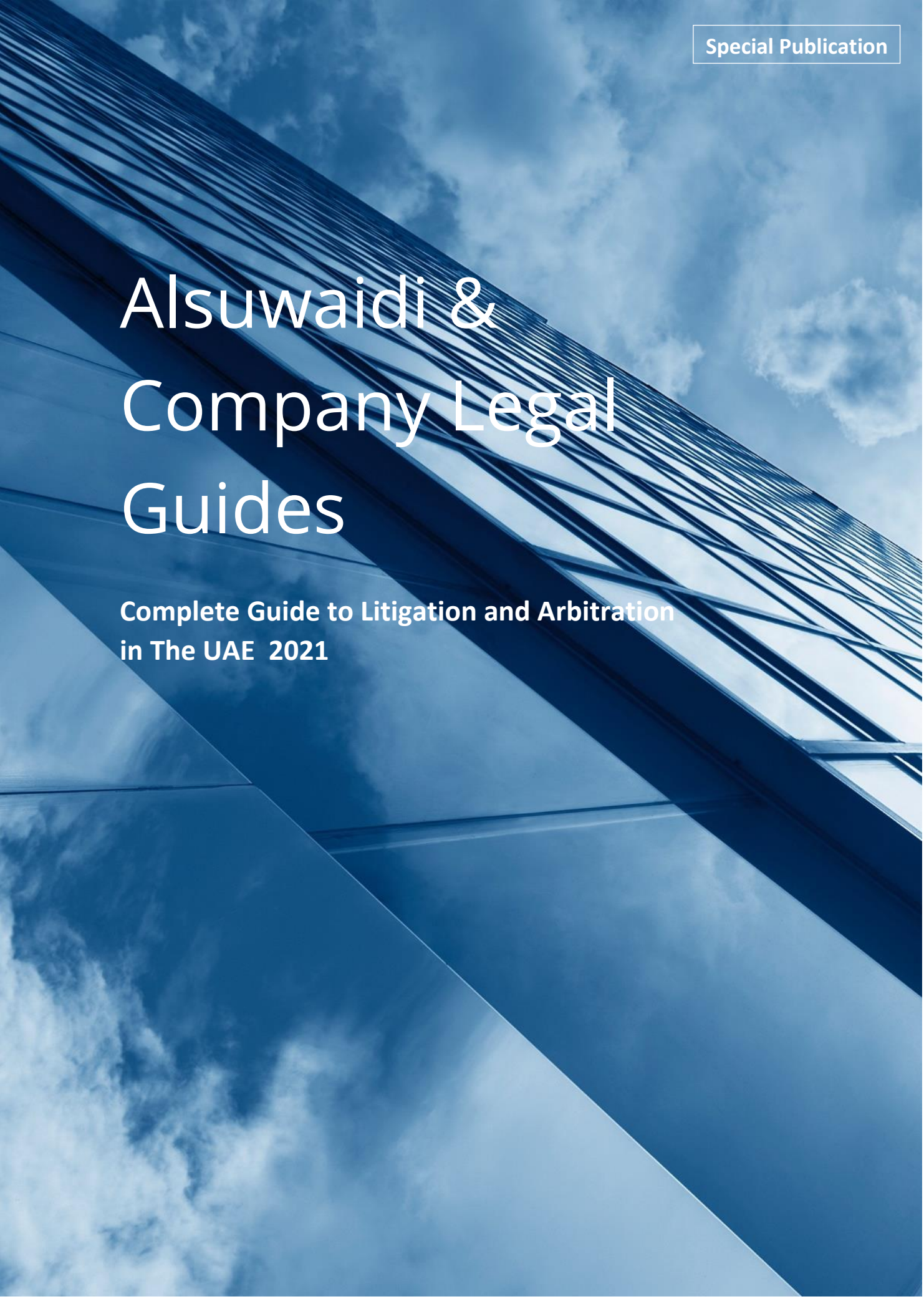


Special Publication

Alsuwaidi & Company Legal Guides

Complete Guide to Litigation and Arbitration in The UAE 2021

ALSUWAIDI & COMPANY

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.

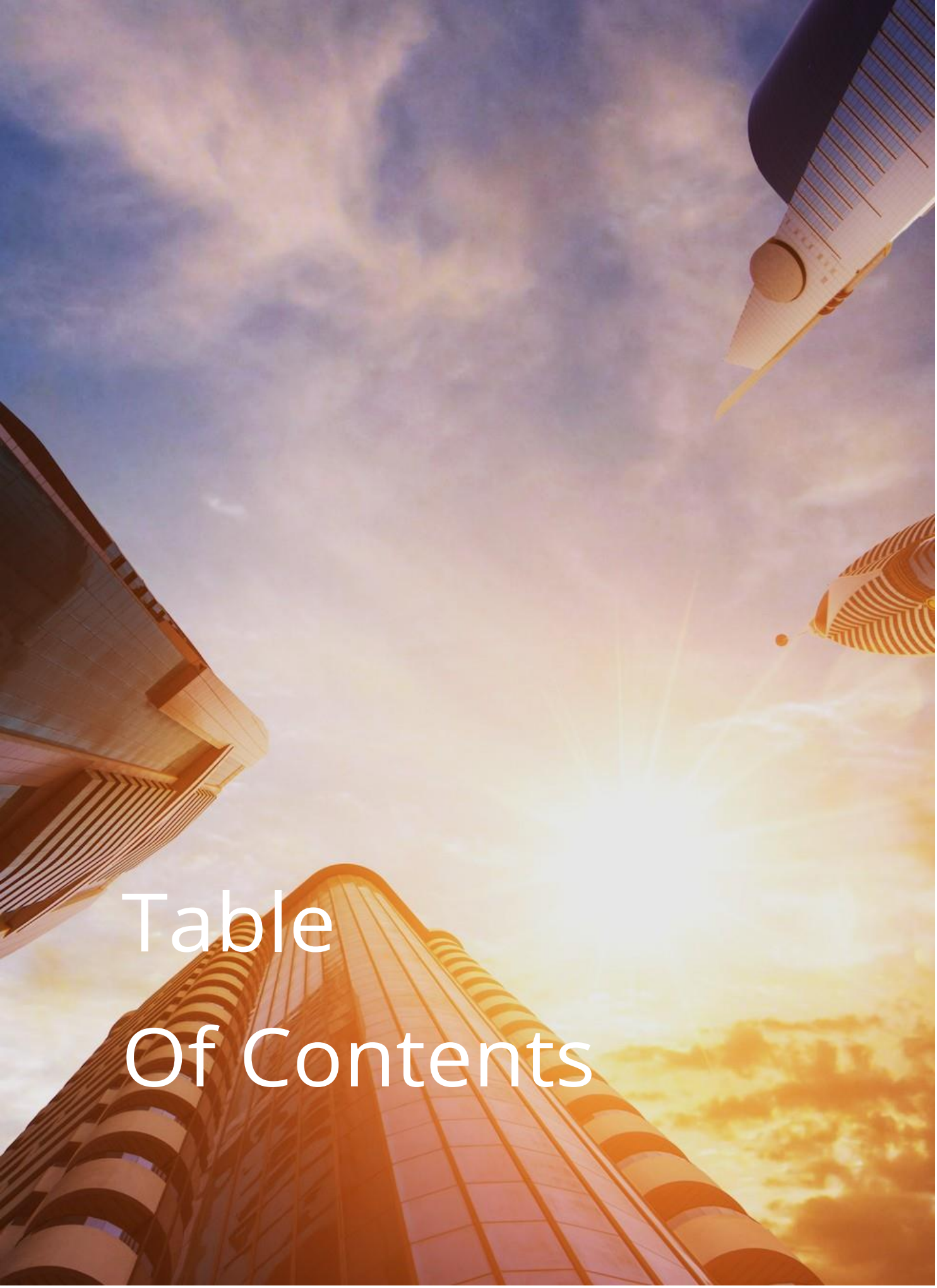
As an arbitrator Robert has been involved in matters concerning professional negligence, property, landlord & tenant, delay analysis, costs, variations, defects, interpretation of contracts, repudiation, and many other aspects of contract in the areas of building, civil engineering, mechanical & electrical, 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
- Technology and Construction Solicitors Association.
- Federation Internationale des Ingenieurs-Conseils International (FIDIC)
- 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 1

