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Litigation

United Arab Emirates

Contributed by Charles Falconer and Peter Gray
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United Arab Emirates

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Doing Business In

Doing business in a new territory you may encounter unexpected problems. In this section we offer some basic advice. The best advice, of course, is to instruct a law firm based in the territory which knows how local problems can be overcome.

Chambers & Partners employ a large team of full-time researchers (over 140) working in their London office. They interview thousands of clients each year. The advice in this section is based on the views of clients with in-depth international experience.

Country Profile

The United Arab Emirates (UAE) has had one of the fastest growing economies in the region, driven by oil and global finance. Since the crash in 2008, in which the UAE, particularly Dubai, was hit hard, property prices have stabilised and economic growth has returned. Dubai's recovery was helped greatly in 2009 by a USD10 billion loan from Abu Dhabi.

The Arab Spring had little effect on the UAE, although in 2011 political activists called for greater public participation in governance. In response, the UAE government committed around USD1.5 billion to invest in infrastructure in the poorer emirates.

Since the initial boom in growth driven by oil and gas, the UAE has successfully diversified its economy and oil and gas now accounts for only 25% of GDP. The UAE now has a high standard of living and its GDP per capita is on a par with leading Western nations.

Business Culture

The small size of the UAE and the business community, centred in Abu Dhabi and Dubai, has a big effect on the business culture. It's a standard joke in the UAE: *"There are only a limited number of places you can go socially. People bump into each other a lot. We laugh about it."*

Despite its small size, the volume of business coming through the country is very high, with a huge, diverse ex-pat community – only around 10% of the population is Emirati. As one Egyptian lawyer puts it, *"we are all guests."* English is the lingua franca, which many Arabs and ex-pats share in common as their second language. Only 10% of business contracts are in Arabic, although all proceedings before UAE courts are in Arabic, except in the Dubai International Finance Centre (DIFC), which has a court system based on English common law.

Courtesy in business relations is important, and neglecting small talk and niceties risks losing a deal. In comparison to London or New York, business meetings in the UAE are described by one expert as *"less formal, but more polite: you won't be excused for being too direct, even if you are in the right, and it is key to take the time at the beginning to discuss other matters."*

One thing to pay attention to is the extensive involvement of the criminal system in the business environment (common in Arab nations) that you would not see in other countries. For example, there is also much stricter liability for managers of companies – criminal liability for a bounced cheque, or personal liability for default on a loan. *"You need to go in with your eyes open."*

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Legal Market

There is a divide in the UAE legal market between local firms and international firms, with the former having a monopoly on local litigation. A recent merger between an American firm and an indigenous UAE firm was aimed at bringing all operations under one roof, but external sources view this as an *“anomaly rather than as part of a trend.”*

For many UAE firms, both full-service and boutique, litigation is their bread and butter. *“We know the language and we have access to the courts.”* Following the financial crisis in 2008, which caused a decrease in banking, corporate and real estate work, international firms have switched their attention to litigation. Most have established dedicated disputes practices, with a focus on arbitration, although some still refer their litigation work to local firms. Litigation in the DIFC courts, in English under common law, is mostly carried out by international firms.

Specialisation in certain areas of law is not common; it will be a matter of whether the firm or particular lawyer has previous experience with any given matter. Moreover, there is no need to worry about having a good advocate, as all proceedings are written. The memorandum to be presented can be drafted by anyone, but must be presented by a licensed lawyer.

Fees are charged either by the hour or on a fixed basis, and contingency fees may be added. Rates for senior lawyers at international firms will be between USD600 and USD700, while for local firms rates can reach up to USD900.

Judiciary

Sources agree that corruption and integrity are not in question when it comes to the UAE judiciary. *“You may not get the decision you want, but it is not a matter of dishonesty.”* One expert points out a Dubai case that was very speedy with a bizarre result, but acknowledges the independence of the judiciary and points out that *“cases against the government can be won.”*

Competence and rigorousness have been put in question. Several sources raised issues with the extensive use of experts, with judges *“effectively delegating decision-making to experts and accepting their conclusions without question.”* As one expert puts it, *“the judiciary needs to stop appointing experts, and start acting as judges.”*

Moreover, there is no requirement to give a justification for decisions, so parties are often in the dark when it comes to the appeal. Only rarely, in around 10% of cases, will you be lucky enough to get a judge who explains their reasoning.

Sources doubt that judges are able to review all aspects of the case. In a lot of instances, *“you can tell the judge hasn’t looked at the case in detail.”* But one source points out that judges are often faced with 30 cases a day, *“making a thorough review impossible.”*

Some local experts note that the establishment of the DIFC courts might be a recognition from the government that the normal courts were not equipped to deal with complex commercial cases, often involving a large number of documents and technical subject matter.

Traditionally, the majority of the judges in the UAE are foreign trained, coming from other Arab countries such as Sudan and Egypt, which follow a very similar civil procedural code. But now Emirati judges from the UAE courts are being trained in the common law system,

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which is improving the perception of the DIFC in the UAE. *“They are very keen and want to play a full role.”* The judiciary in these courts is clearly working to different standards.

Court Process

The UAE is divided into seven emirates (Abu Dhabi, Ajman, Dubai, Fujairah, Ras al-Khaimah, Sharjah, and Umm al-Quwain), and has a federal law system based in Abu Dhabi, the first emirate. Each of the seven emirates also has its own courts, divided into three instances – Court of First Instance, Court of Appeal, Court of Cassation.

