



Dispute Resolution in the Middle East

SETTLEMENT

Settlement

General overview

This volume focuses on how settlement of a dispute can be achieved through Alternative Dispute Resolution (ADR) mechanisms in both the onshore and offshore jurisdictions of the United Arab Emirates (UAE). ADR is a collective term for the various means by which a dispute between parties may be amicably resolved without recourse to the determination of a court or, in the case of arbitration, an arbitral tribunal.

The use of formal ADR is a relatively new concept in the Gulf Cooperation Council (GCC) region. Nonetheless, there appears to be a growing willingness to engage in ADR, as well as an increase in the number of dispute resolution centres which offer ADR services, such as mediation.

A settlement is an agreement between parties to resolve a dispute in accordance with the terms agreed between them. There are a number of reasons why a party should consider settling a dispute. These include, (without limitation) the following:

- settlement allows parties to avoid the uncertainty of waiting for a judgment from a court (or arbitral award from a tribunal). In addition, an agreed outcome represents a solution acceptable to both parties, as opposed to an outcome from a court or arbitral tribunal (which will often be unfavorable to at least one party);
- reaching a settlement saves costs (including legal, expert, disbursements) and management time;
- in some instances, a settlement allows the parties to continue their commercial relationship; and
- the parties are likely to avoid any negative publicity or reputational damage by ensuring that their settlement agreement includes a confidentiality clause (whereas a court judgment may be publicly available).

A number of legal jurisdictions allow the concept of "without prejudice" communication. "Without prejudice" communication allows parties involved in settlement discussions to make concessions or settlement offers in the interest of resolving their dispute, without prejudicing their position before the court. The concept of "without prejudice" communications is recognized before the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM) courts. However, the concept of "without prejudice" communications is not recognized by the onshore courts of the Middle East. Consequently, communications and documents used for the purpose of the settlement process can be submitted before the onshore courts and relied on during court proceedings, if a settlement is not reached.

Onshore litigation

ADR IN THE ONSHORE COURTS

The UAE Civil Code, unlike the civil procedure rules in England and Wales, does not contain provisions relating to pre-action conduct, by which settlement is encouraged before commencing court proceedings.

The main institutions which offer ADR services in onshore UAE are the following:

- The Centre for Amicable Settlement of Disputes;
- The Reconciliation and Settlement Committee; and
- The Mediation Centre.

CENTRE FOR AMICABLE SETTLEMENT OF DISPUTES

In Dubai, Law No. 16 of 2009 establishes a Centre for Amicable Settlement of Disputes ("Centre") which can hear the following:

- disputes which concern the partition of common property;
- disputes relating to debts (up to a maximum value of AED50,000);
- disputes where one of the parties is a bank; and
- disputes where the parties have agreed to refer the matter to the Centre in ongoing litigation, regardless of the value of the dispute.

Disputes which fall within the first three categories must be reviewed by the Centre before they may be filed at the relevant onshore Dubai courts. Disputes which are referred to the Centre are handled by a number of mediators (who review the facts) under the supervision of the concerned judge. While the Centre is handling the case, all limitation and prescription periods are put on hold.

There are numerous cost and time advantages to settling a dispute through the Centre. Disputes referred to the Centre are typically settled within one month from the date on which the parties appear before the Centre. This is significantly faster than the three tier process before the onshore Dubai courts, which takes 18 to 24 months (or longer on occasion). If a settlement is reached then a signed settlement agreement must be attested by a Dubai court judge. This can then be enforced immediately.

THE RECONCILIATION AND SETTLEMENT COMMITTEE

In the UAE, commercial disputes in the Federal Courts (this procedure does not apply for Dubai and Ras Al Khaimah) must be referred to a Reconciliation and Settlement Committee (Committee). The Committee facilitates settlement by way of a preliminary hearing whose purpose is to attempt to settle the dispute amicably. During the settlement hearing, documents can be filed, but as the purpose of the hearing is to settle the case, the filing of documents is unusual. The hearing before the Committee is not private and takes place in a room to which the public has access. Any documents or admissions made in the hearings before the Committee are not privileged and any agreement reached before the Committee is binding and enforceable (and often recorded in the minutes of the hearing, which are signed by the parties). If a settlement is not reached after the hearing, then the claimant can file a claim in the Court of First Instance.

THE MEDIATION CENTRE

The Mediation Centre opened in Dubai in May 2016. The Mediation Centre offers traditional Middle Eastern conciliation practices as well as modern mediation, as well as facilitating accredited mediation courses. The advisory board of the Mediation Centre consists of leading international and local lawyers, and representatives of prominent businesses.

Offshore litigation

DIFC COURTS

Proceedings before the DIFC courts are conducted in accordance with the Rules of the DIFC courts (RDC). The RDC operate to promote an "*overriding objective*" which requires the DIFC courts to deal with cases justly, with a view to saving costs and dealing with cases in a proportionate manner and the litigating parties to assist the courts to achieve the overriding objective.

In contrast to the English High Court, there are no formal pre-action protocol procedures before the DIFC courts. However, the DIFC courts are required to further the overriding objective, which includes encouraging parties to use ADR procedures to settle their dispute before the commencement of litigation.

One way in which the DIFC courts encourage parties to settle their disputes is through Part 32 of the RDC. A Part 32 offer is an option under the RDC which permits parties to attempt to settle substantive claims (excluding costs) which has potential advantages and are explained below.

