

The Foundation of the International Association of Defense Counsel
SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE

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UAE

Responses submitted by:

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1. Would your jurisdiction be described as a common law or civil code jurisdiction?

The UAE operates under a civil law system, its civil code being based on that of Egypt. That said, the Dubai International Financial Centre (“DIFC”) free zone contains its own legal system which operates under common law, based on the English legal system. The DIFC's jurisdiction extends to companies and individuals within the DIFC and those who submit to its jurisdiction.

2. What method of adjudication is used (adversarial, inquisitorial, other or hybrid)?

Local Courts: Inquisitorial.

DIFC: Adversarial.

3. What are the qualifications of the adjudicator (judge – elected, appointed; jury; other)?

Local Courts: The judges are appointed by the local courts and must be graduates of recognized legal / Shari'ah compliant universities. Juries are not used.

DIFC: A mix of visiting judges from other jurisdictions, both common law and civil law, such as: UK, Singapore, New Zealand, Canada, UAE.

4. Are there any procedures available for specialized courts (i.e. commercial court, employment, environmental)?

Local Courts: Yes

DIFC: No.

5. Is arbitration an option and when? If so, what rules are typically used?

UAE Federal Law No. 11/1992 (Civil Procedure Code) contains some, but not complete, guidance for arbitration (Articles 203 to 218). A local arbitration law to address this has been in draft form for several years now. Parties to arbitration

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mainly choose to adopt institutional rules, foreign seats or a DIFC seat given the DIFC has its own arbitration law based closely on that of England and Wales.

6. Will the Courts enforce an arbitration agreement to preclude other forms of litigation?

Local Courts: Yes. If the parties elect to arbitrate as a means of resolving their dispute this will be recognized, as long as the dispute is arbitrable.

DIFC: Yes. Article 13 of the DIFC Arbitration Law 2008 addresses the interaction of arbitration agreements and substantive claims before the DIFC Court:

(1) If an action is brought before the DIFC Court in a matter which is the subject of an Arbitration Agreement, the DIFC Court shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, dismiss or stay such action unless it finds that the Arbitration Agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this Article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the DIFC Court.

7. For Court proceedings, is mediation mandatory, either before or after filing of a claim or complaint?

Local Courts: No

DIFC: No.

8. What is the process for pre-hearing fact discovery (if any)?

(a) Are there provisions for mandatory document disclosures?

Local Courts: There is no formal requirement for disclosure before the UAE courts. A party to a dispute is under no obligation to disclose all documents in its possession. Each party files the documents that it wishes to rely on for its case and there is no obligation on a party to produce a document which is damaging to its case. In practical terms, there is extremely limited discovery available.

DIFC: Yes, under Part 28 of the Rules of the DIFC Court ("RDC"). A party must disclose documents it has or has had under its control that it intends to rely on or which he is required to produce by Law, Rule or Practice Direction. This duty is on-going throughout the course of the proceedings.

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(b) Is there provision for oral examinations of the parties or others?

Local Courts: Proceedings in civil matters are based on written submissions supported by documentary evidence. Normally, the court does not hear oral argument from the parties' lawyers and the case is determined on the basis of the written submissions and documentary evidence placed by the parties before the court. If a party wishes to call a witness, an application must be made to the court. Such applications are rare. If such an application is granted, there is a right to cross-examine the witness. However, the judge closely supervises the testimony of the witness, questions the witness and controls both examination and cross-examination.

DIFC: Not before a hearing, but under RDC 29 cross examination is a usual part of the DIFC Court process.

(c) Are there limits on the length of oral examinations?

Local Courts: No.

DIFC: No.

(d) Are witness statements or summaries to be provided before the hearing?

Local Courts: Although a written statement (or affidavit) of a witness can be filed in court, these will have very little, if any, evidentiary value and are almost always challenged by the opponent.

DIFC: Yes, Parties are required to submit any Witness Statements that they wish to rely on before the hearing (RDC 29.39). Witness Summaries can be provided when a party who is required to serve a witness statement for use at trial but is unable to obtain one, may apply, without notice, for permission to serve a witness summary of the evidence that the witness would give instead (RDC 29.50).

