

2. Is the Respondent solvent and not a man of straw? It is pointless expending large sums of money chasing a Respondent when there is no prospect of recovery even if the claim is successful.

3. Have the contractual provisions that allow the claim to be made been complied with? In many contracts the right to relief may depend on complying with specific notifications which, if not complied with, may result in the ability to make a claim or obtain relief being lost. This may require a careful consideration of the contractual wording and the law governing the contract.

4. What is the Dispute Resolution Mechanism, is one specified at all? Are there options given by the contract as to how a dispute should be resolved, is there a tiered process that has to be followed before commencing a claim in arbitration. If the tiered process is not complied with would this make any claim invalid due to a failure of jurisdiction?

5. What are the merits of the claim? The claim may not be as strong as the Claimant would like and good advice as to its merits is sensible so that a commercial decision can be made.

6. How good is the evidence upon which the claim is being brought? If documents are not within the Claimant's possession, can they be obtained, can evidence held by third parties be obtained or safeguarded?

7. Can the Claimant afford to fund the claim or is it prudent to investigate third party funding?

8. Is arbitration the correct forum for the dispute?

9. What are the arbitration rules to be applied and is a specific arbitration centre stated within the arbitration agreement?

10. Is the arbitration to be conducted under common law or civil law procedures?

4.1 The Operative law

There are two types of law which need to be understood when arbitration is the dispute resolution mechanism. Firstly, the law of the contract, or the substantive law, needs to be ascertained as this is the law that will be applied to the dispute itself. Secondly the law of the seat, or the procedural law, will need to be understood as this is the law that will govern the procedure of the arbitration and is not to be misunderstood with the rules of the arbitration which set out the procure and specific rules to be followed in the arbitration. However, these are themselves subordinate to the procedure law that applies to the arbitration. If there is any conflict between the procedural law and the arbitration rules it will be the procedural law that will take precedence.

In the UAE certain matters will be deemed un-arbitrable and these matters will be for the relevant court in the UAE to consider and decide. This consideration will also apply to other jurisdictions where the seat is not in the UAE. Any dispute will need to be considered alongside the jurisdictional law of the seat to see whether that dispute is arbitrable or not as well as ensuring that the dispute is covered by the arbitration agreement itself.

In the UAE the following types of disputes are generally not arbitrable due to public policy consideration:

1. Personal status (marriage, divorce, inheritance, linage, etc)
2. Governance, freedom of trade, distribution of wealth, private ownership, etc
3. Crime
4. Nationality
5. Minors

Certain laws in the UAE (or in individual Emirates) restrict the right to arbitrate which may include:

6. Commercial Agencies
7. Labour Disputes
8. Real Estate and Leases (both commercial and residential)

The laws as applied in the DIFC and ADGM Courts may also have an effect on some of these restrictions as, for example, the DIFC will allow employment and consumer contracts to be arbitrated.

It is therefore important for the potential Claimant to obtain legal advice on the whether their dispute can be arbitrated despite the contract having an arbitration agreement within it.

If the Respondent submits that the Arbitration Tribunal does not have the jurisdiction to deal with the dispute, as referred, it will be for the Tribunal itself to decide the issue of jurisdiction. Federal Law no. 6 of 2018

4.3 Limitation

The law that governs the arbitration will also govern the limitation periods that are to be applied to any dispute. For example, where the governing law is the law of the UAE the limitations set out under the UAE law will apply however if the law is that of the DIFC the limitations set out under the DIFC law will apply.

There may also be limitations set out in the contract and/or arbitration agreement that need to be considered. The contract and/or arbitration agreement cannot extend a statutory limitation period but can shorten them. It would be a mistake to simply rely upon the statutory limitation period if the contract has expressly stated a shorter period for commencing a dispute process.

4.4 Arbitrator

The choice of arbitrator will be dependent on the arbitration agreement and the relevant arbitration rules. These may set out whether a single arbitrator or a panel of three is to be appointed as well as the qualifications, both professional and expertise, that are required. Where a party has the choice of arbitrator it would be wise to consider the characteristics that would be most suitable and advantageous to that party. Is a civil or common law arbitrator preferred and should the arbitrator have a technical background or indeed be qualified both technically and legally?

4.5 Costs

The issue of costs in arbitration can vary depending on the arbitration rules that apply. In most cases where an arbitration is administered by an arbitration centre the parties are requested to provide an advance payment to cover the cost of the arbitration. Where a party does not make payment of their share of the advance payment the other party will be requested to make payment on the other party's behalf. Unless the entire advance payment is made the arbitration centre will consider the matter as withdrawn. The advance payment will additionally be increased should the Respondent decide to issue a counterclaim. The Claimant should be aware of the potential level of advance costs and have the wherewithal to cover those costs in full as it would be unwise to count on the Respondent paying their share of the advance payment.