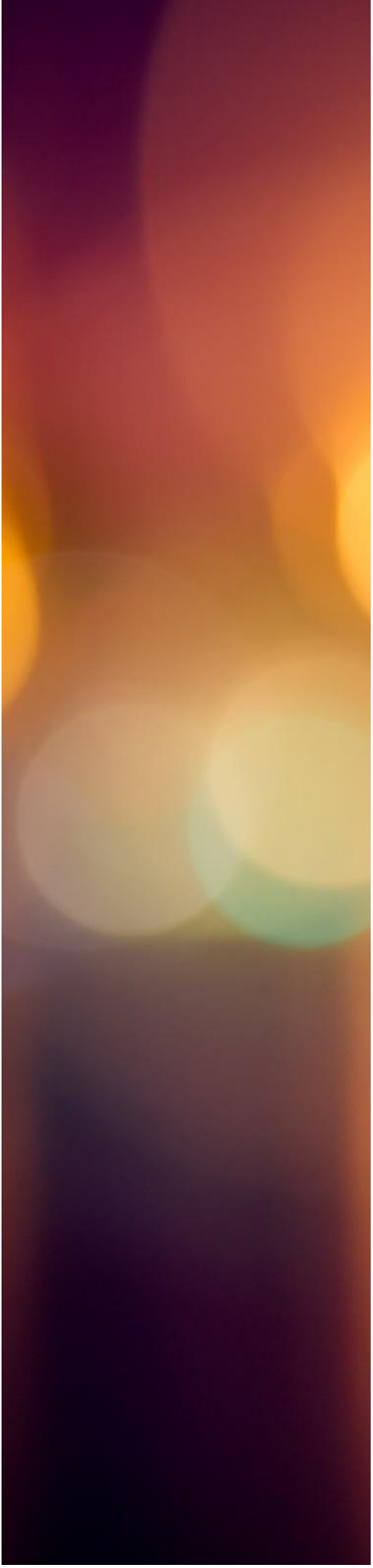
1.0 | Introduction

Alsuwaidi & Company is a leading Emirati law firm in the UAE with offices in Abu Dhabi, Dubai and Ajman. With eminent Emirati and International lawyers dealing with both civil and common law jurisdictions we are uniquely equipped to advise on disputes and conduct litigation & arbitration within the GCC region and beyond.

Alsuwaidi & Company was established in 1997 by Mohammed Alsuwaidi and has since grown into one of the foremost law firms in the UAE helping to support business and individuals in navigating a wide variety of complex and commercial challenges allowing them to prosper and thrive in this most complex of legal environments.

As a firm Alsuwaidi always puts its clients' interests first and brings its deep knowledge of the nuances found in cultural and social variations encountered in both commercial and private environments.

In this guide to litigation and arbitration we set out the unique and diverse practices encountered within the UAE which encompasses both civil and common law jurisdictions. Parties trying to resolve their disputes without a good understanding of their rights and options may find themselves with unforeseen outcomes which can and should be avoided. In presenting this guide we hope to ensure a better understanding of the various processes that are encountered along with a party's options in navigating a sometimes-difficult path to their best advantage.



1.1 Litigation

Alsuwaidi & Company's litigation practice is one of the most renowned and successful in the UAE and with a track record of over 90% wins since inception, our lawyers are robust in representing their clients' interest.

We are known in the local market for implementing creative strategies and for winning cases, utilising our diverse group of leading international and regional lawyers. We have the expertise to manage large-scale and completr6x litigation cases, which incorporate multi- jurisdictional issues, and we frequently represent regional and international clients in all courts across the UAE, including the
DIFC, the ADGM and Court of Cassation. We are adept in handling urgent applications and injunctions, ensuring all our clients' needs are dealt with in an orderly and cost-effective manner. Nothing
is left to chance, and we work in our clients' best interest so their businesses can flourish and grow.

1.2 Arbitration and alternative dispute resolution

Our alternative dispute resolution practice is skilled in managing local and international arbitrations. We are able to offer bespoke advocacy services and lawyers who are qualified arbitrators under the rules of all leading arbitral institutions, including Dubai International Arbitration Centre (DIAC) and the International Chamber of Commerce (ICC).

Our arbitration practice encompasses a range of matters including general commercial, construction, energy, and oil and gas disputes. Our dispute resolution team has extensive experience in dealing with matters such as the enforcement of foreign arbitral awards and monetisation of judgements.

1.3 Jurisdictions

a. Onshore Courts

The onshore courts are the main centres of litigation in the UAE, governed by civil laws and procedural laws in Arabic. For those who are not conversant with civil law procedures the hurdles encountered can seem formidable at first, not least because all proceedings and documents are in Arabic.

b. Offshore Courts

The designation of an offshore court is given to those courts set up within free zones where they have been given the freedom to adopt their own civil and commercial laws and procedures. Whilst not all free zones have adopted their own laws and procedures the Abu Dhabi Global Market (ADGM), Dubai International Financial Centre (DIFC) and the Qatar Financial Centre (QFC) have. All of these free zones adopt a common law system with common law procedures and are conducted in English. For many parties there may be a choice of which jurisdiction to resolve their disputes in and where this choice exists the procedures that are to be adopted and the actions that can be taken become an important consideration depending on the nature and type of dispute to be dealt with.

c. Arbitration

Away from litigation the parties may agree or have agreed to arbitration within their contracts. Arbitration may be conducted in onshore or offshore jurisdictions and can involve the laws and procedures from both the civil and common law. This is a matter of choice by the parties when entering into their contracts and
it is important to decide at the outset what substantive law is to govern the contract and what procedural law will govern the arbitration itself. In most arbitration centres within the GCC region a system based on common law procedures is adopted.

1.4 Power of attorney

a. Why are they needed?

It is important to understand the requirement within the UAE for anyone acting on behalf of a company or individual to have the authority to so act. In the main
this is either set out within the company's memorandum of association and/or minutes of board meeting.

Before any action can be taken on behalf of a client, a Power of Attorney (POA) will need to be provided giving the law firm the authority to represent them. This is a particular requirement in the UAE and in the
GCC region generally. The POA puts in place an agency relationship which allows the law firm to take steps on behalf the client and which will bind the client. Without such a relationship any actions by the law firm will not bind the client and will have no effect.

It should also be noted that the offshore courts such as found in the ADGM, DIFC and QFC do not require a POA in order to represent clients. It is accepted within these courts, as in most common law jurisdictions, that a lawyer has the authority to represent his or her client and a specific document showing such authority is unnecessary. Should any question arise then a simple confirmation by the client will suffice.

The POA should be carefully worded so that the devolved powers given to the agent are clearly set out and do not allow arguments as too its validity or the power so given to the lawyer in representing his or her client. It is not unusual for POAs to be challenged in order to derail proceedings and such challenges by the opposing party are commonplace. Accordingly, a POA must be put in place at the commencement of any action and, if possible, at the time when an instruction is given to the law firm to undertake proceedings.

b. Scope

POAs can be widely drafted to provide the law firm with general powers to act on behalf of a client. For long standing clients, this is sensible as it allows the law firm to act on different matters at different times without having to provide a new POA for each and every matter. Conversely, for clients who will only occasionally need the services of a law firm it may be better to draw up specific POAs for each matter
setting out in detail the acts that are authorized by the client. Where the matter is a dispute, the POA should encompass all actions that may need to be taken on behalf of the client including filing for and conduct of the proceedings, negotiations, settlement, interim/ conservatory steps, appeals, enforcement, etc. If steps that become necessary are left out of the POA, a new and separate POA will have to be provided otherwise the matter could grind to a halt.

c. Language

It may seem obvious but as the POA will need to be provided to the courts it will have to be set out in Arabic. In many cases, the POA will also be bi-lingual (for example Arabic and English) so that the client, if not an Arabic speaker, will know what has been drafted and of course what they are signing. No client should be asked to sign a document that they cannot read.

d. Representation

The POA should include the names of the lawyers representing the client as well as some additional lawyers to ensure that the representation being given to the client is not interrupted due to the lawyer handling the matter no longer being able to so do.

e. Validity and Notarisation

All POAs will need to be notarised by a Public Notary who is authorised by the Courts. The Notary will not only witness the signatures but will also examine the POA to ensure that it is compliant and that the person granting the powers in the POA does in fact have the authority themselves to devolve such powers through the POA. In this respect, the Notary will need to be sure and examine the documents being provided as proof of such authority allowing the grant of the powers
set out in the POA. It is not unusual for the POA to be rejected by the Notary such that amendments may be needed, or other proof of authority provided before it can be notarised. It is therefore very important the any necessary POA is prepared in good time so that issues do not arise in the carrying out of the lawyers' duties.

f. Arbitration

Arbitration needs special mention when discussing POAs. Arbitration is a contractual process that derives its powers from an agreement by the parties. The agreement to arbitrate is usually set out in the contract but is an agreement that may be entered into at any time.