Dubai’s legal system is based in civil law principles and Arabic is the official language of the courts. To adapt to the vast changes in Dubai’s economy, the DIFC was created, which has its own court system based on English common law. It was also a *“necessary response to the vast influx of commercial cases overwhelming the Dubai courts.”*

Large caseloads cause delays in the UAE courts more generally as well, with cases often taking around three to four years. The first instance is the longest, as the process is front-loaded for the submission of arguments and evidence. The same can be done in the second phase, with the final phase reserved for appeal on specific points of law. The DIFC courts are *“considerably faster and judges are more proactive in how cases are run.”*

In the UAE courts, *“the absence of oral pleadings is a major drawback,”* sources point out. *“If a judge is handling the case you feel more confident, but experts overstep their authority, and there is no opportunity to engage in dialogue with the judge to clarify ambiguous issues.”*

Insufficient administrative and research staff to support the judges contributes to the lack of rigorous decision-making in the courts. But at least the Dubai court is *“moving forward with the use of technology,”* although the law reporting system still leaves a lot to be desired, and there is *“no straightforward system of researching the jurisprudence.”*

Enforcement is straightforward. The only hurdle might occur in locating assets to enforce against, as there may be no assets within the jurisdiction or the company may have gone bankrupt. As such, it is *“advisable to seek emergency attachment orders to avoid reaching the end of litigation and finding the defendant has no assets.”* Enforcement in the DIFC requires an additional phase, causing slight delays, but *“works well as a matter of course.”*

Alternative Dispute Resolution

A *“fairly litigious culture”* can be put down to the low costs of litigation, which are limited to fees for the courts, experts and lawyers, with no possibility of having to cover the defendant’s costs. Parties have *“an American attitude to filing cases – they aren’t scared,”* although experts point out that most clients prefer settlement where possible.

Mediation within the court process is mandatory, which is done differently in each emirate. In Abu Dhabi, for instance, you can merely request to pass the mediation phase and carry on. Dubai is also lenient, with only one hearing required. *“It’s just a hoop to jump through – the system is not geared towards the use of ADR. The mediation process is rarely successful and out-of-court mediation is unheard of. It is seen as a waste of money on a non-binding decision.”* However, the DIFC small claims court has successfully implemented compulsory mediation.

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Arbitration is increasingly popular, with established centres in Abu Dhabi (Abu Dhabi Commercial Conciliation & Arbitration Centre (ADCCAC)) and Dubai (Dubai International Arbitration Centre (DIAC)), and the newer centre in Sharjah. DIAC is the most commonly used, with most arbitrations being done in English. It takes on domestic and international disputes, with this distinction often being slight in Dubai's globalised economy.

The big question for most companies is whether to use DIAC or the arbitration centre in the DIFC, which is associated with the London Court of International Arbitration (LCIA). People are comfortable with the DIAC because they are familiar with it, and it will be the default choice for Dubai companies. The DIFC centre faced criticism initially, with challenges to its jurisdiction, and it is *“still recovering from that.”* But, as one source notes, although *“some are sticking with DIAC, there is a trend towards trusting the DIFC.”*

Enforcement of awards is the key factor, which *“is quicker for DIAC, a process which people are also more familiar with.”* There has been uncertainty around enforcement of DIFC awards, but a recent change in UAE law confirmed that DIFC awards will be enforced by Dubai courts in accordance with the New York Convention. According to one expert, *“in five years, questions over enforcement of DIFC awards will no longer be an issue.”* In any case, *“in comparison with the rest of the region, the UAE system is very reliable.”*

Law & Practice

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Acclaimed as a litigation powerhouse, **Gibson Dunn** has a long record of outstanding successes. The London and Dubai teams are an important and influential part in Gibson Dunn's global commercial dispute resolution practice. The international disputes team has outstanding experience in commercial litigation, international arbitration, regulatory investigations and proceedings, internal corporate investigations, antitrust disputes and public law.

The authors

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General information

1.1 Structure of the legal system

The Dubai International Financial Centre ("DIFC") is a financial free zone operating as an autonomous jurisdiction within the UAE. While the UAE Courts operate under an Arabic language, civil law legal system, the DIFC has its own English language courts, with its own body of laws based on common law, and is particularly inspired by the adversarial English legal system. DIFC Court procedure is governed by the Rules of the DIFC Courts ("RDC"), which are modelled on the (adversarial) English Civil Procedure Rules ("CPR"). Where the rules are silent, express provision is made for reference to the English Admiralty and Commercial Courts Guide and the CPR.

1.2 Structure of the courts

The DIFC has its own independent judicial authority and courts that deal with civil or commercial matters arising within the DIFC and that are separate from the other courts of the UAE.

There are three courts within the DIFC: the Court of First Instance ("CFI"), the Court of Appeal ("CA") and the Small Claims Tribunal ("SCT").

The CFI hears cases where the amount in dispute exceeds AED100,000 (USD27,000 approx.), and proceedings are heard by a single judge.

The CA hears appeals filed against judgments and awards made by the CFI. It is the highest court in the DIFC and no appeal arises from a decision of this court. The CA is composed of at least three judges, including the Chief Justice.