In the case of an Ad-Hoc Arbitration the arbitrator(s) will be appointed by the parties directly or through an appointment service. There will be no arbitration centre to administer the arbitration and it will be for the Tribunal to undertake the administrative tasks. Accordingly, it will be a matter for the parties and arbitrators to agree fees and any advance payments to be made.

At the conclusion of the matter the Tribunal will, where they have jurisdiction, also decide the issue of the costs and make an award in this regard. In the UAE most arbitration centre rules will allow party costs to be awarded but it should be noted that the DIAC arbitration rules do not specifically allow for party costs to be awarded. It is noticeable that the Court of Cassation has generally found that the DIAC arbitration rules do not allow party costs to be awarded even where both parties have requested the Tribunal to make such an award.

Finally, it should also be note that in appropriate cases third party finding may be available to the Claimant or to the Respondent. If a party wished to explore this option good preparation and the ability to show that the party has a good chance of success will be necessary.

4.6 Disclosure

Disclosure in arbitration relies on the specific arbitration rules and whether the arbitration is being conducted under common law or civil law procedures. In most arbitrations it is the common law that is used but this does not preclude the parties and Tribunal agreeing that civil law procedures are to be used.

An example of the rules for disclosure that can be used in a common law arbitration are the IBA Rules on Taking Evidence. In essence these rules will require the parties to disclose all the documents that are relevant to the dispute and relied upon. The rules also allow for applications for disclosure where it is thought that the other party has failed to disclose all the relevant documents in their possession.

As to a civil law procedure, the Prague Rules could be used. These rules allow for a more limited disclosure of documents mirroring procured in civil law courts where the court will indicate the types of documents that are to be produced in support of each parties' position and generally are not expected to produce documents that assist the other party. Applications for document production are discouraged but if felt necessary then an application should be made as early as possible preferably no later than the case management conference.

In either case it is possible for the parties to agree with the Tribunal on how disclosure should be undertaken and to what extent such disclosure should be. The Tribunal will wish to keep an eye on the cost and time required for discourse especially where the dispute is relatively limited in size and scope.

In arbitration, as in the common law courts, disclosure can be used as a tactical weapon in order to gain an advantage in the arbitration. Key documents that are not in the party's possession and which have not been initially disclosed can be requested. The request for disclosure can also be used to show to the Tribunal that the other party has not been above board in its disclosure or that certain evidence does not in fact exist in support of the other party's case. However, the tactical use should be carefully weighed as a document request that is too wide or does not, as a matter of fact, relate to the dispute itself can be seen by the Tribunal as being time wasting and a fishing expedition. This may in fact damage a party's case as the Tribunal could end up looking unfavourably upon that party's actions resulting in a costs order against them.

4.7 Language

The language of the arbitration is a matter for agreement between the parties and is usually set out in the arbitration agreement to be found in the contract. In most arbitrations English is used.

4.8 Interim Remedies

Interim remedies are capable of being ordered by the Arbitration Tribunal and, depending on the rules and procedural laws that are to be applied, these can be relatively wide. Additionally, interim remedies can be sought form the local courts both before the Tribunal has been constituted and in emergencies. It is of course the case that the ability to obtain interim remedies will depend on the seat of the arbitration as well as the particular rules that apply.

Within the UAE Federal Law No.6 of 2018 (The Arbitration Law) allows the Tribunal to order precautionary measures which maintain the status quo between the parties, preservation of evidence and orders to prevent parties taking specific actions. In particular those arbitrations which are seated in the DIFC and ADGM are able to use the DIFC and ADGM Arbitration Laws which are based on the UNCITRAL Model Law and the DIFC and ADGM Courts in their wide-ranging ability to order interim measures including injunctions which may be unavailable in the Inshore Courts.

Various arbitration rules allow the parties to have an emergency arbitrator appointed to deal with urgent conservatory matters. Emergency arbitrators are used under the DIFC-LCIA Arbitration Rules, the ICC arbitration rules and are expected to be included in the new DIAC arbitration rules which are currently under discussion. Parties can agree to opt out of such emergency arbitrator procedures although this is in reality unusual.