The arbitration agreement is a stand-alone agreement even when set out as a clause within a contract. This is necessary to allow an arbitral tribunal to decide disputes that may include the validity of the contract. Additionally, arbitration agreements limit the court's powers to deal with disputes arising out of or in connection with the contract and will require a party to grant specific powers to its agent that allows the agent to enter into the arbitration agreement on behalf of the party. Without the grant of such powers the arbitration agreement will be invalid. This is reflected in the UAE Federal Law on Arbitration (Articles 4 and 53.1(b) of Federal Law No. 6 of 2018) and Article 58(2) of the Civil Procedures Law. If the person signing the contract did not have power to enter into an arbitration agreement, then the arbitration itself and/or any subsequent award can be challenged in court. Failure to abide by these requirements can and will lead to an award being set aside and not enforceable.

It is advisable for any party entering into an arbitration to ensure that the requisite authority can be evidenced and to carefully word the POAs showing an unambiguous chain of authority that extends to the legal representatives. These should be sufficiently well drafted so as to allow the agents/legal representatives signing the Terms of Reference in an arbitration to also have the power to enter into arbitration agreements which can ensure that even where a questionable arbitration agreement has been provided it will have been legitimised within the Terms of Reference.

2.0 | The Different Forums For Resolving Disputes – The Onshore Courts

In order to avoid confusion, we discuss below all of the forums used within the UAE setting out each stage of the processes including pre-action processes, interim/conservatory steps, preparation and evidence, trial, appeals, enforcement and costs.

2.1 Pre-Action Stage

The Pre-Action Stage can be overlooked when trying to issue a claim in the Courts. However, it is important to consider what, if any, pre-action steps should be taken to ensure that when the claim is issued it will
be as watertight as possible. It is therefore imperative for any Claimant to discuss the claim with their lawyers to obtain good legal advice and to map out the strategies to be used to attain the Claimant's objectives.

The following matters should be ascertained before commencing a claim:

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

2. Is the Defendant solvent and not a man of straw? It is pointless expending large sums of money chasing a Defendant 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 must be followed before commencing a claim in the Courts (or 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?

2.2 Limitation

General rules relating to limitation periods in UAE are contained in Federal Law No 5 of 1985, UAE Civil Transaction Law. Usually, a claim cannot be brought after 15 years, unless specific provisions state otherwise. Subject to certain exceptions, the limitation periods are:

Contracts — Fifteen years (Article 473 of the Civil Transactions Law).

Cheques — One to Three years (Article 638 of the Commercial Transactions Law).

Insurance — Three years (Article 1036 of the Civil Transactions Law).

Maritime Insurance — Two years (Article 399 of the Maritime Commercial Law).

Torts (causing harm) — Two years (Article 298 of the Civil Transactions Law).

Construction Contracts (Defects) — Ten years (Article 880 of the Civil Transactions Law).

Carriage of Goods by Sea — One year (Article 287(a) of the Maritime Commercial Law).

Employment — One year (Article 6 of the Labour Law).

2.3 Disclosure

Unlike common law processes, the civil courts do not have a process for disclosure. Thus, any evidence must be that in the possession of the Claimant or obtainable from a third a party and be capable of proving the claim that is being made. Does the Claimant have original documents or simply copies? Civil Courts often require original documents to be produced and if this is not possible, it can affect the outcome of the claim.

2.4 Legal Notice

It is common before any legal proceedings are commenced for the Claimant to send, by way of their lawyers, a Legal Notice briefly setting out the background of the dispute, contract or other requirements and the claim itself which if not complied with in a specified amount of time will lead to court proceedings being instigated. The UAE Law requires Legal Notices in the case of termination of a contract or where a landlord wishes to evict a tenant. In other cases, the Claimant should be advised by their lawyer whether a Legal Notice is required by law or not. If a Legal Notice is a prerequisite to the commencement of proceedings, then any claim commenced without a Legal Notice will find itself open to challenge by the Defendant.

2.5 Interim Remedies

Precautionary Attachments can be obtained in order to freeze the assets of a Defendant who may attempt to conceal or dispose of their assets prior to any judgement that may be made against them. In order to obtain the grant of a precautionary attachment, the court will need to be satisfied that the application is justified and necessary. To do this, the Claimant would need to show the court that there is a good claim against the Defendant and that there is a real risk of dissipation of the Defendant's assets that would prevent the Claimant from being able to enforce any judgement that the court hands down. The grant of a precautionary attachment is discretionary, however, if the court is not initially satisfied that the evidence supports the Claimant's application, they may require the Claimant to provide any additional evidence that they deem necessary to grant the application. Further, it should be noted that the Civil Procedure Law requires a substantive claim to be issued within 8 days of the court's grant of the Claimant's application for the precautionary attachment.

Other interim remedies that are available in the onshore courts include the grant of a payment order (Cabinet Resolution No. 33 of 2020) without having to bring

2.6 Language

The onshore courts' proceedings are conducted under the Arabic language and any documents that are
not in Arabic will need to be translated by official translators. This of course gives rise to the risk that the translated document does not properly reflect the original which could cause difficulty in proving the claim as that document's meaning could be misunderstood

2.7 Commencing a Claim

A party wishing to commence a claim in the onshore courts will need to ensure that the claim is commenced in the correct court by reference to both the Emirati state (where the Defendant is domiciled and where the damage has occurred) and the nature of the dispute being referred. Articles 20 to 41 of the Civil Procedures Law (Federal Law No. 11 of 1992) should be considered.

On deciding which court is the appropriate court the claim should be registered with the Case Management Office by submitting the Statement of Claim. This can be done electronically.

The Statement of Case must contain the following details:

- the Plaintiff's name, title, identification number (if any) or copy of ID card or any other document issued
- by a Government authority proving the Plaintiff's identity, profession, domicile, workplace, telephone number, fax or email; if the Plaintiff has no domicile in the state, they shall name an elected domicile
- as well as their representative's name, title, profession, domicile, workplace, fax number or email.

- the Defendant's name, title, identification number (if any), profession, domicile or elected domicile, residence, workplace, telephone number and their

an action before the Court of First Instance and where the applicant can show that the debt is due for immediate payment and that the whole claim is for
a debt of a specified amount or a moveable of a specified type and amount. Additionally, the court can issue
a travel ban where the debt is over AED10,000 or where it is necessary to prevent a child being taken abroad.

Once the matter has been registered and the case management office has collected the court fees, a case number will be allocated, and a first hearing date will be scheduled. The Defendant(s) are notified.

Service of the summons upon the Defendant is by the Court and will occur after the hearing date has been set. The UAE Executive Regulations of Civil Procedures Law, as amended, provides that the service of the summons shall be carried out at the Claimant's request, or by order of the Court, or the Case Management Office through the Process Server, or in the manner specified by the Regulations. The Court may permit
the Claimant, or their lawyer, to serve the summons although this cannot be by electronic means.

The summons may be served upon the Defendant wherever they are found, or at their domicile, or place of abode, or to their lawyer. If the Process Server is unable to find or serve the Defendant, a copy of the summons may be left with a spouse, relative, in law or servant living with them. If the Process Server cannot serve the summons in any other way, it can be served by affixing it to the door of Defendant's home or office.

Service of the summons may be affected by the Court by using Recorded Voice or Video calls, SMS, Smart Applications, Emails, Fax, any other modern technological means or as agreed by the parties.

representative's name, title, profession, domicile, workplace if they work for others, but in case the Defendant or their representative have no given
- residence or workplace, the last residence, domicile, workplace, postal address, fax number or email address shall be mentioned;
- the Court before which the lawsuit is filed;
- the date of submission of the statement of claim to the case management office;
- the subject matter of the lawsuit, requests and grounds thereof;
- the documents being relied upon, and if not in Arabic an official translation into Arabic; and
- the Plaintiff's signature or their representative's, after verifying their identities.

If the summons cannot be served for whatever reason the hearing will be adjourned to a later date and the Court can serve the summons by notification, normally by trying to effect service at the Defendant's last known address.
If this fails, the court will order service of summons
by publication. The Plaintiff or their representative will carry out this procedure by arranging publication with a newspaper of general circulation issued in Arabic
in the State and in another newspaper issued in a foreign language and will be deemed to have been served.

