

An aerial photograph of the Dubai skyline, featuring the Burj Khalifa as the central focus. The city is densely packed with skyscrapers and modern architecture. In the foreground, a complex multi-level highway interchange is visible. The sky is a clear, vibrant blue with some light, wispy clouds. The overall scene is brightly lit, suggesting a clear day.

DISPUTE RESOLUTION IN THE MIDDLE EAST

Default judgment



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DEFAULT JUDGMENT

GENERAL OVERVIEW

Default judgment is the term given to a judgment made by an administrative act, rather than a judgment reached following a full trial. Typically, a default judgment is reached following a failure by one party to comply with a fundamental procedural requirement.

The key question is whether the particular triggering procedural requirement has been satisfied, rather than looking at an assessment of the merits of the relevant underlying submission or claim. Under many rules of civil procedure (in litigation), a default judgment may occur where the defendant fails to file an acknowledgement of service or a defence within the time limits set down (or indicating in these documents that the proceedings are not being contested).

Default judgment is distinct from "summary judgment", where a party applies for a claim to be determined at an early stage of the proceedings, without the need for a full trial of the issues and a hearing of evidence, on the basis that the claim or defence has "no real prospect" of success and there is no other reason why the matter should be disposed of at trial.

As a general rule, default (and summary) judgment are not remedies that are available to arbitral tribunals (as distinct from the courts), although it is possible for arbitral rules (or for the parties' agreement) to provide such specific powers.

When choosing which dispute resolution mechanism to incorporate into any agreement, thought should be given to the risk that the other party may refuse to engage with the process. This is an issue that will often only become relevant where a dispute has already arisen, although where possible thought should be given to the availability of default judgment at the outset when considering the appropriate dispute resolution mechanism.

ONSHORE LITIGATION

The onshore courts of the Gulf Cooperation Council (GCC) states, in general, have similar rules and procedures regarding obtaining default judgment. These rules appear in their respective civil procedure laws, save for Saudi Arabia, where they appear in the law of procedure before the Sharia Courts.

Using the United Arab Emirates (UAE) as an example, Article 53(1) of the UAE Federal Law No. 11 of 1992 (the civil procedure law in the UAE), states (in translation) that default judgment will be granted where a defendant or his representative fails to appear before a Court of First Instance after being properly summoned to do so on one or two occasions. If default judgment is granted, a defendant will have no right to apply to review the judgment or re-open the case at any time, although the defendant will retain a right to appeal that judgment.

If no appeal is filed against the default judgment within 30 days, the judgment will become final and may be executed against the judgment debtor in the Execution Court using standard execution procedures.

OFFSHORE LITIGATION

There are three main offshore courts within the GCC (the Dubai International Financial Centre (DIFC) Court, Abu Dhabi Global Market (ADGM) Court and Qatar Financial Centre (QFC) Court) and they differ in their approaches to obtaining default judgment. The Rules of the DIFC Courts (RDC) are very similar in substance

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to the English civil procedure rules, and the ADGM Rules include comparable but much less detailed provisions. There is no mechanism for obtaining default judgment under the current rules of the QFC Court.

Using the DIFC Court as an example, the RDC allows a claimant to apply for default judgment where the defendant has missed the time limit to acknowledge the claim against them, or has acknowledged the claim but failed to file a defence. Accordingly, default judgment will not be available where the defendant has fully satisfied the claim on which the claimant is seeking judgment (including costs) or has fully admitted the claim but requested time to pay the amount due. If the defendant has applied to have the claim struck out or assessed for immediate (ie summary) judgment, the claimant will not be able to obtain a default judgment; the defendant's application must be disposed of first. The claimant must provide the court with satisfactory evidence that the claim is eligible for default judgment as part of its application.

Default judgment may be granted in a claim for either a specified or unspecified sum of money. Where the claim is for a specified amount, the claimant may specify whether he would like the judgment debt to be paid in whole or, if not, the times and rate at which it is to be paid in instalments. Where the sum has not been specified, the court will decide the value of the claim. The court may also choose to award the claimant interest and costs. In the DIFC Court it is customary for a default judgment award to be granted in US dollars. Where the claim is for an amount in another currency, the judgment will expressly allow for payment in that currency or in the equivalent US dollar sum.

Once default judgment has been granted, the defendant has no right to appeal the court's decision. However, the defendant may apply to the court to have it set aside or varied. The court must set aside any decision wrongly entered into; that is, where the court did not correctly comply with the relevant provisions of the RDC. RDC 14.2 provides that the DIFC Court also has broad discretion to set aside or vary a judgment "on such conditions as it sees fit". This usually applies where the defendant has a real prospect of successfully defending the claim, were it allowed to proceed, or where it appears to the court that there is some other good reason to set aside or vary the judgment – often where new information has been brought to its attention. It is important to act promptly, as the court will consider whether the party seeking to set aside the default judgment has made the application in good time.

ARBITRATION

The task of an arbitral tribunal is to make a determination of the issues in the case before it. As such, where either party fails to engage with the arbitral process, for example by failing to serve and file a response to a Request for Arbitration within the relevant time limit or failing to file and serve a Statement of Defence within the relevant time limit, a tribunal will usually continue to the conclusion of the arbitral process rather than issue a pre-emptive final (or default) arbitral award against that party in default - though it may shorten timescales if the claimant requests it to do so.

This accords with the that parties be given a full or reasonable opportunity to put their case (even if they do so very belatedly). This contrasts with proceedings before a court, where the judge is given more effective powers to proceed in the absence of a reluctant party. Therefore, if the availability of judgment in default is attractive to a party (for example, if it is considered likely that the counter-party will not participate in the process), then arbitration may not be the preferred option, given the tribunal's obligation to give the counter-party a reasonable opportunity to participate and to determine the case on the merits.

Parties to arbitration should be aware that – under the institutional rules of the DIFC-LCIA, Dubai International Arbitration Centre (DIAC) and International Chamber of Commerce (ICC) – if the respondent fails to serve and file a response to a Request for Arbitration, this will not preclude the respondent from denying any claim or from advancing a counterclaim in the arbitration.

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