Whilst any orders that are made by an emergency arbitrator are directly enforceable, a party can use that order or award to make an application to the local court where the order is to be complied with, such as preserving evidence in a different jurisdiction, to ensure that the court orders the necessary interim relief.

It is also the case that in many circumstances it may be better to go straight to the local courts to obtain interim relief as this may be quicker and more effective as the court's order can be directly enforced.

4.9 Commencing a Claim

Within the UAE the majority of arbitrations are commenced under the rules of the relevant arbitration centre or institution. Where an arbitration is to be administered rather than ad-hoc the procedure is generally as follows, however each administrative centre will have its own particular rules which should be read and understood before commencing the arbitration:

1. A Request for Arbitration is sent to the Registrar of the arbitration centre (such as DIFC-LCIA or DIAC) as well as to the Respondents where applicable. These Requests for Arbitration must comply with the relevant rules (Article 1 of the DIFC-LCIA Rules or Articles 3 & 4 of the DIAC Rules).
2. The receipt of the Request for Arbitration by the Registrar is deemed to be the date of commenced of the arbitration.
3. An ad-hoc arbitration is commenced when the Claimant serves upon the Respondent a Notice of Arbitration. The Notice must comply with the relevant Procedural Law (in the UAE this is Arbitration Law - Federal Law No.6 of 2018). The arbitration is deemed to be commenced on the date that the Notice is received by the Respondent.

4.10 Service of the Claim

If an arbitral institution is used, then service must be in accordance with the relevant rules and are less onerous than the Rules of Court for service. Generally, service will be as set out in the contract, to the last known address of the other party, the registered address or any other method that the parties may have agreed. It is usually wise to serve the Notice of Arbitration or Request for Arbitration by more than one method so that the other party will stand less chance of trying to say that the Notice or Request was not served. Whichever method of service is used it must be capable of recording the service so that evidence of service can be provided if necessary.

4.11 Jurisdiction Challenges

It is common in arbitration for the Tribunal's jurisdiction to be challenged. This is considered by the Responding party in particular to be an effective method of avoiding the claim for a period of time, if not completely.

The Tribunal is able to consider and decide challenges to its jurisdiction. This is a central part of an arbitrator's powers and is recognised in jurisdictions across the world. Within the UAE Article 19 of the Federal Law No. 6 of 2018 (The Arbitration Law) recognises that the arbitration Tribunal has the power to determine the nature and scope of their own jurisdiction.

Challenges to jurisdiction tend to be in respect of a party not being a party to the contract or not covered by the arbitration agreement, that the arbitration agreement is invalid or has not been entered into by an authorised person, or that the dispute is not covered by the arbitration agreement or is not arbitrable at all.

To be successful a jurisdiction challenge should be made as soon as practicable and in the case of questions of bias or conflict aimed at the Tribunal these should be made as soon as the party wishing to make such a challenge becomes aware of those matters. Once the challenge has been made the Tribunal will set out a timetable for submissions and, where necessary, a hearing. The Tribunal will then consider the submissions and evidence presented and make an award on jurisdiction. In some cases, the award on jurisdiction will be included within the final award. If the Tribunal considers that it does not have jurisdiction, they should issue a final award with that finding and end the arbitration proceedings.

4.12 Default Judgement

Unlike the Courts arbitration does not have the ability to issue a default judgement. If the Respondent or Claimant (in the case of a counterclaim) fails to serve a defence the Tribunal is obliged to continue and hear the case and decide the dispute based on the submissions and evidence presented. At all times, the Tribunal should keep the defaulting party informed and ensure that they are copied into all correspondence, submissions, etc so that they are given a full and proper chance to take part. It is not therefore the case that where a party fails to take part in the arbitration proceedings (normally the Respondent) that the party that does take part (normally the Claimant) will automatically succeed in their claim.

4.13 Case Management

Case management is an import part of the arbitration process and is dependent on the parties agreeing with the Tribunal the process to be used as well as the timetable in the arbitration. Where institutional rules are used a default timetable may be provided which is useful when the parties are unable to agree a reasonable timetable even with the help of the Tribunal. In most arbitration rules the Tribunal does have the power to order directions having heard the submissions of each party in this respect such that no party can subvert the proceedings by failing to agree the procedure and timetable. Despite this Tribunals are reluctant to simply order directions and will try their best to obtain agreement when possible. Whichever arbitration rules are used the parties will need to ensure that they comply with those rules and are aware of any default or mandatory steps that are to be taken.

In institutional arbitration the secretariat of the arbitration centre will provide guidance and support to the parties to enable a smooth process based on the relevant arbitration rules.