In the case of cross border service, any international, bi-lateral or regional treaties or conventions will need to be considered. Our lawyers will be able to advise on any steps that need to be taken in such cases.

2.8 Challenges to Jurisdiction

It is not unusual for a Party, normally the Defendant, to try and avoid the action brought against it by challenging the court's jurisdiction and thus have the matter thrown out.

Jurisdiction is authority granted to Forum or Tribunal that has been legally constituted to administer and decide matters brought before it. Jurisdiction can be chosen in certain circumstances by a provision within the contract between the parties or simply by the place in which the parties reside, or where the contract has been constituted. It is important for parties that are engaged in dispute resolution to understand what jurisdiction governs their contract or other matter that is disputed between them. If a party does not challenge the Forum or Tribunal's jurisdiction at an early enough juncture it may be found that they have waived their right to challenge that Forum or Tribunal. Thus, if there is a question of jurisdiction to be raised this should be undertaken at the earliest possible opportunity.

In the UAE, the court's jurisdiction arises for the Civil Procedure Law (Article 20 to 23 of Federal Law no. 11 of 1992) which states:

Article 20
"With the exception of the real actions related to a real estate abroad, the courts shall have the jurisdiction to examine the actions prosecuted against the citizen and the actions prosecuted against the foreigner who has residence or domicile in the state."

Article 21
"The courts shall have jurisdiction to examine the actions against the foreigner who has no residence or domicile in the state in the following cases:

- If he had an elected domicile.
- If the action is related to real estates in the state, a citizen's heritage,
- or an open estate therein.
- If the action is concerned with
- an obligation concluded, executed, or its execution was conditioned in the state or related with a contract required to be authenticated therein or with an incident occurred therein or bankruptcy declared at one of its courts.
- If the action has been instigated by a wife who has a domicile in the
- state, against her husband who had a domicile therein.
- If the action is concerned with
- an alimony of one of the parents or the wife or with a sequestered or with
- a minor, or with his next of kin or with a custody on fund or on person,
- in case that the claimer of the alimony, the wife, the minor or the sequestered has a residence in the state.
- If the action is concerned with the civil status and the plaintiff is a citizen or a foreigner who has domicile in the state, provided that the defendant
- had not a determined domicile abroad or the national law is imperatively applicable on the action.
- If one of the defendant has a domicile or residence in the state."

Article 22
"The courts shall have jurisdiction to settle the primary issues and the interlocutory requests on the original action falling under its jurisdiction, and they shall
also have jurisdiction to decide on every request related to such actions and which the good course of justice requires its examination therewith. They shall also have jurisdiction to order summary and precautionary measures which shall
be executed in the state even if they were not related to the principal action."

Article 23
"If the defendant has not appeared and the court does not have jurisdiction
to examine the action in accordance with the preceding articles, the court shall automatically decide its lack of jurisdiction."

Despite international recognition that parties are free to decide the jurisdiction that governs their contracts it is unlikely that an onshore court would refuse to hear a matter where the jurisdiction falls within their domain and is covered by the above noted provisions. This can lead to conflicts between different Emirates where actions have been started by each party in different states. In such cases, the Union Supreme Court will decide the matter of jurisdiction. It is therefore wise, when choosing UAE jurisdiction, to ensure that any contract sets out which Emirati laws will govern it.

In most cases the only time when an onshore court will cede jurisdiction is when a valid arbitration clause has been agreed between the parties and ideally this should be written into the contract itself.

2.9 Judgement in Default

Where a Defendant does not respond to the claim served upon it within the time stipulated by the court rules or at all, the court may at the first hearing give judgement to the Claimant. Unlike some other jurisdictions, the Onshore courts do not have a procedure where the Claimant makes an application for judgment in default but rather it is a matter of the court's discretion whether at the first or perhaps a subsequent hearing to give judgement in favor of the Claimant. At the first or subsequent hearing the Claimant's advocate may request the court to issue its judgement following the Defendant's failure to respond.

2.10 Case Management

Case management is the process where the Court directs and controls how the case proceeds and what steps are to be taken to ensure that the case is dealt in a sensible and time efficient manner. It is the Case Management Office, an adjunct of the Court, which registers the case, serves notices, and exchanges memoranda and documents to the parties. A date will be set for the first hearing, and this is normally about 10 days from service of the summons upon the Defendant(s). The Court thereafter sets dates for each further hearing and will direct whether an expert is required to produce a report. Only when the court is satisfied that all evidence and memoranda has been received as is considered necessary will they consider and write a judgement.

As will be appreciated the parties will have little input into the case management save where applications are made or as noted above, judgement in default is requested.

2.11 Evidence

a. Disclosure of Documents

The Onshore Courts only require parties to provide the documents that they rely upon in support of their case and are under no obligation to produce documents that may support the Defendant's case.

However, under Article 18 of the Federal Law No. 10 of 1992 on Evidence in Civil and Commercial Transactions ("UAE Evidence Law"), a party will
be entitled to make a request to the Court to order the other party to produce a document where:

- The law permits production; or
- The document is a document that is jointly held by the parties (ie where the document is for the benefit of both parties and/or shows the parties' mutual obligations and rights; or
- Where the other party has relied on the document at any stage of the proceedings.
- In reality, the ability of a party to obtain documents from the other party is extremely limited and can have a significant effect on the litigation and party's chances of success. If a party does not have the documents that can prove its claim, then there will be a good chance that the claim will fail. It should also be borne in mind that the Court will give pre-eminence to original, signed and official documents which allows parties to request that the originals of documents relied upon are produced which can cause significant delays to the proceedings.

b. Admissibility and Burden of Proof

The Onshore Courts do not have rules that limit the admissibility of evidence as would be found in common law jurisdictions. Rules relating to privilege and hearsay do not exist and it would be unusual for a court to refuse the admissibility of evidence that is provided by a party even where such evidence would be considered as inadmissible in other jurisdictions.
The Court is concerned with the authenticity of any evidence that is presented and indeed will order the production of original documents where necessary.

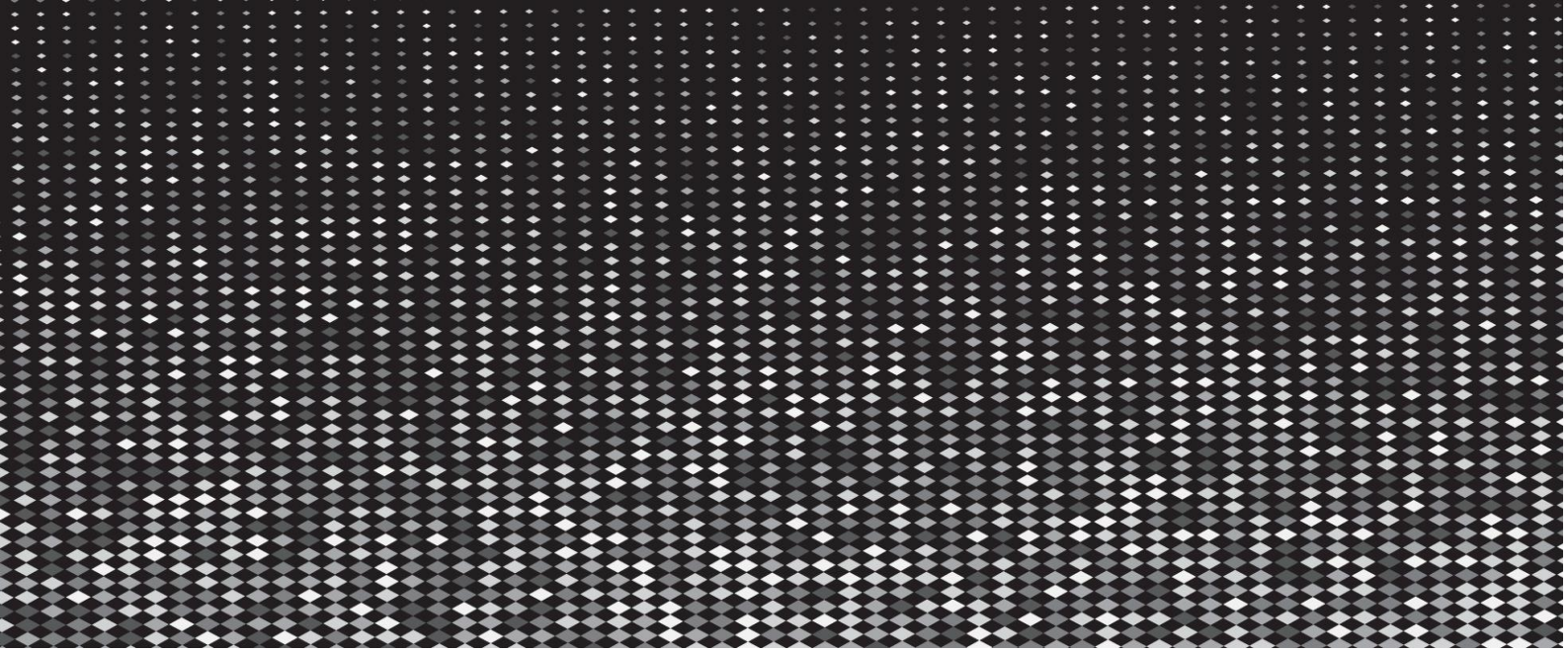
The burden of proof is simply stated under Article 1
of the UAE Evidence Law as being that "the Plaintiff has to prove his right, and the Defendant has to disprove it".