Parties may make a Part 32 offer at any stage before the commencement of proceedings and up to 21 days prior to the trial date. A Part 32 offer is made when it is served on the offeree and is accepted by serving the written notice of acceptance on the offeror and filing the notice with the court.

FORM OF PART 32 OFFER

An offer to settle which is made in accordance with Part 32 of the RDC must include the following form and content. It must:

- be in writing;
- state on its face that it is intended to have the consequences of Part 32;
- specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with RDC 32.28 to 32.33 if the offer is accepted;
- state whether it relates to the whole of the claim or to part of it, or to an issue that arises in it and, if so, to which part or issue; and
- state whether it takes into account any counterclaim.

TERMS OF THE SETTLEMENT

The terms of a Part 32 offer must comply with the criteria listed above. All other terms of the offer depend on the facts of the case. A Part 32 offer should be carefully drafted to deal with every detail of the proposed offer. Key issues which should be considered during negotiations and the drafting stage of any settlement agreement are the following:

- the scope of the claims to be settled;
- confidentiality clause stating that the terms of the settlement should be kept confidential between the parties;
- payment arrangements;
- legal costs; and
- disposal of court proceedings.

COST CONSEQUENCES OF ACCEPTANCE/REJECTION OF A PART 32 OFFER

A Part 32 offer is an offer to pay a certain sum of money in settlement of the claim, which may be accepted by the claimant within 14 days from the date of the offer. If the Part 32 offer is not accepted and the claimant fails to obtain a judgment "*more advantageous*" than the Part 32 offer, the claimant will be liable for the legal costs (plus interest) of the proceedings from the date the offer was rejected.

A Part 32 offer is treated as "*without prejudice except as to costs*". This means that, if the offer is not accepted, it cannot be used or referred to during legal proceedings in relation to the claim, save as to the issue of costs.

ADVANTAGES OF A PART 32 OFFER

The main advantages of a Part 32 offer are as follows:

- a Part 32 offer is a formal offer registered with the DIFC courts and must strictly follow the procedures laid down in the RDC;
- a Part 32 offer can be used to save costs and time in avoiding a full trial;
- the offeror of a Part 32 offer can exert pressure on the offeree to consider settling the dispute, as a rejection of a Part 32 offer may have serious cost implications for the offeree;
- a Part 32 offer does not prejudice a party's right to pursue litigation;
- a Part 32 offer can be made in whole or in part of the claimed amount and, if accepted, will result in a strike-out of the whole or part of the claim in accordance with the terms of the offer; and
- there is no limit to the number of Part 32 offers which can be made by either party before the commencement of the trial.

PART 18 OFFER - ADGM COURTS

Like the DIFC, the ADGM is a financial free zone which is not subject to onshore UAE civil and commercial law. The ADGM has its own court system and the ADGM Court Procedure Rules 2016 make provision, in Part 18, for settlement offers. A Part 18 offer is similar to the Part 32 offer in the RDC. A Part 18 offer is treated as "*without prejudice save as to costs*" and "*may be made by a claimant or a defendant in respect of the whole, or part of, or any issue that arises in a claim, counterclaim or other additional claim or an appeal or cross-appeal from a decision made at a trial.*" A Part 18 offer must be made in accordance with the prescribed form stated in the ADGM Court Procedure Rules 2016.

Further, each of the DIFC and ADGM Courts will, at the stage of the proceeding at which a Case Management Conference is convened (see Volume 8 "**Case Management**"), ask the parties if they would like to stay the proceedings for a short period of time in which they can attempt to settle the dispute.

Arbitration

DIFC-LCIA

The DIFC-LCIA facilitates mediation under the DIFC-LCIA Mediation Rules (dated 1 August 2012). DIFC-LCIA mediation can be used where the parties have agreed to mediate existing or future disputes under the rules, or upon request by the parties. Once DIFC-LCIA mediation is agreed, the court appoints a mediator, having due regard for any nomination or criteria of selection agreed in writing by the parties. The commencement of mediation does not preclude the parties from initiating or continuing any arbitration or judicial proceedings in respect of the dispute which is subject to mediation.

INTERNATIONAL CHAMBER OF COMMERCE (ICC)

The ICC has its own mediation rules (dated 1 January 2014) which contain comprehensive provisions for the appointment of a mediator and the mediation process. In an arbitration under the ICC Rules, the arbitral tribunal has various case management powers which it may use to assist with the settlement of a dispute. Appendix IV of the ICC Rules states that the arbitral tribunal may at any point in the proceedings inform or remind the parties that they are free to settle all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC Mediation Rules. Where agreed between the

parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable by law.

If a settlement is agreed before the arbitration has fully commenced, the settlement agreement will be documented. However, if a settlement is agreed after the file has been transmitted to the arbitral tribunal, the parties may request that the arbitral tribunal records the settlement agreement in the form of a consent award.

DUBAI INTERNATIONAL ARBITRATION CENTRE (DIAC)

DIAC does not provide mediation services. The DIAC Arbitration Rules state that the arbitral tribunal shall terminate the arbitration once a settlement has been agreed. If requested jointly by the parties, the arbitral tribunal shall record the settlement in the form of a written consent award, which will contain a statement clarifying that it is an award made by the parties' consent. Each party to the arbitration, including the tribunal, shall receive an original copy of the consent award.





