



DISPUTE RESOLUTION IN THE MIDDLE EAST

Evidence



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EVIDENCE

GENERAL OVERVIEW

The purpose of presenting evidence is (i) to ensure a party provides sufficient support for its case and (ii) to assist a court or an arbitral tribunal in determining disputed issues of fact or expert opinion. The rules relating to evidence are therefore important to understand. In short, effective evidence management can win cases and poor evidence management can lose them. Accordingly, parties should adopt best practices during their commercial dealings by maintaining comprehensive contemporaneous records that reflect their commercial dealings with their opponent, as well as how and when key events unfolded. Such an exercise can often make the difference between winning and losing a dispute.

Rules of evidence vary depending on the jurisdiction and whether the forum is common law or civil law-based. In common law systems, judges act as "referees" who administer rules of evidence, and render a "judgment". By comparison, in civil law jurisdictions, the judge or court-appointed expert takes a more active part in the conduct of the proceedings and in the presentation of evidence (including examining witnesses). Civil law jurisdictions are less bound by the same technical rules of evidence which characterize common law adversarial legal systems. In the Gulf Cooperation Council (GCC) states, onshore courts are founded on civil law systems, whereas offshore courts, such as the Dubai International Financial Centre (DIFC) Court, are based on common law principles. In arbitrations in the GCC states, parties from different cultural and jurisdictional perspectives are often pitted against each other; these contrasts are particularly stark where lawyers or arbitrators from different legal systems find themselves in the same case or arbitration.

This volume does not discuss document production. Please refer to Volume 12 "[Document Production](#)" for an overview.

ONSHORE LITIGATION

GCC states have standalone evidence laws. Federal Law No. 10 of 1992, as amended, is the "UAE Evidence Law".

Admissibility

Onshore courts are focused on establishing the facts necessary for determining issues between the parties. They are reluctant to be limited by any rules of evidence that might prevent them from achieving this goal. Accordingly, the UAE Evidence Law contains few rules on admissibility; admissibility standards focus on authentication of evidence. Thus, the UAE Evidence Law does not set out any rules relating to privilege or hearsay which might otherwise assist a party in resisting the inclusion of certain evidence in a case.

Despite broad admissibility standards, onshore courts also tend to be reluctant to order a party to produce documents (see Volume 10 "[Document Production](#)").

Burden of proof

In most GCC states, the burden of proof is not clearly linked to a specific or quantitative standard. For example, Article 1(1) of the UAE Evidence Law states that "*the plaintiff has to prove his right, and the defendant has to disprove it.*"

Methods of presenting evidence

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Commercial disputes before the GCC onshore courts are characterized by limited, written documentary exchanges with little, if any, taking of witness evidence or oral advocacy. Informal oral advocacy occurs in more private sessions before court-appointed experts.

Expert evidence

The UAE has a specialized law, Federal Law No. 7 On the Regulation of the Experts Profession Before Judicial Authorities, which applies in conjunction with the UAE Evidence Law.

Onshore UAE Courts are empowered to appoint one or more experts to advise on the evidence and any of the disputed legal issues. While the appointment of an expert may be made upon the application of one of the parties to the proceedings in some GCC jurisdictions (eg UAE, Kuwait), onshore courts usually appoint an expert or panel of experts on their own initiative. Such experts are frequently involved in advising on the key legal issues in a case.

Expert sessions, which are effectively "closed office" meetings, allow for informal oral advocacy and active party participation in the process leading up to the filing of the expert's report.

While the onshore courts are not bound by an expert's report, in practice conclusions set out in an expert's report are usually adopted by the courts. As a result, the expert process is often the most important stage of a dispute before the onshore courts, and the process should be planned accordingly.

OFFSHORE LITIGATION

The DIFC, Abu Dhabi Global Market (ADGM), and Qatar Financial Centre (QFC) Courts base their laws of evidence on common law principles.

In the DIFC Court, evidence is governed by Part 29 (Evidence) and Part 31 (Experts and Assessors) of the Rules of the DIFC Courts 2016. Part 29 sets out how evidence is to be submitted, and the DIFC Courts may admit factual evidence, orally and through witness statements. In accordance with Part 29, the court may make an order that both sides must exchange witness statements by a specified date. These statements are important, as they will form the basis of the factual evidence that each witness will give. A witness who has provided a statement will be expected to attend the trial to be cross-examined on the contents of their statement. Part 31 sets out the rules in respect of expert evidence, and the DIFC Courts may also admit expert evidence, orally and through written expert reports, which should assist the court by providing an objective, unbiased opinion on matters within their expertise.