The evidence provided by the parties is weighed by the court and they will come to their conclusions without recourse to a specific standard to be applied. All the Court needs to do is to accept that the Plaintiff has proven their case or that the Defendant has disprove the Plaintiff's case.

c. Expert Evidence

In accordance with Federal Law No. 7 of 2012 (On the Regulation of Expertise before the Judicial authorities) the onshore Courts use experts to investigate the evidence in the case that has been brought before them and to investigate any issue of disputed law.
Such experts are appointed by the Court on its own initiative and will advise the Court on the central legal issues in the case. The experts may have closed
sessions with the parties and their legal representatives where the legal representative can informally advocate his client's case. The expert will gather evidence in these closed sessions and when completed will write a report that is then provided to the court. If witness evidence is to be considered at all it will be during this stage and by verbal or written statements to the expert. More usually the expert will be asking questions rather than expect submissions and witness statements being provided.

Whilst the Court does not have to accept the expert's report and conclusions it is unusual for the Court not to do so. It is important to understand that the expert's report is the most important document that the
Court possesses as it often will decide the case when adopted by the Court. Accordingly, the interaction with the expert(s) will be vitally important and must
be approached with great care and a clear understanding of the case and evidence that needs to be presented.



2.12 Case Preparation

The Onshore Courts do not hold trials where the case is presented, and the evidence examined orally. There is no 'trial' of the matter. The case is presented by the advocates in documentary form (Memorandum) with each party presenting their memorandum at each hearing as directed by the Court. In most cases, the advocate will be in attendance to answer any questions by the court which are mainly in relation to the service of documents and other administrative issues. It is thus imperative that care is taken with the case preparation including the evidence that is needed to prove the case as well as a consideration of the tactics to be used.

The hearings are conducted in Arabic and as they are mainly administrative and there is therefore no need for the legal representative to attend and it is quite usual for local counsel to be instructed to appear at the hearings. The proceedings will be held in Arabic which means that all documents relied on will need to be translated by a Ministry of Justice certified translator and in the case of oral evidence a court appointed translator will need to be in attendance should the witness not speak Arabic or where permission
is granted an employee of the witness' embassy can act as translator.

Whilst it is the case that witness generally do not appear at the hearing it is permissible for, on application to the Court, for a witness to provide oral evidence. This is rare and good reasons for such a request will be needed before the Court will allow oral evidence to be given.
Even if oral evidence is allowed it is by no means certain that cross-examination of the witness will be allowed, and where it is such cross-examination will be closely controlled by the Court. If a witness is required to give oral evidence, they will attend court and swear a religious oath in accordance with their religion.

Before the written memoranda are provided to the court, the parties must ensure that all relevant documents that are to be relied upon are translated into Arabic and that all Powers of Attorney are in place. When the final written memoranda have been received by the Court the Court will, if they are satisfied that all submissions and evidence have been provided, will notify the parties that the matter is closed and that
the Court will proceed to Judgement.

The Court of First Instance can take between 3 and 6 months to provide its judgment, if no expert is appointed. And between 9 and 12 months
to provide its judgment, if an expert is appointed.

2.13 Court of Appeal

Any party may appeal from judgement of the Court of First Instance. This is a right and does not require permission from the Court of First Instance or the Court of Appeal. An appeal may be on factual or legal grounds with the Court of Appeal consisting of three judges rehearing the substantive dispute.

It should be noted that a party must file its appeal within 30 days of the Court of First Instance Judgement.

The Court of Appeal can take between 3 and 5 months to provide its judgement.

2.14 The Court of Cassation

The Emirates of Dubai and Ras Al Khaimah have their own Courts of Cassation with all other Emirates having a right of Appeal from judgements of their Courts of Appeal to the Federal Supreme Court based in Abu Dhabi. In all cases an appeal to the Court of Cassation or the Supreme Court may only be on a point of law.

Any appeal to the Court of Cassation or Supreme Court must be filed within 60 days of the Court of Appeal Judgement. In certain circumstance this time limit may be extended but party are advised not to rely on a possible extension as any application to extend can be refused.

The Court of Cassation or Supreme Court can either remit the matter back to the Court of Appeal for further substantive hearings and a further judgement or give final judgement from which there is no further appeal. Should the matter be remitted back to the Court of Appeal then any judgement given by the Court of Appeal will again be capable of an appeal to the Court of Cassation or Supreme Court.

The Court of Cassation or Federal Supreme Court can take between 3 and 5 months to provide its judgement.

PART 2

A |

Introduction

3.0 THE OFFSHORE COURTS

The Offshore Courts are located in the Dubai International Financial Centre (DIFC) and Abu Dhabi Global Markets (ADGM). Both of these are 'Free Zones' meaning that they have been granted power by the UAE Federal authorities to set up and enact their own laws and legal practises. Both of these free zones have chosen to enact common law as the governing law with courts that have legal systems that are similar to the courts found in England and Wales. This has resulted in a significantly different set of rules and processes to that found in the Onshore Courts in the UAE and any party using these courts must be alive to the need to prove their case using oral evidence and to abide by the burden of disclosure of all relevant documents in a dispute, not just those documents upon which the party wishes to rely upon to prove their case.

The Offshore Courts are not restricted to using Emirati Advocates to present a party's case with lawyers conversant in the common law procedure being able to act and present cases before those courts. The DIFC and ADGM Courts have systems for the registration of suitably qualified and experienced lawyers for the preparation and presentation of cases. If a lawyer is not registered, then they would be unable to act in these courts. Al Suwaidi & Company is registered and able to act in all courts throughout the UAE including the DIFC and ADGM Courts.

3.1 Pre-Action Stage

The Pre-Action Stage can be overlooked when trying to issue a claim in the Courts. However, it is important to consider what, if any, pre-action steps should be taken so as to ensure that when the claim is issued it will be as watertight as possible. It is therefore imperative for any Claimant to discuss the claim with their lawyers to obtain good legal advice and to map out the strategies to be used in order to attain the Claimant's objectives.

The following matters should be ascertained before commencing a claim:

1. The identity of the Defendant. Whilst this may appear obvious it is always wise to be sure of the Defendant's identity before issuing a claim in the Courts. Who is responsible for the loss which may have been incurred or is there a joint responsibility for the loss?
2. Is the Defendant solvent and not a man of straw? It is pointless expending large sums of money chasing a Defendant 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 the Courts (or 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. Are the Offshore Courts the correct forum for the dispute?

3.2 Limitation

In the DIFC Courts the following limitations will apply:

- Breach of Contract – Six Years from a breach of contract or from knowledge of Fraud. (Article 123 DIFC Law 6 of 2004)
- The parties to a contract may reduce the limitation to a period of not less than one year. (Article 22 DIFC Law 7 of 2005)
- Law of Obligations – 15 Years from cause of action. (Article 9 of DIFC Law 5 of 2005)
- Employment Claims – Six months from date of termination or from the date of the matter complained of. The court may dis-apply this period if circumstances justify the court in so doing. (Articles 10 & 61 DIFC Law 2 of 2019)

3.3 Disclosure

Disclosure is set out within DIFC Court Rules 28 and ADGM Court Rules 86. These rules are reflective of each other and relate to electronic and hard copy documents. The parties are required to produce those documents upon which they rely, and such other documents as may be required by law, rule or practice direction.

Where a Party considers that documents in the possession or control of the other party have not been produced, they can/may request the production of particular documents or classes of documents by an application to the Court. Any such application must set out not only the documents required to be produced but also the reason why the document(s) are relevant and material to the dispute and would assist the court in the trail of the matter.

3.4 Language

The Offshore Courts are conducted in English.