Generally, the case management will be dealt with at a procedural meeting which is likely to be held by video or telephone conference call between the Tribunal and the parties and/or their representatives. The Tribunal will record the agreements and directions from the procedural meeting within a procedural order. The directions will include filing dates for the various pleadings (statement of case, statement of defence, etc), factual and expert witness evidence, documentary and other evidence, site inspections if needed, any other pre-trail steps to be taken and of course the hearing itself. The procedural meeting can also be used to highlight any issues that either party wishes to raise including any preliminary matters that are to be addressed, challenges to jurisdiction, etc.
Once the procedural meeting has concluded and the directions issued the parties will know the steps that they need to take and the dates by which those steps need to be complied with. It is to be note that if a party fails to comply with the directions the Tribunal has the power to make adverse cost orders and to eventually disallow any evidence that has not been provided in accordance with those directions and any extended dates allowed therein.

Despite the potential difficulties in obtaining agreement from the parties it is the case that the Tribunal will ultimately give directions to ensure that the arbitration does proceed in a way that the Tribunal considers reasonable having considered the parties' submissions. If difficulties are encountered an experienced arbitration lawyer should be consulted to advise and/or take the necessary steps to deal with any such difficulties.

4.14 Evidence

With most arbitrations being conducted under common law principles it will be no surprise that the evidential rules within the common law court systems are to some degree followed. This is the case even though arbitrations rules do not have rules on evidence contained within them. It is a matter for the parties and Tribunal to agree on the rules of evidence to be used, if any, within the arbitration proceedings.

a. IBA Rules on Taking Evidence in International Arbitration 2010

The IBA Rules on *Taking Evidence in International Arbitration 2010* are a very good set of rules which can accommodate both common law and civil law procedures and certainly allow any disputes as to the admissibility, etc of evidence to be dealt with in a considered and reasonable way. The IBA Rules accommodate the applicable laws of the arbitration seat as well as the arbitration procedural rules that may apply. It is the flexibility of the IBA Rules and their common use in arbitration that makes these evidentiary rules so useful in many successful arbitrations.

It is advised that the IBA Rules are incorporated into the arbitral proceedings at the procedural meeting or within the Terms of Reference where required under any particular Arbitration Procedural Rules.

b. Factual Witnesses

It is usual in common law arbitration proceedings for evidence to be presented within witness statements and care must be taken in the preparation of those statements and the evidence that is to be adduced. As with the Offshore Courts it is vitally important that the available evidence is properly investigated and the evidence that is relevant is disclosed and referred to within the witness statements. The factual witnesses will be cross-examined on their witness statements and any other evidence given orally.

If the arbitration proceedings are based on the civil law processes it is likely that factual witnesses will not be used or if they are their use will be limited.

It is important in any arbitration proceedings to ensure that the way in which evidence, and in particular witnesses, is to be produced is understood and agreed so as to avoid difficulties at a later stage. This is particularly important when representatives come from different legal backgrounds and may not be versed in the procedures to be used in the arbitration.

c. Expert Witnesses

Experts are a common feature of arbitration and are used extensively in technically orientated disputes such as medical, accounting, construction and engineering and IT. Depending on whether the arbitration process is civil or common law based will determine how the expert evidence is used.

Under civil law procedures it is usual for a single expert to be appointed by the Tribunal and that expert will investigate and gather evidence to present to the Tribunal.

This is to be contrasted with the common law process where experts are appointed by the parties to support their case, albeit on an independent basis, and will use their knowledge and the available evidence to prepare a report for the Tribunal. The experts will be cross-examined on their reports, or it could be agreed that the experts give evidence at the same time, known as hot tubbing, which allows for a conversation between the experts which can be very valuable to the Tribunal.

Whichever way experts are used in arbitration it is their duty to give independent and objective evidence to the Tribunal which overrides any duty that they may have to those instructing the expert. Any expert who does not give independent and objective evidence to the Tribunal will be doing their instructing party a serious disservice as the Tribunal will be able to see that the expert is not objective and is in fact giving evidence biased toward the instructing party. In such circumstance the Tribunal is highly likely to reject the expert's evidence and will result in that party's case being seriously weakened.
It is undesirable for an expert witness to be connected to the instructing party. If the expert has a connection or indeed has worked with or for the instructing party this must be disclosed. The Tribunal will not dismiss that expert's evidence but will take a view and may give that expert's evidence less weight should they consider that his evidence cannot be considered as objective or independent.

Should a party be unsure about their chosen expert it is advised that they discuss the issue and take advice from an experienced arbitration lawyer.