9. What is the process for pre-hearing expert disclosure (if any)?

(a) Are expert reports or written summaries required to be exchanged?

Local Courts: Yes, as witness testimony is rarely used before the UAE Courts, expert reports are heavily relied on by judges when issuing judgments.

DIFC: Under RDC 31.20, expert evidence is to be given (and exchanged) in a written report prior to cross-examination at the hearing unless the Court directs otherwise.

(b) Are the parties entitled to conduct a pre-hearing oral examination of opposing experts?

Local Courts: No. Experts provide their evidence via written reports.

DIFC: No, although a party may put written questions to the other party's experts regarding their report within 28 days of service of the expert's report (RDC 31.24-25).

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(c) *Are there provisions requiring experts to meet and narrow issues before the hearing?*

Local Courts: No. Once the court appointed 'Expert Panel' has prepared and filed its report in court, the parties are given an opportunity to comment on the report and a date is fixed for this purpose. The report is not binding on the judge.

DIFC: The Court will normally direct a meeting or meetings of expert witnesses (including any Court-appointed expert) before trial. Sometimes it may be useful for there to be further meetings during the trial itself. The Court may, at any stage, direct a discussion between experts (RDC 31.58).

10. Are there other notable discovery rules?

Local Courts: N/A

DIFC: Yes. Specific disclosure can be made, as can applications for third party disclosure in appropriate circumstances.

11. Is there a prehearing conference (for trial management, settlement or other purposes)? Who conducts it? How long before the hearing?

Local Court: No.

DIFC: The Court may (although is not obliged to do so, it is usual) fix a Case Management Conference. A party may also apply in writing for a Case Management Conference at any time. Any such application must state the reasons why a case management conference is necessary (RDC 26.1). The CMC is conducted in front of a Judge (RDC 26.8).

12. Can a prehearing motion for judgment be brought? If so, what is the threshold test for judgment?

Local Court: No.

DIFC: RDC 24.3: The Court may give immediate judgment against a claimant or defendant in any type of proceedings. Immediate judgment can only be given if the Court considers that:

- (a) claimant has no real prospect of succeeding on the claim or issue; or
- (b) defendant has no real prospect of successfully defending the claim or issue; and
- (c) there is no other compelling reason why the case or issue should be disposed of at a trial (RSC24.1)

13. Is there a process for obtaining pre-hearing rulings with respect to evidence admissibility including admissibility of expert testimony? What is the process and when does it occur?

Local Court: N/A

DIFC: An application could be made in appropriate circumstances at any time up to, and at, the hearing.

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14. What is the standard for admissibility of expert evidence?

Local Court: The usual expert's declaration as to competence and independence, etc., will need to be given.

DIFC: The usual expert's declaration as to competence and independence, etc., will need to be given.

15. Does the Court have the power to appoint its own experts? Under what circumstances and what type?

Local Court: Yes. The court can appoint an expert at any stage to investigate any matters in which the court considers it requires assistance. It is common practice for the court to appoint an expert for findings of facts in a variety of issues including financial, accounting or other technical matters. The expert is selected from a list of experts maintained by the court.

DIFC: Yes. Under RDC 31.29, the Court may appoint one or more independent experts to report to it on specific issues designated by the Court.

16. Does your jurisdiction protect privilege? If so, what privileges are protected from disclosure (attorney client / legal advice; documents prepared in anticipation of litigation; settlement discussions; other)?

Local Court: Disclosure obligations are very limited. The concept of “without prejudice” correspondence used in common law jurisdictions is not recognised in the UAE. Even correspondence exchanged between the parties marked “without prejudice” and brought into existence expressly for the purpose of furthering genuine settlement negotiations can be filed in court and relied on. Any admissions or offers made in such correspondence may be prejudicial to the party making such admissions or offers. For this reason, settlement negotiations are not usually documented.

DIFC: The DIFC Courts’ 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”.