3.5 Legal Notice

It is common before any legal proceedings are commenced for the Claimant to send, by way of their lawyers, a Legal Notice briefly setting out the background of the dispute, contract or other requirements and the claim itself which if not complied with in a specified amount of time will lead to court proceedings being instigated. Whilst a legal notice may not be a prerequisite to commencing a claim in the DIFC and ADGM Courts it is advisable to serve such a notice as this will allow the other party to recognise that an action is to be commenced and allows for the possibility of settlement prior to any such action being commenced.

3.6 Interim Remedies

The Offshore Courts being based on common law procures are fully conversant in dealing with applications for interim remedies which include anti-suit injunctions, interim injunctions, freezing orders, disclosure orders, interim payment orders, interim declarations, orders for the sale of property and property preservation orders.
Whilst both the DIFC and ADGM Courts have similar rules in respect of interim remedies it is the case that the DIFC Courts Rules are wider in their reach giving guidelines as to the manner and detail required in the application for interim remedies. It is of course important to ensure that the Court has jurisdiction under its Rules to consider and decide any such application for interim relief and to ensure that the relevant tests for interim relief are applied. The various tests that are used within the English Courts are a useful guide and should be followed. Generally, the Courts will expect to see the following:

- A good arguable case;
- A serious question is to be decided;
- Whether damages would be an adequate remedy rather than an injunction; and
- A consideration of the balance of convenience.

In an application for a freezing order the courts will wish to know the nature and location of the assets and whether there is a serious risk of dissipation of those assets.

It is also to be noted that in many urgent cases it is possible to make an ex-part application to obtain the order so long as the applicant is willing to undertake to pay any damages that arise should the order be rescinded when the Court hears submissions at an interparty hearing which will be set down shortly after the ex-parte hearing and issue of the requested order.

3.7 Commencing a Claim

A claim is commenced in the Offshore Courts and will need to comply with the relevant Court Rules. Those rules are set out below for both the DIFC and ADGM Courts.

a. DIFC Courts

All claims to be commenced in the DIFC Courts are encouraged to be filled electronically using the online e-filling system of the DIFC Court. This by far the most effective method for filing a case.

i) Small Claims Tribunal (SCT)

The SCT is empowered to deal with disputes that do not accede AED500,000, where the dispute involves employment issues of any value (where the parties agree to the SCT hearing the matter), or where the parties agree that their dispute can be dealt with by the SCT so long as the value of the dispute does not accede AED1,000,000.

The claim is commenced in the SCT by requesting the SCT Registrar to provide a claim form, filling in

the claim form which shall include the reasons for the remedy that is required and paying the relevant Court fee.

ii) Court of First Instance

Part 7 Claims

This is the most widely used type of claim issued in the DIFC Courts. The claim form is intended for matters that are in excess of AED500,000 or otherwise would be suitable for the SCT and which involves matters of fact and law. The claim is commenced by filling in the claim form and paying the relevant Court Fee.

Part 8 Claims

A Part 8 Claim should only be used where the dispute does not require matters of fact to be decided (or at least where the matters of fact in dispute are minor in nature) or where the Court rules/practice direction require a Part 8 Claim. Any Claim should make clear that it is a Part 8 Claim and clearly set out the matter to be decided along with the remedy that is required. In most cases a Part 8 Claim is used to decide the interpretation of a particular contractual clause and/or an issue of law. The claim is commenced by filling in the claim form and paying the relevant Court Fee.

iii) Technology and Construction Division (TCD)

Within the DIFC Courts system there is a specialist division that deals exclusively with matters and disputes related to technology and construction matters. Part 56 of the DIFC Court Rules allows claims to be heard by the TCD if they involve the following types of claim:

- building or other construction disputes;
- engineering disputes;
- claims by and against engineers, architects, surveyors, accountants and other specialised advisers relating to the services they provide;
- claims by and against the DIFC or any DIFC Body relating to their statutory duties concerning the development of land or the construction of buildings;
- claims relating to the design, supply and/or installation of computers, computer software and related network and information technology systems and services;
- claims between landlord and tenant for breach of a repairing covenant;
- claims between neighbours, owners and occupiers of land in trespass, nuisance, etc;
- claims arising out of fires;
- claims involving taking of accounts where these are complicated; and
- challenges to decisions of arbitrators in construction and engineering disputes.

This list is not exhaustive.

The TCD is designed as a specialist Court that is experienced in and capable of considering complex engineering and technical matters with a set of tailored rules allowing such disputes to be dealt with more effectively and efficiently than may be the case before the general Court of First Instance. As noted by Chief Justice Michael Hwang:

> ***"The TCD has been designed around the particular characteristics of highly complex technology and construction disputes, which can be resolved much more speedily and efficiently with the oversight of specialist judicial expertise".***

iv) Court Fees

The SCT fees are based on 2% of the value of any employment matter with a minimum fee of USD100. For all other matters the fee is based on 5% of the claimed amount with a minimum fee of USD100.

The Court of First Instance Fees are also based on 5% of the claimed amount with a minimum fee of USD1,500 and a maximum of USD130,000. It should also be noted that currently the percentages and caps are as follows:

Up to USD500,000	5% of the value of the claim and/or the property with a minimum of USD1,500
USD500,000 - USD1 million	USD25,000 + 1% over USD500,000
USD1 million - USD5 million	USD30,000 + 0.5% over USD1 million
USD5 million - USD10 million	USD50,000 + 0.4% over USD5 million
USD10 million - USD50 million	USD70,000 + 0.15% over USD10 million
Over USD50 million	USD130,000

If the claim is non-monetary Part 8 claim the fee is set at USD5,000.

b. ADGM Courts

All claims to be commenced in the ADGM Courts are encouraged to be filled electronically using the online e-filling system of the ADGM Court. This by far the most effective method for filing a case.

i) Small Claims Division (SCD)

The claim is commenced in the SCD by requesting the SCD Registrar to provide a claim form, filling in the Claim Form (CFI 2) which shall include the reasons for the remedy that is required and paying the relevant Court fee. The maximum sum claimable under the SCD is USD100,000.

ii) Court of First Instance

Claim Form (CFI 1) should be used for claims in excess of USD100,000. If the matter does not involve a substantial issue of fact the Court's simplified procedure Rule 30 and Claim form (CF 6) can be used. In both cases the claim is commenced by filling in the claim form and paying the relevant Court fee.

iii) Employment Division

To commence an employment Claim Form (CFI 3) is used. The claim is commenced by filling in the claim form and paying the relevant fee.

iv) Court Fees

SCD fees are 1.5% of the value of the claim with a minimum of USD100 and a maximum of USD1,500.

Employment Division fees are 1.5% of the value of the Claim with a minimum of USD100 and a maximum of USD1,500.

Money and/or property claims exceeding USD100,000 are as follows:

USD100,001 - USD500,000	2.5% of the value of the claim
USD500,000 - USD1 million	USD12,500 + 2% over USD500,000
USD1 million - USD5 million	USD22,500 + 0.5% over USD1 million
USD5 million - USD10 million	USD42,500 + 0.25% over USD 5million
Over USD10 million	USD 55,000 + 0.15% over USD 10 million to a maximum of USD65,000

If the claim is non-monetary or unquantified damages claim the fee will be USD2,500.

3. 8 Service of the Claim

a. DIFC Courts

i) Small Claims Tribunal

The Court will serve the claim on behalf of the Claimant.

ii) Court of First Instance

Following receipt of the Claim the DIFC Court will issue the claim and the Claimant will have 4 months in which to serve the claim upon the Defendant unless the Defendant is outside the of the DIFC or Dubai when a period of 6 months will be allowed.

Service by the Claimant can be by personal service, courier, leaving the claim at a specified place (where no address for service has been specified and the Defendant does not have legal representation) or by means of electronic communication. It should be noted that in some cases the claim is to be served by the Court.

Following service of the Claim (where not served by the Court) the Claimant is within 7 days to file a certificate of service unless the Defendant has within that period filed the Acknowledgement of Service.

Special rules apply to service of the claim outside of the DIFC or Dubai.

b. ADGM Courts

i) Small Claims Division

The Court will serve the claim on behalf of the Claimant.

ii) Court of First Instance and Employment Division

Following issue of the claim by the Court the Claimant will have 4 months to serve the claim upon the Defendant unless the Defendant is outside the of the ADGM when a period of 6 months will be allowed.

Service by the Claimant can be by personal service, by email or other electronic communication, by serving at a specified place in accordance with Rule 17 or, where authorised by the Court, by an alternative method or at an alternative place.