4.15 Confidentiality

a. Arbitration

Arbitration is a confidential process which is not open to the public save where the parties have agreed otherwise, or the arbitral rules remove confidentiality. However, if an arbitration award is challenged or enforced in court the court may allow the parties details and the case itself to be in the public domain.

It is important that even where party's desire confidentiality there may in certain circumstances in which they become public knowledge, however this is unusual and in general arbitration is considered to be a confidential process.

b. Documents

In common law jurisdictions certain documents and communications are considered to be confidential and will not be admissible in evidence. This includes 'Without Prejudice' communications and legal privilege.

In respect of other confidential documents any party which wishes to withhold documents on the basis of confidentiality would need to show good reason why those documents should not be disclosed. The other party can make an application for disclosure and the Tribunal will decide whether disclosure should be allowed or not. Grounds may include commercial or technical confidentiality and political or institutional sensitivity that the Tribunal determines is compelling.

Where a party considers that certain documents should not be disclosed we recommend that the status of those documents should be discussed with their legal representatives.

4.16 Case Preparation

Case preparation generally follows the format of common law courts unless the arbitration is to be conducted under civil law procedures.

As the focus in arbitration is towards the final hearing of the dispute it is imperative that the parties take time to prepare their case so that they are able to make the best case possible and are ready and able to counter the evidence and legal submissions that will be made by the other party. The Tribunal expects the entire case to be put to them in the final hearing and as a consequence the final hearing, depending on the subject matter, can last from a day up to a few weeks or more. Accordingly, careful consideration of steps needed to be undertaken prior to the hearing is of the utmost importance.

With smaller cases the arbitration may be a 'documents only' arbitration. In these cases there will be no final hearing and the Tribunal (a single arbitrator) will write the award based on the written submissions of the parties and the evidence that they have provided. However, if the factual evidence is seriously contested an oral hearing may be undertaken to allow examination of the witnesses.

With civil law arbitrations it is likely that the final hearing will be limited with memorandums having been provided by the parties and the Tribunal conducting proceedings and any investigations that may be needed.

Whilst in reality a civil law arbitration does not follow absolutely the civil law procedure it is the case that cross examination of witnesses is discouraged as set out under the Prague Rules (Inquisitorial Rules on Taking Evidence in International Arbitration) the Tribunal decides which witnesses should be called for examination and will normally lead any questioning of witnesses with very limited opportunity for cross-examination by the parties or their advocates.

a. Pre-Trail Review

Prior to the hearing a 'Pre-Trail Review' (PTR) may be undertaken. The PTR is used to ensure that all the necessary actions for the hearing have been completed or are being completed. The parties are expected to agree a timetable for the hearing with timings for oral submissions, factual witnesses and expert witnesses as well as a highlighting any differences between the parties as to the conduct of the hearing. Where there are differences between the parties the Tribunal will provide directions to resolve those differences to ensure that the hearing commences on time and is kept to the allocated time. Where possible a list of issues to be decided by the Tribunal should also be agreed if not previously agreed.

The Claimant is usually expected to prepare the hearing bundles following discussions between the parties as to those documents that should be included. The Tribunal is concerned to keep the bundles to a manageable size and would wish to avoid all and every document being included. It is also the case that the relevant documents upon which the parties will rely are, where possible, to be agreed and included in the bundles. Where the bundles are voluminous a bundle of the core documents should also be agreed which will ensure that time is not wasted in constantly finding and opening different files during the examination of the factual and expert witnesses. The Tribunal may encourage the use of electronic bundles especially where the dispute has voluminous documentation. There are a number of document management systems that can be used in the more complex arbitration hearings which allow electronic bundles and transcripts to be searchable and for the users to highlight and link documents to present as may be necessary during the hearing.

If the parties agree the hearing may be recorded and transcripts can be requested by the parties and should be agreed at the PTR. If translators are to be used they must be approved translators details of which are to be provided and agreed prior to or at the PTR.

Where witnesses are unavailable for personal attendance at the hearing evidence may be given by video link or similar. Reasons for the unavailability of a witness to give evidence in person is required. During 2020 the emergence of a pandemic has caused many hearings to be by video link and this has had the effect of the Tribunals and legal representatives becoming much more familiar with the use of video links as well as problems that can sometimes arise in its use.

b. Logistics

Unlike a court hearing the parties will need to arrange for the hearing venue, accommodation for the Tribunal and the parties including representatives, witnesses and experts where necessary. The hearing would normally be undertaken in a hotel conference room with breakout rooms. Arrangements will also need to be made for any IT equipment to be used and translators if required. The hearing room must be suitable to accommodate all the people attending the hearing and allow the room to be set up with a U-shaped table allowing for the Tribunal sitting at the head and the parties along each side. The witnesses will also need to be properly accommodated to allow them to give evidence.