The SCT hears cases where the amount in dispute does not exceed AED100,000 (USD27,000 approx.) or AED200,000 (USD54,000 approx.) for employment matters. It is also possible for parties to elect, in writing, to use the SCT to resolve disputes not exceeding AED500,000 (USD136,000 approx.) or any amount for employment matters. Unlike the CFI, SCT claims are confidential by default, and include a mandatory “consultation”, which is effectively a courtroom mediation. Only parties may attend; lawyers are not permitted. An impressive 90% of SCT cases are settled by mutual consent within three weeks of their commencement.

Judgments, orders and awards made by the DIFC Courts, but which require execution outside of the DIFC, will be enforced by the Dubai Courts. The judgment, order or award must be final, appropriate for enforcement and translated into Arabic.

The general rule under RDC 35 is that hearings are to be in public, unless one of the grounds of RDC 35.4 arises.

RDC 35.4 provides that a hearing may be held in private if:

- publicity would defeat the object of the hearing;
- it involves matters relating to national security;
- it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;
- a private hearing is necessary to protect the interests of any child or patient, including the approval of a compromise or settlement on behalf of a child or patient or an application for the payment of money out of court to such a person;
- it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;
- it involves non-contentious matters arising in the administration of trusts or in the administration of a deceased person’s estate; or
- the court considers this to be necessary, in the interests of justice.

Further, under RDC 35.7 there are six types of hearing that will be listed as hearings in private in the first instance, namely:

- (1) an application to suspend a warrant of execution or a warrant of possession or to stay execution where the court is being invited to consider the ability of a party to make payments to another party;
- (2) a determination under RDC 15.41 or a redetermination under RDC 15.44 or an application to vary or suspend the payment of a judgment debt by instalments;
- (3) an application for a charging order (including an application to enforce a charging order), third-party debt order, attachment of earnings order, administration order or the appointment of a receiver;
- (4) an order to attend court for questioning;

- (5) an application for security for costs under Article 46(1) of the Court Law 2005; and
- (6) an application by a trustee or personal representative for directions as to bringing or defending legal proceedings.

The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness.

If the court in which the proceedings are taking place has a sign on the door indicating that the proceedings are private, members of the public who are not parties to the proceedings will not be admitted unless the court permits.

When a judgment is given or an order is made in private, if any member of the public who is not a party to the proceedings seeks a transcript of the judgment or a copy of the order, he must seek the permission of the judge who gave the judgment or made the order.

A judgment or order given or made in private, when drawn up, must have clearly marked in the title: 'Before [title and name of judge] sitting in Private'.

Article 53 of the DIFC Court Law provides that the DIFC Courts may, at any time during or after the hearing of a proceeding, make an order forbidding or restricting the publication of evidence if it is necessary in the interests of justice.

In addition, SCT hearings are generally held in private.

1.3 Costs

Under RDC 38.6 the court has discretion as to:

- whether costs are payable by one party to another;
- the amount of those costs; and
- when they are to be paid.

If the court decides to make an order about costs the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. (The SCT is an exception, where costs may only be awarded where a party has acted unreasonably.)

In exercising its discretion to award costs, the court must have regard to all the circumstances, including:

- the conduct of all the parties;
- whether a party has succeeded in part of his case, even if the party has not been wholly successful; and
- any payment into the court or admissible offer to settle made by a party which is drawn to the court's attention and which is not a Part 32 offer.

The court may make a range of orders regarding costs, including that a party must pay a proportion of another party's costs or a stated amount. Costs may be assessed immediately or following a separate procedure known as detailed assessment.

Where an order is silent as to costs, the general rule is that no party involved is entitled to costs in relation to that order.

1.4 Funding

In principle litigation funding is permitted, but there is not yet any DIFC Courts case law on the subject and no studies as to how much it has been used if at all in the DIFC.

The DIFC Courts Code of Conduct (the “Code”) sets standards for professional conduct of all lawyers operating within the DIFC. The Code includes conduct in relation to fees. Article 9.3 of the Code prohibits contingency fees. Conditional fee arrangements are not prohibited.

Initiating a Lawsuit

2.1 Statute of limitations

Subject to other laws, under DIFC Law, a claim cannot be commenced more than six years after the date of the events that give rise to the claim (Part 7, Chapter 1, Section 38 of the DIFC Court Law No. 10 of 2004). Notwithstanding this, where a cause of action arises as a result of fraud by the defending party, then there is no time limit before which the action must be commenced (Law of Obligations DIFC Law No. 5 of 2005). This assumes that DIFC Law applies; in many instances, the parties may choose a different applicable law, in which case that law’s limitation periods may apply.

2.2 Filing

Although there are no formal pre-action protocols under the RDC, the RDC does provide for an overriding objective, which requires parties to assist the courts in saving expense and in dealing with cases proportionately, expeditiously and fairly. The RDC makes express provision for the use of alternative dispute resolution as part of the overriding objective.

The DIFC Courts are required to further the overriding objective by actively managing cases before them, including:

- encouraging the litigating parties to use an alternative dispute resolution procedure; and
- assisting the parties in settling the whole or part of their dispute.

In short, the courts will work to assist the parties towards settlement, but there are no mandatory pre-action steps. (The exception is the SCT, with its consultation process, as described above.)