Privilege is also recognised in RDC 28.42(2) as a valid ground for withholding production of disclosable documents, where it is available under the legal or ethical rules determined by the Court to be applicable.

Given the common law background of many of the judges of the DIFC Courts, and that the courts’ establishment is based on principles in the English Civil Procedure Rules, in the absence of any more appropriate legal basis, the DIFC Court can be expected to fall back on English legal principles of privilege. However, the lack of a fixed privilege framework in the DIFC allows the courts’ judges to develop their own body of law in this area and an opportunity to depart from some of the concepts that have been developed under English law.

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17. If privilege is not protected, are there other protections from disclosure (i.e. privacy) that could prevent disclosure of otherwise privileged information, and what is the basis for those protections?

Local Court: Other non-disclosure situations: lawyers are not allowed to disclose information provided by the client without the client's permission.

DIFC: N/A.

18. Who determines privilege disputes, or disputes with respect to other forms of protection described in 17 above?

Local Court: The Court.

DIFC: The DIFC Court.

19. Briefly describe the trial process?

(a) *Are there opening submissions, in what form and of what length?*

Local Court: In general, there is virtually no oral hearing in civil cases. The entire case is conducted using written memoranda and documentary evidence, and the matter is often referred to an expert registered with the court. Oral evidence can only be given to establish a fact in a civil case with the permission of the court and the right to cross-examine witnesses is severely restricted. The filing of the written evidence continues until the Court has decided it has enough and can make its judgment.

DIFC: Skeleton arguments are prepared by each party (RDC 35.61) and filed at Court at least 2 days before the start of the trial (RDC 35.62(1)). The parties will then be invited to deliver oral opening statements at the beginning of a trial which should be uncontroversial and "no longer than the circumstances require" (RDC 35.67).

(b) *What is the order of presentation of witnesses?*

Local Court: If a party wishes to call a witness, an application must be made to the court. If an application is granted, the witness can be cross-examined.

DIFC: The order of the parties' respective witnesses is decided before the trial by the relevant party and set out in the trial timetable (RDC 35.60).

(c) *Who conducts examination and in what order?*

Local Court: The judge closely supervises the testimony of the witness, questions the witness and controls both examination and cross-examination.

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DIFC: The order of witnesses will be decided upon before the trial and noted in the agreed trial timetable subject to any objections from the judge. The claimant's witnesses (factual and expert) will be cross-examined first.

(d) *What is the process for closing submissions?*

Local Court: The last submission is generally requested by the court. This might be requested from either the claimant or the defendant.

DIFC: All parties will be expected to make oral closing submissions, whether or not closing submissions have been made in writing. It is a matter for the legal representatives to consider how in all the circumstances these oral submissions should be presented (RDC 35.71). In a more substantial trial, the Court will normally also require closing submissions in writing after oral closing submissions (RDC 35.73).

20. Please identify any other notable trial procedures.

Local Court: There is an automatic right of appeal at First Instance.

DIFC: None.

21. Who bears the burden of proof of liability? Causation? Damages? What is the standard of proof for each?

Local Court: Generally speaking, the claimant bears the burden of proof. The decision to award damages is at the discretion of the court hearing the case.

DIFC: The burden of proof is on the claimant.

22. What heads of damage are recoverable (compensatory, pre-judgment interest, punitive damages, other)?

Local Court: Actual loss suffered and, in special circumstances, lost profit can be recovered.

DIFC: Article 21 of DIFC Court Law states that at the conclusion of proceedings heard by the Court of First Instance, the Court of First Instance may make any orders it considers appropriate or just, including orders relating to:

- (a) restitution;
- (b) disgorgement;
- (c) compensation;

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- (d) damages; or
- (e) damages in substitution for an injunction.

23. If punitive damages are available, what is the threshold for recovery, and range of awards?

Local Court: Punitive damages are not generally available or awarded as a matter of UAE law. While there is no explicit statutory or regulatory prohibition on insurance in respect of punitive damages, it is likely that a UAE court would not recognise or enforce this.