In the case of video conference hearings a secure system must be used with the parties and the Tribunal being able to have breakout rooms within the system. It is imperative that confidentiality is maintained in any breakout rooms so that parties and their advisors can discuss any issues that arise in private and the Tribunal can have private discussions and the ability to discuss with the parties legal advisors any matters that are not to be dealt with in the open hearing.

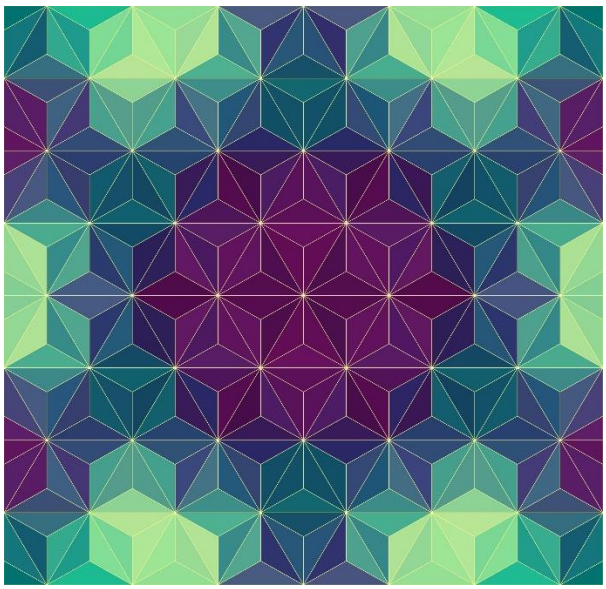
c. Witnesses

Not to be forgotten is the arrangements for the witnesses' attendance at the hearing. If in person the parties will need to ensure that the witnesses have made themselves available for the hearing and that all travel and accommodation arrangements have been made. The witnesses will need to be told when they are schedules to give evidence so that they are not waiting around the hearing room unnecessarily.

4.17 The Hearing

The hearing will be before one or three arbitrators. The parties' representative will be allowed to summarise their case before the witness evidence is given.

It should be noted that witnesses should either swear an oath or affirm their evidence before the examination starts. In many jurisdictions including the UAE witness must swear an oath as affirmations are not acceptable. This can cause problems where the witness is unwilling to swear an oath but if the evidence is given without doing so there is a risk that the arbitration award will not be enforced and set-aside.



The Claimant's witnesses will usually give evidence first. In most cases the evidence in chief will be the witness statements with, where necessary, some supplementary questions by the Claimant's representee.

The Respondent's representative will proceed to cross-examine the witness in detail putting the Respondent's case, as is appropriate to that witness. Following the cross-examination, the Claimant's representative will be allowed to re-examine the witness to clarify any issues that arose under cross-examination. Re-examination that did not arise out of the cross-examination will not be allowed.

Once the Claimant's witnesses have given evidence it will be the turn of the Respondent's witnesses to give their evidence in chief, be cross-examined and if necessary re-examined. On completion of each witnesses' evidence the Tribunal may ask questions, occasionally the Tribunal may interrupt examination to ask a question but usually the Tribunal allows examination to proceed without interruption.

The expert witnesses, if used, will give evidence at the conclusion of the factual witnesses' evidence and will be examined in the same way with the expert's report acting as the evidence in chief. Occasionally it will be agreed that the experts give their evidence at the conclusion of all the factual witnesses (both Claimant and Respondent) to allow their evidence to be examined at the same time. This process is known as 'hot tubbing' and allows for the experts to interact and discusses the issues in dispute with the Tribunal normally conducting the questioning. The party representatives will thereafter be allowed to ask the experts questions that they consider have not yet been dealt with.

Once the factual and expert evidence has been provided both parties' representatives will be allowed to summarise their case and comment on the evidence that has been given. These submissions may be given orally or, where the matter is complex, in writing within a set period of time after the conclusion of the hearing. The Tribunal may set down a date and time for those submissions to be made before the Tribunal rather than them just being provided in writing. This allows the Tribunal to raise questions to the representatives in order to clarify any outstanding matters.

The Tribunal will provide its award in writing after the conclusion of the hearing and receipt of the closing submissions.