2.3 Jurisdictional requirements for defendants

The DIFC Courts only hear civil and commercial matters that have a relevant link to the DIFC or where the parties have expressly included a DIFC Court jurisdiction clause. Criminal matters in relation to the DIFC will be governed by the relevant federal UAE laws and tried before the competent courts of the relevant Emirate.

Dubai Law No. 16 of 2011 provides that commercial entities have the option to resolve their disputes before the Courts of the DIFC. Under Article 5, the CFI shall have the exclusive jurisdiction to hear and determine:

- civil or commercial claims and actions to which the DIFC or any DIFC Body, DIFC Establishment or Licensed DIFC Establishment is a party. Certain of these terms are widely defined under DIFC Law and, as such, the understanding of the boundaries of the DIFC’s jurisdiction continues to evolve;

- civil or commercial claims and actions arising out of or relating to a contract or promised contract, whether partly or wholly concluded, finalised or performed within the DIFC or which will be performed or which is supposed to be performed within the DIFC under the express or implied terms stipulated in the contract; and
- civil or commercial claims and actions arising out of or relating to any incident or transaction which has been wholly or partly performed within the DIFC and is related to DIFC activities.

The CFI may also hear and determine any civil or commercial claims where the parties agree in writing to file such claims with it, before or after the dispute arises, provided it is done so expressly and clearly (i.e. opting into the jurisdiction of the DIFC Courts).

2.4 The initial complaint

Proceedings must be started by a Claim Form under either Part 7 or Part 8 (alternative procedure for claims), with the former being more commonly used. Proceedings are started when the court issues a Claim Form at the request of the claimant. If a claimant wishes his claim to proceed under Part 8 the Claim Form should so state, otherwise the claim will proceed under Part 7.

A Claim Form is a formal written statement setting out the name and address of the claimant and the defendant, the basic details of the claim and the sum claimed. The facts and circumstances giving rise to the claim may be included in the Claim Form; however, these are often set out in a separate document named “Particulars of Claim”.

A claim is commenced under Part 7 where there is likely to be a dispute in respect to the facts of the case. After the court issues the Claim Form, that document and any Particulars of Claim are to be served on the defendant within four months of issue, or within six months of issue if the Claim Form is to be served out of the DIFC or Dubai.

The defendant must respond within 14 days of service by filing an Acknowledgement of Service of the Claim Form or a defence within 14 days. If the defendant files only an Acknowledgement of Service, the defence and any counterclaim is then due within 28 days of service of the Claim Form. In complex cases, time extensions may be sought to allow the defendant a longer period in which to prepare a defence.

Alternatively, a claim can be brought under Part 8 if there is no substantial dispute as to the facts, or a rule or practice direction in relation to a specified type of proceedings requires or permits the use of a Part 8 procedure. The claimant must serve all of its evidence at the same time as the Claim Form. A Part 8 defendant is not required to file a defence, but must acknowledge service and serve its own evidence within 14 days. Evidence is normally in the form of a witness statement or an affidavit.

Once a statement of case has been served, amendments can only be made with either the written consent of all the other parties or with the permission of the court.

2.5 Serving proceedings

Once the Claim Form has been issued it is served on the defendants by the claimant or the claimant’s solicitors, save where a rule or practice direction provides that the court must serve the Claim Form or the court orders otherwise.

Service has to be effected: (i) within four months after the date of issue where the form is to be served within the DIFC or Dubai; and (ii) within six months after the date of issue, only where the form is to be served outside the DIFC or Dubai.

Where the Claim Form is to be served outside of the DIFC, but still within the UAE, the Claim Form must be accompanied by a certified Arabic translation.

If the Claim Form has been served by the claimant, it must file a Certificate of Service not later than seven days after the date for the filing by the defendant of the Acknowledgement of Service, unless by that date the Acknowledgement of Service has been filed. A claimant must have filed a Certificate of Service in order to obtain judgment in default.

Given the international nature of the DIFC, permission to serve the required documents outside of the jurisdiction is not required. However, the Claim Form is required to be served by any method permitted by the law of the place in which it is to be served.

A defendant who wishes to dispute the court's jurisdiction may make an application to have service set aside under RDC 12.

2.6 Failure to respond to a lawsuit

If the defendant fails to file either an Acknowledgement of Service or a defence within the deadlines set out in the RDC, the claimant can then make an application for Default Judgment. The DIFC Court will only grant a Default Judgment if it is satisfied that:

- the Claim Form has been served on the defendant (a Certificate of Service on the court file will be sufficient evidence);
- the defendant has not filed an Acknowledgement of Service or has not filed a defence and in either case the relevant period for doing so has expired;
- the defendant has not satisfied the claim; and
- the defendant has not made an admission of the claim to the claimant or to the court.

Where the defendant was served with the claim outside the DIFC and the defendant has not acknowledged service, the claimant must provide an affidavit setting forth evidence that:

- the claim is one that the DIFC Courts have power to hear and decide;
- no other court has exclusive jurisdiction to hear and decide the claim; and
- the claim has been properly served.

Even where the court does grant Default Judgment against the defendant, the judgment must be set aside if it is shown later that the necessary preconditions for granting a Default Judgment were not met. The court has discretion to set aside the Default Judgment where it feels that the defendant has a real prospect of successfully defending the claim or it appears to the court that there is some other good reason for setting aside or varying the judgment. A key consideration in deciding whether or not to do so is whether an application to set aside or vary the judgment was made promptly on the part of the defendant. Such an application must also be supported by evidence.