Following service of the Claim (where not served by the Court) the Claimant is within 21 days to file a certificate of service unless the Defendant has within that period filed the Acknowledgement of Service.

It is to be noted that both DFC and ADGM have rules that allow service of the claim such that the Defendant cannot avoid the claim by refusing service or by not giving their current address.

In the case of cross border service any international, bi-lateral or regional treaties or conventions will need to be considered. Our lawyers will be able to advise on any steps that need to be taken in such cases.

3.9 Challenges to Jurisdiction

It is not unusual for a Party, normally the Defendant, to try and avoid the action brought against it by challenging the court's jurisdiction and thus have the matter thrown out.

Jurisdiction is authority granted to a Forum or Tribunal that has been legally constituted to administer and decide matters brought before it. Jurisdiction can be chosen in certain circumstances by a provision within the contract between the parties, simply by the place in which the parties reside or where the contract has been constituted. It is important for parties that are engaged in dispute resolution to understand what jurisdiction governs their contract or other matter that is disputed between them. If a party does not challenge the Forum or Tribunal's jurisdiction at an early enough juncture it may be found that they have waived their right to challenge that Forum or Tribunal. Thus, if there is a question of jurisdiction to be raised, this should be undertaken at the earliest possible opportunity.

Rule 12.1 of the DIFC Courts and Rule 38.1 of the ADGM Court Procedure are very similar and allow a Defendant to '*apply to the Court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have*'. In order to make such an application in either Court the Defendant must file and serve an Acknowledgement of Service and support the application with written evidence. In the DIFC Court an application must be made with 14 days of filing the Acknowledgement of Service whilst in the ADGM Court such an application must be made within 28 days of filling the Acknowledgement of Service.
Jurisdiction will be ceded by the DIFC and ADGM Courts where a binding arbitration clause has been agreed between the parties and, ideally, this should be written into the contract itself. Additionally, where it is clear that another court has jurisdiction (for example the Dubai Courts) the DIFC and ADGM Courts will cede jurisdiction.

3.10 Default Judgement

The rules in relation to 'Default Judgement' in the DIFC and ADGM Courts are in essence similar however the DIFC Court rules are more detailed. Despite this the processes in both courts allows the Claimant to apply for default judgement where the Defendant has failed to acknowledge the claim or provide a Defence.

The Default Judgement cannot be appealed in either court but may, on application of the Defendant, be set-aside and the Defence allowed to be issued and served. Any application to set-aside would need to show a good reason why the Defendant had failed to serve the Acknowledgement of Service and/or Defence as well as showing that the Defence had a real prospect of success or that there is some other good reason why the judgement should be set-aside. The Defendant is likely to be ordered to pay the costs of the application even if successful. The case would thereafter proceed normally as if the Default Judgement had not occurred.

3.11 Case Management

Unlike the Onshore Courts the Offshore Courts have case management conferences (CMC) which allow the parties to make proposals as to the way in which the case is to progress and allows consideration of the case, disclosure, witnesses, expert witnesses and the trial length and date. The powers for case management are to be found at Part 4 and Part 26 of the Rules of DIFC Court and Part 12 of the ADGM Court Rules.

The DIFC Court will set down a CMC of its own accord or by application from by the Claimant within 14 days of the date on which the Defendant has served its Defence. The CMC may be ordered to be in person before the judge or by electronic or telephone as considered appropriate. With relatively straightforward matters the Court may simply consider the papers/bundle provided by the parties and issue its Order for Directions without the need for any further input by the parties. Of course, if no Defence is served within the requisite time, the Claimant can apply for Default Judgement and the need for CMC will disappear.

The ADGM Court will automatically set down a date for the CMC which will be within 14 days of the Defence being served. The CMC will be by telephone or video conference although in certain cases the Court may order the CMC to be in person.

Parties in the DIFC Court prior to the CMC are to lodge a bundle with the Court including a completed CMC Information Sheet, the Statement of Case, Statement of Defence, Counterclaim and Defence to Counterclaim, Court Orders, Agreement (if possible) regarding disclosure of documents and directions as may be appropriate and a memorandum containing a short description of the case, a short summary of the procedural history and an agreed list of the important issues, both evidential and legal.

Parties in the ADGM Court prior to the CMC are to lodge a completed directions questionnaire, agreed directions (if possible) and an agreed list of significant issues in the case.

In both Courts the judge will consider and discuss with the parties the case and the directions that are necessary to ensure efficient and smooth progress of the case and will deal with any issues as to disclosure, witnesses and experts (if the need for and nature of experts is known).

It is usually unnecessary for the parties to attend the CMC as the court will normally only deal with the administration of the case and will not need to hear from the parties themselves. The Court will only expect the legal representatives to attend, be it on telephone, video conferencing or in person.

It should be noted that the Court has a wide range of powers and can make orders from applications by either party or make orders of its own initiative.

3.12 Evidence

The way in which evidence is attained and used in Offshore Court proceedings is comprehensive and relies on both parties producing documents, witnesses and expert witnesses to support and prove their case. Unlike the Onshore Courts it is expected and indeed demanded by the court rules that all relevant evidence is produced including any evidence that is unhelpful to a Party's case. In this regard the powers of the court in ordering production of documents is wide and if a party can be shown to be deliberately withholding evidence the courts has powers to take a view on that Party's behaviour and draw adverse inferences that could harm that Party's case.

It is thus vitally important for a Party to have properly investigated the evidence that is relevant to the case and disclose all such evidence as required under the Court's Rules.

Part 29 of the Rules of the DIFC Court governs the use and admission of evidence. Part 31 of the Rules of the DIFC Courts governs the use and admission of expert evidence.

Parts 14 to 16 of the ADGM Court Rules govern the use and admission of evidence. Part 17 of the ADGM Court Rules governs the use and admission of expert evidence.

In both the DIFC Court and the ADGM Court evidence is introduced through witness statements and those witnesses, including expert witnesses, will be expected to attend court to be cross-examined by the other party's legal representative.

Whilst the rules in respect of evidence are wide ranging and can appear to be complex the thrust of those rules is to ensure that both parties can present their case with the benefit of all the relevant evidence and to allow the courts to make their judgement based on all the relevant evidence available and of course the parties' submissions in relation to that evidence.

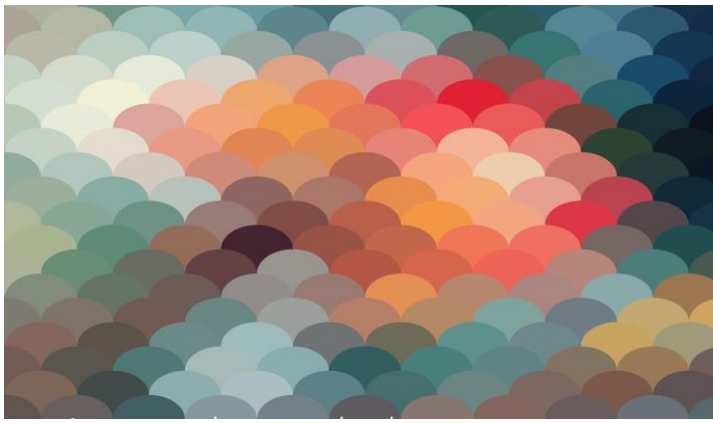
3.13 Confidentiality

Unlike the Onshore Courts the Offshore Courts have rules that protect communications that contain offers that are intended to settle the dispute between the parties. These are known as 'without prejudice' communications and so long as the parties make it clear that such communications are on a 'without prejudice' basis they cannot be produced in court for any reason save for an offer to settle in accordance with Part 32 of Rules of the DIFC Court and Part 18 of the ADGM Court Rules.

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 court will decide whether disclosure should be allowed or not. As set out at Part 28.28 of Rules of the DIFC Courts reasons for avoiding disclosure will include legal privilege and grounds of commercial or technical confidentiality and political or institutional sensitivity that a court determines is compelling. The ADGM Courts does not set out specific grounds for avoiding disclosure, but it is likely they will follow similar rules as stated by the DIFC Court.