4.18 Appeals and Annulment

Arbitration awards, both domestic and international, are not capable of appeal on substantive grounds but may be set aside or sent back to the Tribunal for reconsideration where a party has been able to successfully appeal on a point of law. The seat of the arbitration will dictate the procedural law to be applied and this will need to be considered with care when deciding whether an appeal is possible and any time limits for such an appeal.

An additional challenge to the award may be made due to serious irregularity which has caused substantial injustice to one of the parties or indeed both.

If seated in the UAE appeals, challenges and enforcement are dealt with under Federal law No.6 of 2018 (the Arbitration law) and brought before the local courts. Article 53 of the Arbitration law allows for the following ways in which to have the award annulled:

- 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.

It is to be noticed that the Arbitration Act retains the ability of the local courts to refuse enforcement of the award where the court considers that the award contravenes public morality and public policy which has allowed the courts to refuse enforcement for any number of reasons which would not normally be an effective challenge to the award. Despite this the local courts are becoming more arbitration friendly and the use of these to refuse enforcement is becoming increasingly rare. However, public policy remains an important aspect of refusing enforcement and is also stated as a reason to refuse enforcement under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 at Article V part 2(b).

In the Offshore courts (DIFC and ADGM) appeals to annul an award are governed by Article 44 DIFC Arbitration law and Chapter 8 of the Arbitration Regulations 2015 of the ADGM. The reasons to annul or remit the award back to the Tribunal include the following:

- the incapacity of a party entering into the arbitration agreement;

- invalidity of the arbitration agreement;
- no and/or incorrect notice given to the Responding Party of the appointment of the Tribunal or of the proceedings or was in some other way prevented from being able to present their case.

- the award decides a dispute not within the terms of submission to the Tribunal or beyond the scope of its terms;
- the composition of the Tribunal was not in accordance with the arbitration agreement and/or the agreement of the parties and/or was not in accordance with the law of the jurisdiction where the award was made;
- the dispute was not capable of settlement under the laws of the DIFC or ADGM;
- 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;
- the award was against public policy of the UAE.

4.19 Enforcement

In Onshore arbitrations Article 52 of Arbitration Act is to be considered. This allows arbitration awards to be enforced in the same way as a court judgement. Any challenge to enforcement must be within 60 days of the award being published.

Additionally, the local courts can suspend enforcement of the award for 60 days to allow the Tribunal to correct or eliminate any grounds that there may be to refuse enforcement.

As to foreign awards the UAE is a signatory to the New York Convention and the grounds set out at Article IV for enforcement requires:

- the duly authenticated original award or a duly certified copy thereof;
- the original agreement referred to Article II (an arbitration agreement in writing) or a duly certified copy thereof.

Article V sets out the reasons for refusal to enforce an award and these include:

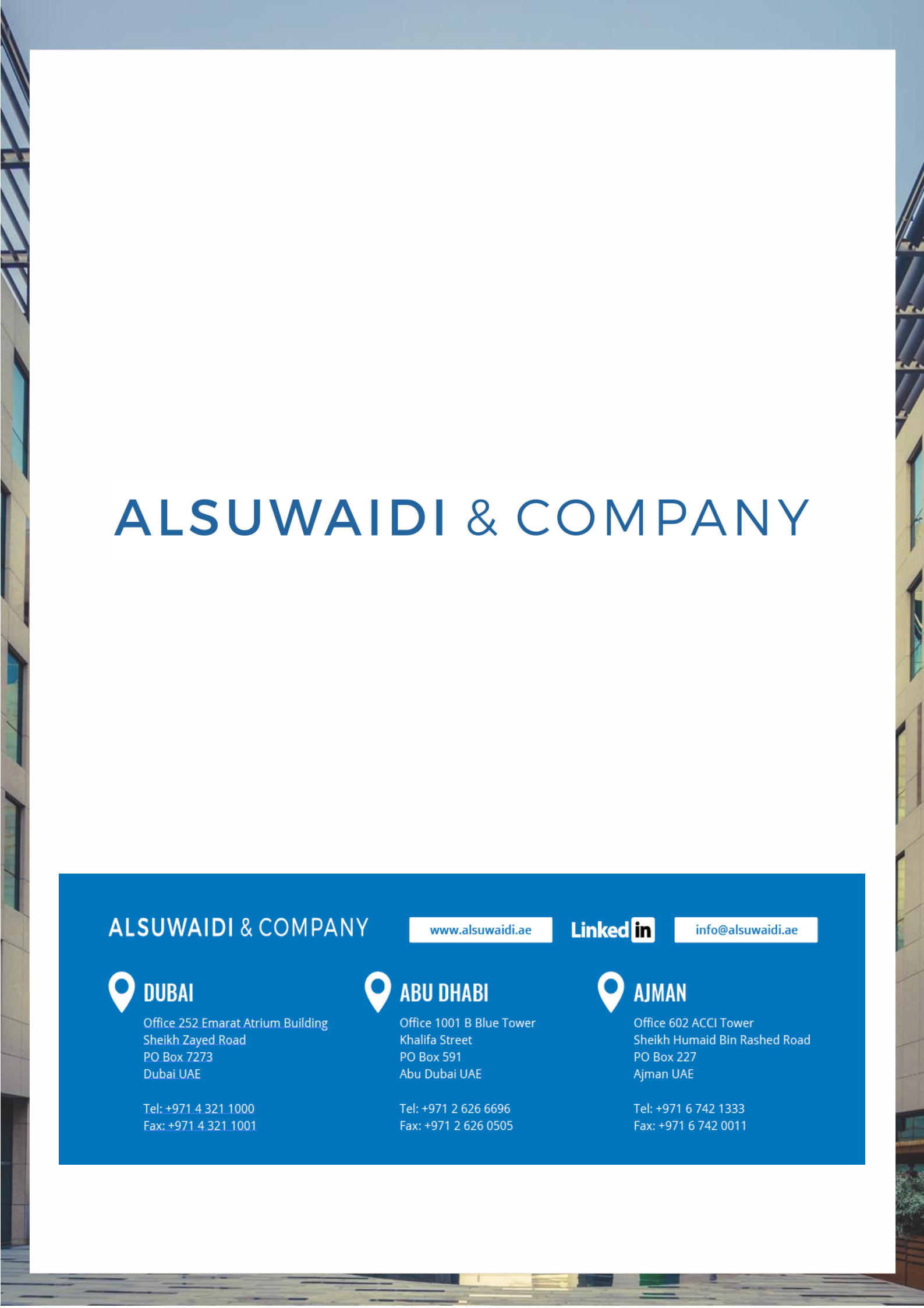
- the incapacity of a party entering into the arbitration agreement;
- invalidity of the arbitration agreement;
- no and/or incorrect notice given to the Responding Party of the appointment of the Tribunal or of the proceedings or was in some other way prevented from being able to present their case;
- the award decides a dispute not within the terms of submission to the Tribunal or beyond the scope of its terms;
- the composition of the Tribunal was not in accordance with the arbitration agreement and/or the agreement of the parties and/or was not in accordance with the law of the jurisdiction where the award was made;
- the dispute was not capable of settlement under the laws of the relevant country;
- 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;

- the award was against public policy of the relevant country.

The process of enforcement in both the Onshore and Offshore courts need to be checked before embarking on enforcement or challenging the award as they may differ depending on the court that will be seized of the matter.
An additional issue to be considered when enforcing an award in the UAE is the question of parallel proceedings having been commenced in the Onshore as well as the Offshore courts. This is particularly relevant where the DIFC is being used as a conduit jurisdiction to enable enforcement in the UAE.

In order to resolve conflicting jurisdiction issues where parallel proceedings have been commenced Dubai has set up the Joint Judicial Committee to review and resolve such conflicts. Currently the use of the DIFC as a conduit jurisdiction is possible but limited to those cases where there is no conflict between the DIFC and Dubai local courts. This may change as test cases make their way through the DIFC courts and it is thought that the DIFC courts will increasingly become less restricted in enforcing foreign arbitral awards.

It is imperative that any holder of an arbitral award who wishes to enforce that award through either the Onshore or Offshore courts should consult an experienced lawyer to consider and advise on the best course of action.



ALSUWAIDI & COMPANY

ALSUWAIDI & COMPANY

www.alsuwaidi.ae

LinkedIn

info@alsuwaidi.ae

DUBAI

Office 252 Emarat Atrium Building
Sheikh Zayed Road
PO Box 7273
Dubai UAE

Tel: +971 4 321 1000
Fax: +971 4 321 1001

ABU DHABI

Office 1001 B Blue Tower
Khalifa Street
PO Box 591
Abu Dubai UAE

Tel: +971 2 626 6696
Fax: +971 2 626 0505

AJMAN

Office 602 ACCI Tower
Sheikh Humaid Bin Rashed Road
PO Box 227
Ajman UAE

Tel: +971 6 742 1333
Fax: +971 6 742 0011