2.7 Class action

The RDC make provision for both representative actions, where more than one person has the same interest in a claim, and Group Litigation Orders for the management of claims which give rise to common or related issues of fact or law.

A representative action under the RDC does not require each claimant to issue proceedings and then “opt in”, unlike with Group Litigation Orders. Instead, a claim may be brought by a party as a representative of any other persons who have the same interest in the claim. The representative parties are then considered bound by the judgment delivered in a representative action without having to issue proceedings in their own name, but the judgment may only be enforced by or against a person who is not party to the claim with the permission of the court.

Group Litigation Orders, on the other hand, are a case management mechanism allowing the court to determine similar issues arising out of a number of cases as a group rather than individually. However, unlike representative actions, a claim must first be issued by a claimant before they can apply for their case to be placed on a “Group Register”, which details the claims subject to the Group Litigation Order.

The effect of a Group Litigation Order is that where a judgment or order is given or made in relation to a Group Litigation Order issue, that judgment is then binding on all other parties listed on the Group Register at the time that judgment is given.

Pretrial Proceedings

3.1 Dismissing the lawsuit

A party can use the following methods to seek to dismiss a lawsuit before evidence has been obtained.

Disputing the Court’s Jurisdiction – Part 12 of the RDC

This allows a defendant to challenge the jurisdiction of the court to hear a claim in the first instance. In order to make such an application, a defendant must first file an Acknowledgement of Service and then file the application, together with supporting evidence, within 14 days of filing the acknowledgement. If the court dismisses the application, then the Acknowledgement of Service filed by the defendant lapses and a further acknowledgement must be filed.

Typically, a challenge to jurisdiction would be on the basis that it would be more appropriate for another court to hear the action.

Strike Out Action – Part 4 of the RDC

RDC 4 gives the DIFC Courts the power to strike out a statement of a case if it appears to the court:

- that the statement of the case discloses no reasonable grounds for bringing or defending the claim;
- that the statement of the case is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings; or
- that there has been failure to comply with a rule, practice direction or court order.

Where the court does decide to strike out a statement of case, it may make any consequential order that it considers appropriate in doing so. The court may also make orders, which provide that a party's statement of case will be struck out, unless the order is complied with. Failure to comply with the order will also allow the other party to obtain judgment with costs by requesting such from the court. However, an application may be made to set aside the judgment within 14 days of service of the judgment.

Immediate Judgment – Part 24 of the RDC

Under RDC 24, the court may give immediate judgment against a claimant or defendant, on the whole of a claim, on part of a claim or on a particular issue if the court considers either that the claimant party has no real prospect of succeeding on the claim or issue/defending the claim or issue, or that there is no other compelling reason why the case or issue should be disposed of at trial. An application for immediate judgment may be made in relation to any type of proceedings and may be based on a point of law or the evidence (or lack thereof), which can reasonably be expected to be available at trial.

A claimant may not make an application for immediate judgment without the permission of the court, until the defendant files an Acknowledgement of Service or a defence. There is no restriction on when the defendant may make an application for immediate judgment.

The application notice must include a statement that it is an application for an immediate judgment made under Part 24 of the RDC. The application notice or the supporting evidence must:

- identify concisely any point of law or provision in a document on which the applicant relies; and/or
- state that it is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue or (as the case may be) of successfully defending the claim or issue to which the application relates and, in either case, state that the applicant knows of no other compelling reason why the case or issue should be disposed of at a trial.

Any written evidence that a party wishes to rely on at a hearing for immediate judgment must be filed with the court and served on the other parties to the proceedings at least seven days in advance of the hearing, or three days if it is evidence in reply to any other party's written evidence.

In response to an application for immediate judgment, the court may make any of the following orders:

- judgment on the claim or any part of the claim;
- the striking out or dismissal of the claim;
- the dismissal of the application; and
- a conditional order.

Security for Costs

RDC 25 allows for a defendant to apply for security for its costs of the proceedings. Such an application should be made not later than the first Case Management Conference and should be supported by written evidence setting out the grounds on which security is sought, all

relevant factors to the application, a statement of costs already incurred along with a statement of anticipated future costs. The security will normally be given in the form of a written guarantee for the amount so ordered by the court. Proceedings will not ordinarily be delayed by an order to provide security for costs; the RDC state that it is usually better to give the party subject to the order a reasonable time within which to decide if they wish to provide the security or not. Failure to pay ordered security for costs typically leads to the dismissal of the claim.

3.2 Dispositive motions

In addition to the applications identified above, a claimant may also apply for a default judgment under RDC 13 in the event that a defendant has failed to acknowledge or reply to a claim issued against them.

3.3 Joinder

Under RDC 20, interested parties may join existing proceedings either on the courts own initiative, on the application of an existing party to the proceedings or on the application of a person who wishes to become a party.

In order to join or remove a party after the Claim Form has been served the court's permission is required.

The application should be supported by evidence setting out the proposed new party's interest with the lawsuit. If all existing parties and the new party are in agreement about the proposed addition, the application to join may be resolved without the need for a hearing.

The court may/will order a person to be added as a new party if:

- it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
- there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.

No party may be added as a claimant to the proceedings unless their consent to such an application has been made in writing and filed with the court.