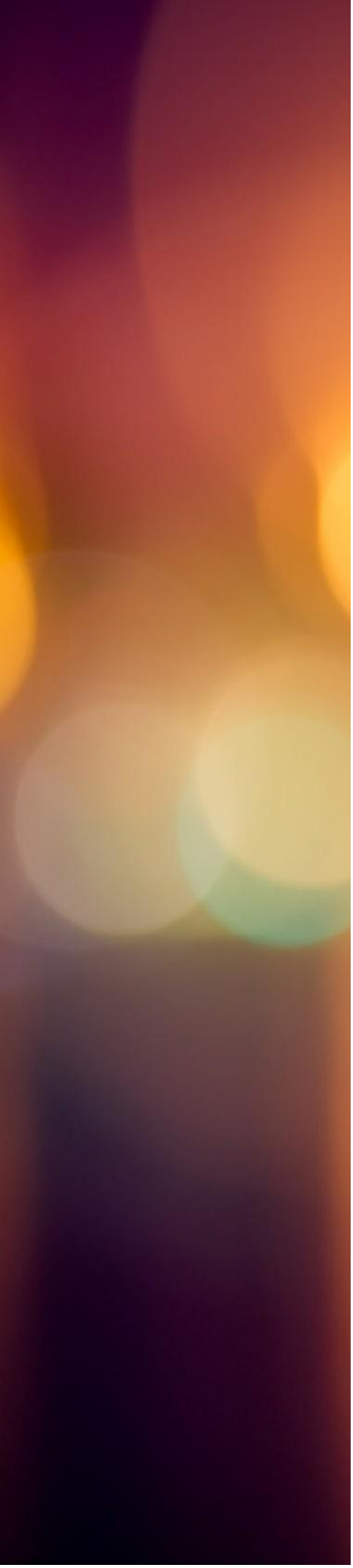
Where a party considers that certain documents should not be disclosed, we recommend that the status of those documents should be discussed with their legal representatives.

3.14 Case Preparation



As the focus of litigation in the Offshore Courts 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 Offshore Courts expect 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.

Prior to the hearing a 'Pre-Trail Review' (PTR) may be undertaken. In the DIFC the procedure is set out at Part 26 of the RDC where it is noted that if the Court considers it appropriate it will order a PTR between 4 and 8 weeks before the hearing. The ADGM procedure is slightly different and, as set out at Part 12 Section 82, allows for a pre-trail check list to be sent out by the Court to be completed by the parties and returned. If the Court considers that a PTR is necessary, it will notify the parties setting a date.



The PTR is used to ensure that all the necessary actions for trial have been completed or are being completed. In both Courts, and prior to the PTR itself, 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 judge will provide directions at the PTR to resolve those differences and that all necessary steps have been taken to ensure that the hearing commences on time and is kept to the time allocated for the hearing. Where possible a list of issues to be decided by the Court should also be 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 Court is concerned to keep the bundles to a manageable size and would wish to avoid all and every document to be 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 Courts encourage the use of electronic bundles, but this is to be agreed prior to or at the PTR. Bundles should be lodged with the Listing Office at least 14 days (7 days for ADGM) before the hearing.

As a matter of course the Court will record the hearing and transcripts can be requested by the parties. If Translators are to be used, they must be approved court 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 can 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 courts and legal representatives becoming much more familiar with the use of video links as well as problems that can sometimes arise in its use.

Where witnesses are unsure about the procedure in Court or are nervous it is permissible for the witnesses to be given an explanation of the court process as well as providing an understanding of how the evidence is to be given and how to respond to cross-examination (witness familiarisation).

3.15 The Hearing

The hearing in the courts will be presided over by a single judge. All parties are to be in the court room when the Judge enters, all parties will bow as a sign of respect. The judge will allow counsel to summarise their case before the witness evidence is given. The Claimant's witnesses will usually give evidence first. In most cases the evidence in chief will be the witness statement with, where necessary, some supplementary question by the Claimant's counsel. The Defendant's counsel will proceed to cross-examine the witness in detail putting the Defendant's case to the witness, as is appropriate to that witness. Following the cross-examination, the Claimant's counsel 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 Defendant's witnesses to give their evidence in chief, be cross-examined and if necessary re-examined. On completion of each witnesses' evidence the judge may ask questions, occasionally the judge may interrupt counsel's examination to ask a question but usually the judge 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 Defendant) 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 judge normally conducting the questioning. Counsel 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 counsel 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 court may set down a date and time for those submissions to be made before the court rather than just being provided in writing. This allows the judge to raise questions to counsel in order to clarify any outstanding matters.

The Court will hand down its judgement either orally, in simple matters, or in writing after the conclusion of the hearing and receipt of the closing submissions.

3.16 Court of Appeal

In both the DIFC and ADGM courts permission is needed to appeal.

a. DIFC Courts

Part 44 of the RDC governs appeals setting out the following:

- an application to appeal can be made at the hearing when the court hands down the judgment.
- an application to appeal can be made to the Court of First Instance within 21 days of the date when judgement was handed down, or as otherwise directed by the Court of First Instance.

- an application to appeal can be made to the Court of Appeal within 21 days of the date when judgement was handed down, or as otherwise directed by the Court of First Instance: and
- where the Court of First Instance refuses to allow an appeal an application to appeal can be made to the Court of Appeal within 21 days of the Court of First Instance's refusal.

b. ADGM Courts

Part 25 of the ADGM Court Procedure Rules governs appeals setting out the following:

- an application to appeal can be made to the Court of First Instance within 21 days of the date when judgement was handed down;
- an application to appeal can be made to the Court of Appeal within 21 days of the date when judgement was handed down; and
- where the Court of First Instance refuses to allow an appeal an application to appeal can be made to the Court of Appeal within 7 days of the Court of First Instance's refusal.

Permission to appeal will be allowed where it is found that the appeal would have a real prospect of success or some other compelling reason to allow permission to appeal.

The Appeal Courts will review the judgement of the lower court (they do not have a rehearing) and may refuse the appeal and affirm the lower court's judgement, annul, or set aside the lower court's judgement or make any other order the Court of Appeal considers appropriate.

In both the DIFC and ADGM the judgement of the Court of Appeal is final.

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:

9. 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?

10. 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.

11. 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.

12. 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?

13. 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.

14. 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?

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

16. Is arbitration the correct forum for the dispute?

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

18. 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.

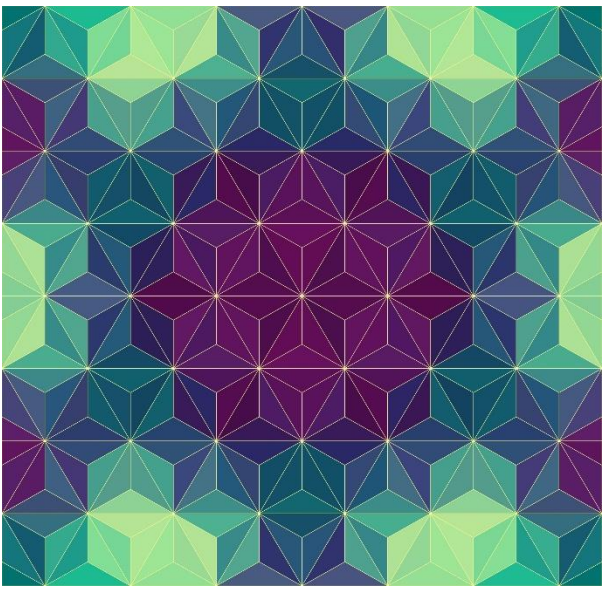
c. Witnesses

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;

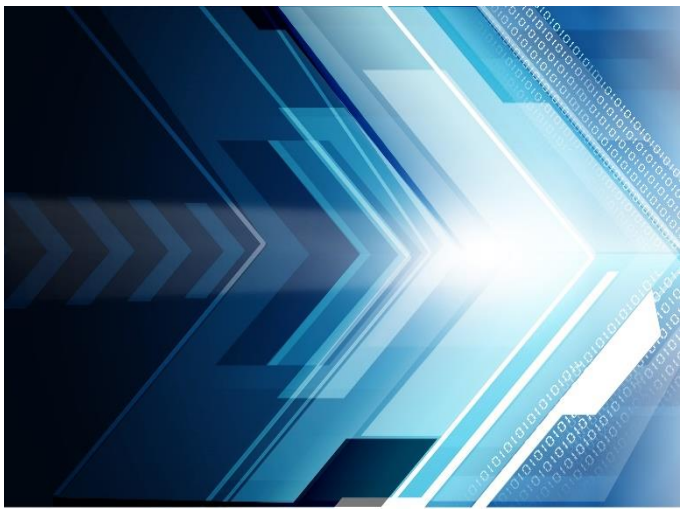
- no and/or incorrect notice given to the Responding Party of the appointment of the Tribunal or of the proceedings or was in some other way prevented from being able to present their case.

- 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

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