DIFC: DIFC law does not expressly provide for punitive damages, and we are not aware of any examples of such awards by the DIFC Courts, although it could be that the DIFC Courts follow English law and award punitive damages in rare instances.

24. Are there time limits for bringing claims? Responding to claims? Please describe.

Local Court: Limitation periods are not dealt with in any one particular statute. Instead, they are discussed in various statutes. General rules relating to time limitation are set out in UAE Federal Law No. 5 of 1985, the Civil Transactions Law (Civil Code). In general, a claim is time-barred after 15 years, unless a specific provision states otherwise. There are several specific provisions which deal with time bars under UAE Federal Law No. 18 of 1993, the Law of Commercial Procedure (Commercial Code), which governs commercial transactions. Further, there are several other statutes that have specific provisions relating to time limitation. Therefore, there are many exceptions to the general rule. Subject to these exceptions, the following limitation periods can be taken as a general guide:

- Contracts: 15 years.
- Cheques: three years.
- Insurance: three years.
- Causing harm (tort): three years.
- Building contracts (defects): ten years.
- Carriage of goods by sea: one year.
- Employment: one year.

DIFC: Section 38 of the DIFC Court Law states that, subject to any other DIFC Law, a claim cannot be commenced more than six years after the date of the events that give rise to the claim.

25. What are the requirements to establish jurisdiction over a foreign defendant in your court? Can a foreign defendant request that the court decline jurisdiction on the basis that there is a more convenient forum?

Local Court: The UAE courts have jurisdiction to hear actions filed against foreigners having a domicile or a place of residence in the UAE. Under the Civil Procedure Code, in certain circumstances the UAE courts may also have

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jurisdiction over actions against foreigners who have no domicile or place of residence in the UAE. Although a forum challenge can be brought, if the UAE courts have jurisdiction, they will often hear the claim. The position is different if the contract provides for disputes to be referred to arbitration in a foreign jurisdiction. The UAE courts recognise these types of clauses and the Civil Procedure Code contains provisions enabling the court to stay a civil claim filed in respect of a contract containing an arbitration clause, provided that the defendant relies on the arbitration clauses at the first hearing of the claim.

The courts also ignore a choice of jurisdiction clause in certain types of commercial matters, including commercial agencies or distributorship, real property, employment and government contracts.

DIFC: The DIFC has jurisdiction over disputes between companies and individuals within the DIFC and also those who submit to its jurisdiction. Forum challenges can be brought and will be considered by the Court as they would in common law jurisdictions.

26. Are there procedures for a defendant to bring other potentially responsible parties into the proceeding? Briefly describe.

Local Court: Yes, applications to join other parties can be made on paper.

DIFC: Parties may be removed, added or substituted in existing proceedings either on the Court's own initiative or on the application of either an existing party or a person who wishes to become a party (RDC 20.2). The application may be dealt with without a hearing where all the existing parties and the proposed new party are in agreement (RDC 20.3).

The application to add or substitute a new party should be supported by evidence setting out the proposed new party's interest in or connection with the claim (RDC 20.4).

27. Are legal costs recoverable by either party? If so, under what circumstances, and how is the amount calculated? (i.e. is it a loser pays costs system).

Local Court: The courts generally only award nominal or token amounts in legal fees. These rarely exceed AED2,000 (about US\$545), regardless of the fees actually incurred. However, the winning party may recover the court fees as well. Interest is not awarded on costs.

DIFC: Under RDC 38.6, the Court has discretion as to:

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

Under RDC 38.7, if the Court decides to make an order about costs:

- (1) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
- (2) the Court may make a different order.

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28. Are contingency fees allowed?

Local Court: No.

DIFC: No

29. Is third party funding of claims permitted? Under what circumstances?

Local Court: Commercial litigation is usually funded by the client personally. Advocates usually require advance payment of the fee. The practice of obtaining insurance to cover legal costs is not generally common or required. Insurance is often not cost-effective.

DIFC: Potentially, depending on the circumstances.

30. Are class or multi-party actions allowed? Under what circumstances? For what types of claims?

Local Court: The UAE courts do not have a mechanism for class or collective action. Each claim must be filed separately.