The order for the addition of a party would need to be served on all parties to the proceedings, and any other person affected by the order.

A new defendant will only become a party once the amended Claim Form has been served on him.

Discovery

Disclosure (as discovery is known in the DIFC Court) is one area of DIFC Court procedure that does not follow the English CPR. The rules governing the production of documents (Part 28 of the RDC) are based on the principles set out in the IBA Rules on the Taking of Evidence in International Arbitration.

Parties are subject to standard production of documents and are required to submit to the other party documents on which they rely and documents that they are required to produce by any law, rule or practice direction. Unlike standard disclosure under the CPR, parties are not obliged to produce documents which either adversely affect their own case or support the case of opposing parties, unless ordered to do so by the court following a Request to Produce under RDC 28.13.

A party may object to the production of any document under grounds set out in RDC 28.42, including:

- lack of sufficient relevance or materiality;
- legal impediment or privilege under the legal or ethical rules;
- unreasonable burden to produce the requested evidence;
- loss or destruction of the document; or
- grounds of commercial or technical confidentiality determined to be compelling.

The court will review the disclosure order and any objections before deciding whether or not to make a disclosure order compelling the requested party to produce the requested documents within its possession, custody or control. The court may also order the production of documents on its initiative where it considers the requested documents to be relevant and material to the outcome of the case.

Part 30 of the RDC provides that a party may apply for an order for a person to be deposed before the hearing takes place. A deponent may be examined on oath before a judge, an examiner of the court or such other person as the court appoints and must be examined. Any such deposition may then be given in evidence at a hearing, unless otherwise ordered by the court.

4.1 Legal privilege

There is no DIFC legislation which specifically deals with privilege. However, while the law is silent on the existence of privilege, the RDC includes reference to privilege as a ground for objecting to the production of documents (Rule 28.42). Similarly the DIFC glossary describes privilege as “the right of a party to refuse to disclose a document or to produce a document or to refuse to answer questions on the ground of some special interest recognised by law.” Therefore, practitioners generally work on the basis that it does exist in the DIFC. Given the common law background of the DIFC Courts and the English law basis of the RDC, it is expected that the DIFC Courts will adhere to the English legal principles of privilege.

There are two principal types of legal privilege under English law:

- (1) legal advice privilege; and
- (2) litigation privilege.

Legal advice privilege protects the confidentiality of the attorney-client relationship and applies to confidential communications between the attorney and client that are for the purpose of seeking or giving legal advice.

Litigation privilege allows a litigating party to prepare for litigation without the fear that any documents that have been produced for that purpose will have to be eventually dis-

closed. This type of privilege only arises once litigation or other adversarial proceedings are reasonably in prospect or have actually commenced. From this moment, any confidential communications between any of a client, its attorney and a third party which are for the sole or dominant purpose of obtaining or providing legal advice or evidence for use in the proceedings which are in contemplation or have commenced are subject to litigation privilege.

Other relevant types of privilege include the following:

Common interest privilege

Extends the privilege enjoyed by a party to adversarial proceedings or the recipient of legal advice to others with a shared interest in an issue to which the privileged material relates. The common interest must exist at the time of disclosure of the communications.

Without prejudice privilege

Designed to encourage parties to a dispute to try to reach a settlement by allowing them and their legal representatives to speak openly and make certain concessions knowing that the communications cannot be disclosed later in a court of law if the negotiations fail to achieve a settlement. In order to avail of this privilege, all such oral and written communication should be expressed to be “Without Prejudice” and should be part of a genuine attempt at settlement of the dispute.

Trials

5.1 Structure

Trials are adversarial proceedings in the common law tradition, where advocates will orally present their client’s case and put that of the opposing side to proof with the judge acting as arbiter. Parties usually serve skeleton arguments shortly in advance of a hearing, outlining the points they intend to make at trial, on both the other parties to the proceedings and the court.

Following opening arguments on behalf of the respective parties presenting their respective cases, the court will normally hear witness evidence. The general rule employed by the court is that any fact which needs to be proved by the evidence of witnesses is to be proved at trial by their oral evidence given in public.

Evidence is normally given by witness statement, served in advance. Unless otherwise ordered, a witness’s statement will stand as their evidence in chief, but may be amplified or evidence given in relation to new matters which have arisen since the witness statement was served with the permission of the court. Regardless of whether or not the witness statement or part of it was referred to in a witness’s evidence in chief, they may be cross-examined on the witness statement. Typically, the cross-examiner seeks to undermine or discredit the witness and, in so doing, to advance his own client’s case.

All parties will be expected to make oral closing submissions, even where closing submissions have been made in writing. Unless the trial judge directs otherwise, the claimant will make his oral closing submissions first, followed by the defendants in the order in which they appear on the Claim Form with the claimant having a right of reply.

Judgment is not delivered until it is formally pronounced in an open hearing by the court or is issued by the Registry to the parties or their legal representatives. However, it is common practice (and expressly allowed by the RDC) for the court to submit draft texts of the proposed judgment shortly before the judgment is pronounced for the parties to provide comments on any typographical errors and the like.

All cases in the DIFC Courts are civil cases and jury trials are not available.

5.2 Evidence

The general rule employed by the court is that any fact that needs to be proved by the evidence of witnesses is to be proved at trial by their oral evidence given in public. As for any hearing other than the trial, evidence may be proved by the use of witness statements unless otherwise ordered. Where a witness does not attend court for cross-examination, their evidence may be given little or no weight, depending upon the circumstances.