In the ADGM, Part 5 of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015 set out the rules on admissibility, hearsay, witnesses, experts, preserving evidence, oaths and sanctions for contempt and false evidence. These rules are quite comprehensive. Evidence rules set out guidelines on hearsay and hearsay exceptions. The ADGM Court may admit both factual and expert evidence, orally or through witness statements. The ADGM Court is also empowered to compel competent witnesses, including spouses, subject to limited exceptions. The ADGM Court may also make preservation orders to preserve evidence.

Article 10.2.3 of the Qatar Financial Centre Civil and Commercial Court Regulations and Procedural Rules provide that the QFC Courts may admit evidence, both as to matters of fact and expert opinion, on such terms and in such form as it considers appropriate. Furthermore, pursuant to Article 27, the QFC Court has the power to give directions as to the provision of statements by witnesses of fact whom the parties propose to

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call at trial, the manner in which any witness evidence is to be given, whether the parties should be permitted to call expert evidence, the form and content of any experts' reports, and the number of experts who may be called. The QFC Court may also appoint an expert to assist it in its determination of the case. However, any expert who provides evidence before the QFC Court must understand that their duty is to assist the court on matters within their own expertise. The expert evidence must also be independent, and this duty overrides any obligations to the instructing party or to those by whom the expert is paid.

Broadly, these offshore jurisdictions are committed to providing clear, transparent and robust evidence rules. In practice, whilst there are some differences between each, all three set of rules are broadly very similar.

ARBITRATION

Disclosure

The procedure for obtaining and submitting evidence plays an important role in international arbitration. While many international arbitrations involve at least some measure of disclosure, the availability and scope of disclosure varies widely among common law and civil law jurisdictions.

The *IBA Rules on the Taking of Evidence in International Arbitration 2010* (IBA Rules) provide a framework for the process and procedure for taking evidence in international arbitrations, and accommodates both common law and civil law approaches.

The IBA Rules can be incorporated into arbitration agreements, and supplement any institutional rules that apply according to the parties' agreement and applicable national laws. The IBA Rules provide a case-by-case framework for taking evidence efficiently. They are commonly adopted in international arbitrations, as they are particularly useful in dealing with witness evidence and document production. In practice, the IBA Rules are often incorporated as part of the arbitral tribunal's terms of reference or when the preliminary hearing and procedural timetables are set. Please see Volume 10 "[Document Production](#)" for further information.

Witness evidence

Factual witness evidence may be submitted by the parties in international arbitration in support of their case, and provision for this is often made in the Procedural Order at an early stage of the proceedings. The usual practice is for witness evidence to be submitted in the form of a witness statement which stands as the direct evidence of that witness, and cross examination of that witness to be conducted at a hearing.

Expert evidence

Expert evidence in international arbitration is an area where the differing approaches of the common and civil law are particularly apparent. The common law system involves the exchange of reports prepared by party-appointed experts, who are then cross-examined at an oral hearing, with a view to determining which party's case prevails. Such experts are usually required to produce independent reports which represent their own opinions, not the position of the party appointing them. By contrast, the civil law system usually involves a single independent expert appointed by the arbitral tribunal, as opposed to the parties

It is important for an expert witness to give an objective unbiased opinion. His or her overriding duty is to the arbitral tribunal. This duty overrides any obligation to the party from whom the expert has received instructions or by whom he or she is paid. He or she therefore needs to provide independent assistance to the tribunal in relation to the matters within their expertise. If the expert has a clear connection with the

instructing party, then he or she may be accused of lacking independence, and their evidence may be given less weight as a result. Any material conflicts of interest should be declared at the outset of the proceedings.

The use of expert evidence in international arbitration is common practice. An arbitral tribunal is often chosen for its specialist knowledge or expertise, and the appointment of an expert to give evidence on specific issues can clarify and enhance the arbitral tribunal's understanding, and assist in its decision-making in respect of a dispute.

Inspection

Inspections (for example, of a project site) are sometimes carried out by tribunals, often to give them a better understanding of the subject matter of the dispute. The parties are usually present at any such inspections.

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