DIFC: Yes, the DIFC allows multi-party actions. RDC 20.1: Any number of claimants or defendants may be joined as parties to a claim. Under RDC 20.11, the Court's permission is required to remove, add or substitute a party, unless the claim form has not been served.

31. Can claims be commenced by a consumers association or other representative organization? Under what circumstances?

Local Court: N/A

DIFC: Potentially, depending on the circumstances, although given DIFC's status mainly as a financial and business freezone, with ancillary services, it is very unlikely such potential claims will ever arise.

32. On average, how long does it take to get to trial/final hearing, and what factors can affect that?

Local Court: The time frame for trials can be lengthy: 24 months is not uncommon.

DIFC: Each individual case will be heard within a different time frame dependant on a number of variable factors such as the availability of the Judges, counsel, the number of cases being heard in the DIFC Court, the complexity of the case etc.

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Roughly a case would be expected to take a minimum of 12 months from claim form to trial although this greatly varies from case to case.

33. Is an appeal process available (distinguish between final and interlocutory/procedural orders as needed)? Who hears the appeal? How are they appointed? What are their qualifications?

Local Court: Yes, an unsuccessful party has the automatic right to appeal from the Court of First Instance to the Court of Appeal. There is a right of further appeal to the Court of Cassation on a point of law only. The circuit of this Court is formed by three Judges presided by one of them.

DIFC: Yes, under RDC 44 an appeal process is available in the DIFC Courts. Permission to appeal is required. Appeals are heard by three of the DIFC Court judges. DIFC Courts have a judicial panel consisting of internationally-renowned commercial and civil law judges including both female and Emirati judges.

34. Are hearing rooms available for electronic trials or appeals (i.e. where documents and transcripts are presented on computer monitors; witnesses can testify by video conference)?

Local Court: No

DIFC: Yes.

35. What is the practice regarding the use of graphics, computer animation, power point and the like, in trials? In appeals?

Local Court: N/A

DIFC: There are no specific rules on this. It is likely that the DIFC Court would need to be consulted directly.

36. Will the lawyer at trial be the same as the one responsible for pre-trial procedures? Is there a solicitor / barrister distinction?

Local Court: No distinction. Only lawyers licensed by the UAE Courts can appear.

DIFC: Yes, there is a solicitor/barrister distinction. Rights of audience are required.

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- 37. What are the contributory negligence laws in your jurisdiction? Is there a comparative fault assessment, joint and several or proportionate liability among tortfeasors? Does a plaintiff's negligence reduce or eliminate liability of defendants named in the litigation?**

Local Court: Yes, local courts will take contributory negligence into account.

DIFC: The DIFC Courts will take contributory negligence into account when awarding any interim payments (RDC 25.81).

- 38. Is service of a complaint issued outside your country permitted in your country by “informal” means, or must the Hague Convention be followed?**

Local Court: Diplomatic channels must be followed. Dubai is not a signatory to the Hague Convention.

DIFC: As above.

- 39. Do your laws prohibit export of relevant documents from your jurisdiction for the purposes of litigation outside your jurisdiction? (Consider privacy rules)**

Local Court: Under the protection of a Court Order, specific relevant documents can be exported.

DIFC: Under Article 4 of the DIFC Data Protection Regulations, a transfer of personal data to a recipient located in a jurisdiction outside the DIFC may take place only if that jurisdiction is deemed to have an adequate level of protection for that personal data. The Commissioner of Data Protection applies the same adequacy standards with regards to third countries as set out by Article 29 Working Party of the European Commission on Data Protection.

- 40. Please point out any litigation Best Practices employed by Courts in your jurisdiction but not yet referenced in the survey.**

Local Court: N/A

DIFC: N/A

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- 41. Are there any significant areas in which you believe the playing field between plaintiff and defendant is not level that you think need to be addressed?**

Local Court: No.

DIFC: No.

- 42. Are there legislative efforts under way that address any of the litigation practices in your country?**

Local Court: Yes, arbitration as discussed.

DIFC: N/A.