Where a statement is tendered as evidence at a trial in any manner other than by a person giving oral evidence, that statement is deemed to be “hearsay” and the person who made the statement may have their credibility attacked. Where a party intends to rely on hearsay evidence at trial he must serve a notice on the other parties that identifies the hearsay evidence, states that the party serving the notice proposes to rely on the hearsay evidence at trial, and gives the reason why the primary witness will not be called. The court may, on the application of any other party, call the maker of the hearsay statement to be cross-examined on the contents of the statement. Alternatively, any other party may call evidence to attack the credibility of the person who made the hearsay statement.

5.3 Expert testimony

Expert evidence must generally be in a written report addressed to the court. Expert evidence is permitted at trial, but no party can call an expert or put an expert’s report into evidence without the permission of the court. The court itself may appoint one or more experts to report to it on specific issues designated by the court. Even then, expert evidence will be restricted by the court to that which is reasonably required to resolve the proceedings.

Experts have an overriding duty to assist the court. They are obliged to act independently. This duty overrides any obligation to the person who instructs or pays an expert.

As with lay witnesses, expert witnesses are usually subject to cross-examination by the other parties’ lawyers. The court may also ask expert (and lay) witnesses questions regarding their evidence.

Settlement

6.1 Court approval

Court approval is not usually required to settle a lawsuit. One key exception to this is for Part 32 offers.

Parties may during a case make what is known as a Part 32 offer. Where a Part 32 offer is made, the other party has 21 days within which to accept it. If the defendant makes a Part 32 offer which the claimant does not accept and the court awards the claimant the same or a lesser sum at trial, typically the claimant will not be entitled to its costs from the last date from accepting that offer.

If the claimant makes a Part 32 offer which is not accepted, and the defendant is ordered to pay the same or a greater sum, the defendant may be penalised further by having to pay a higher rate of interest, or incur some other monetary consequence.

Normally a party can simply accept a Part 32 offer. There are two exceptions; namely RDC 32.45 applies:

- where offers are made by one or more, but not all, defendants; or
- where the trial has already started and a party seeks to accept a late Part 32 offer.

6.2 Confidentiality

Where settlement agreements are confidential, a notice of discontinuance can be made to the court pursuant to Part 34 of the RDC.

In the event that terms of a settlement remain to be fulfilled, an option available to the parties is to file an application notice requesting a “Tomlin Order”. The schedule attached to the Tomlin Order must outline the terms of the settlement agreement and remains private on the court’s file. This allows the court to close proceedings on its file and gives the parties liberty to apply if the schedule is not adhered to. If a party breaches the schedule, the court can reopen the case at either party’s request.

Damages & Judgment

7.1 Rules relating to damages

Article 40(2) of the Law of Damages and Remedies provides:

“The Court may in its discretion on application of a claimant, and where warranted in the circumstances, award damages to an aggrieved party in an amount no greater than three (3) times the actual damages where it appears to the Court that the defendant’s conduct producing actual damages was deliberate and particularly egregious or offensive.”

In theory the DIFC Courts can award punitive damages. When determining whether or not to grant punitive damages, the courts have looked to English case law for guidance. Typically, punitive and aggravated damages are only granted in very rare circumstances, such as where the defendant deliberately committed the wrong to make (additional) profits – see, for example, *Rookes v Barnard* [1964] AC 1129.

7.2 The collection of interest

Under Sections 18 and 32 of the DIFC Damages and Remedies Act 2005, interest on damages for non-performance of obligations accrues as from the time of non-performance.

A party may collect interest accruing after judgment is entered. A proceeding in relation to damages under a judgment of the DIFC Court carries interest from the date the judgment is entered and interest is payable:

- at such rate as is fixed by the Rules of Court; or
- at such lower rate as the DIFC Court determines is just in the circumstances.

7.3 Non-monetary relief

The DIFC Courts have a range of non-monetary remedies at their disposal, including declarations, injunctions, specific performance, search and seizure and pre-emptive applications. Where a person commits a breach of any requirement, duty or obligation which is imposed under any DIFC Law the court may, on application of any person who is aggrieved by such conduct, make an order for one or more of the above forms of relief.

Declarations

The DIFC Court may make a binding declaration on points of law or fact whether or not monetary remedy is claimed, for example, the enforcement of a foreign judgment.

Injunctions

The court may by order grant an injunction in all cases in which it appears to the court to be just and convenient to do so, including such order as shall: (a) restrain a party from doing a particular act (either within a period of time or in perpetuity); or (b) compel a party to do an act within a specific period of time. Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.

Specific Performance

The court may order one party to a contract to perform its contracted obligations so long as:

- the obligation is specific and/or the subject matter of the obligation is specific; and
- the court decides that damages are unquantifiable or are not a sufficient remedy.

An order for specific performance may be made together or in combination with any other order as the court sees fit to decide.

7.4 Enforcement procedure

Under Article 7(4) of the Judicial Authority Law (Dubai Law No. 12 of 2004) judgments, awards and orders of any foreign court may be executed within the DIFC in the manner prescribed by the RDC.

The laws of the DIFC also allow the enforcement of foreign judgments by the DIFC Courts. In accordance with Article 24(1)(a) of DIFC Law No. 10 of 2004 (the “**DIFC Court Law**”), the DIFC Courts have the jurisdiction to ratify any judgment of a recognised foreign court. Ratification of a judgment essentially converts the judgment into a judgment of the DIFC Court, which can then be enforced either within the DIFC, or “onshore” in Dubai in accordance with the Protocol of Enforcement between the DIFC Court and the Dubai Courts.

Section 24(2) of the DIFC Court Law obliges the CFI to comply with any treaties concluded by the UAE with other countries regarding the mutual enforcement of judgments, orders or awards. One such relevant treaty that would come under this provision would be that of the Riyadh Convention, which allows for the mutual enforcement of judgments of other Arab League states.

Article 42 of the DIFC Court Law provides that judgments ratified by the DIFC Court may in turn be enforced outside the DIFC in accordance with the Judicial Authority Law.

The RDC apply these provisions in Part 45, stating that where an enactment so provides, the court will enforce a decision for the award of a sum of money or other decision made by

any court or tribunal other than the court as if it were a court order. An application for such enforcement must be accompanied by a copy of the award sought to be enforced, the name and address of the person against whom the award is sought to be enforced and how much of the award remains to be paid.

Enforcement of a money judgment can be obtained by issuing a claim on the judgment following either the Part 7 or Part 8 route (as described above). The Claim Form should contain a concise statement of the nature of the claim and a certified copy of the foreign judgment should also be exhibited to the Claim Form.

The DIFC Courts have also signed Memoranda of Understanding with the courts of other jurisdictions. For example, in January 2013, the DIFC Courts and the English Commercial Court signed a Memorandum of Guidance as to Enforcement to facilitate mutual enforcement. Although such memoranda are not binding, they indicate the approach each signatory court would take to enforcing a judgment handed down by the other court.

Appeal

8.1 Grounds for appeal

Part 44 of the RDC deals with appeals. Permission to appeal is required, except in very limited circumstances which are set out in RDC 44.6.

Permission to appeal will only be granted if the court considers that the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard.

Where the CFI refuses an application for permission to appeal, a further application for permission to appeal may be made to the CA.

The CA is the highest court in the DIFC and no appeal shall arise from a decision of this court.

8.2 Time limits and triggering events

RDC 44.36 provides that the appellant must file the appeal notice at the CA within such period as may be directed by the lower court, which should not normally exceed 28 days; or, where the court makes no such direction, 14 days after the date of the decision of the lower court that the appellant wishes to appeal.

The appeal notice must be served on each respondent as soon as practicable and no later than seven days after it is filed.

Alternative Dispute Resolution

Alternative dispute resolution is encouraged in the DIFC. The DIFC has its own arbitration institution, the DIFC-LCIA, which is separate from the DIFC Courts. Mediation and other forms of ADR are also encouraged.

9.1 Relevant law

Arbitrations in the DIFC are governed by the Arbitration Law of 2008, which replaced an earlier arbitration law. The 2008 Law is largely based on the UNCITRAL Model Law.

Under the 2008 Law, arbitration agreements are required to be in writing, although they may be recorded in any form. The Arbitration Law thereafter states that the parties are free to determine the applicable procedural rules and the number of arbitrators.

Following a number of conflicting decisions in the DIFC Courts on whether the court had the power to order a stay of DIFC Court proceedings in favour of arbitration proceedings seated outside the DIFC, the 2008 Law was expressly amended in December 2013 to grant courts the power to grant stays in favour of arbitrations seated outside of the DIFC or even without a designated seat.

For an award to be enforced in the DIFC, the 2008 Law provides that it must be in writing and signed by the arbitrators. If the award is to be enforced in the DIFC, then the original arbitration agreement and the original award (or certified copy) are first presented to the DIFC Courts for ratification, following which the award becomes equivalent to a judgment, order or award of the DIFC Courts and may be enforced within the DIFC as such.

If the award is to be enforced outside the DIFC, but within the Emirate of Dubai, then it may first be ratified by the DIFC Courts and then enforced by the execution judge of the Dubai Courts in accordance with the Protocol of Enforcement between the Dubai Courts and the DIFC Courts.

Pursuant to Dubai Law No. 12 of 2004, “the execution judge at the Dubai Courts has no jurisdiction to review the merits of a judgment, award or order of the DIFC Courts.” In March 2011, the Dubai Courts approved the execution of a DIFC-LCIA arbitral award ratified by the DIFC Courts without re-examination of the merits of the award. It remains unclear, however, whether such an award would be recognised by the courts of the other Emirates.

As regards the enforcement of foreign arbitral awards, the DIFC Court of First Instance is bound to recognise and enforce a foreign arbitral award on the terms set out in the New York Convention. Article 24 of the DIFC Court Law (DIFC Law No. 20 of 2004) requires the court to comply with the terms of any applicable treaty for the mutual enforcement of judgments or awards which have been ratified by the UAE which includes the New York Convention.

An award may be set aside by the court only if one or another of the provisions of Article 41 of the Arbitration Law applies:

- the party making the application provides proof that a party was under some incapacity;
- the arbitration agreement was invalid;
- the party making the application was not given proper notice;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
- the subject matter of the dispute was not capable of settlement by arbitration under DIFC Law; or
- the award conflicts with public policy in the UAE.

