Dispute Resolution in the Middle East

PREPARATIONS FOR TRIAL

DLA PIPER

Preparations for trial

General overview

This volume aims to set out some of the final steps that should be undertaken in preparation for trial. After months, or years, of dedicating time and resources to the dispute resolution process, the final stages of preparing for trial can often be a stressful time because the end is in sight, yet a number of uncertainties remain. Careful management of practical considerations will ensure that you are as well prepared for trial as possible and can focus on the substance of the hearing and other important matters, such as strategy.

Onshore litigation

The final preparatory steps that must be taken into consideration when preparing for an onshore litigation hearing differ substantially from those that are necessary when preparing for an offshore litigation hearing or arbitration hearing.

VENUE

Civil proceedings in the onshore United Arab Emirates (UAE) Courts are conducted in Arabic and are predominantly based on written pleadings, rather than oral testimony, so the format of the hearing is very different to an offshore litigation or arbitration hearing. In onshore litigation, the court will set a deadline for filing memoranda, and will adjourn proceedings for intervals of up to (approximately) four weeks in between these dates, with little involvement from the parties beyond their compliance with the filing deadlines. There is therefore no need to carry out the sort of logistical arrangements involving attendees and venue bookings that are often necessary for offshore litigation and arbitration hearings. Whilst it is possible for representatives from either side to attend the hearings, as these occasions involve little more than submitting written memoranda and obtaining the date for the next hearing, common practice is for local counsel to attend the hearings and report back with any updates on decisions rendered by the court.

WITNESSES

As a, civil proceedings in the onshore UAE courts are largely conducted "on the documents"; whilst parties may seek the court's permission to provide oral evidence, this is not commonplace. The cross-examination of witnesses in civil proceedings is similarly rare and, when permitted, is strictly controlled by the judge. When a witness is asked to attend court and provide oral evidence, they will need to take an oath (the substance of which will be particular to their religion). If evidence is to be provided in a language other than Arabic, a court-appointed translator (who is usually an employee of the court) or a member of staff from the witness's embassy will be required to translate the evidence. Given the rarity of factual witnesses being required to provide oral evidence, there is often no need for witnesses to undergo the sort of familiarization training that is discussed in relation to offshore litigation and arbitration. In terms of expert evidence, the court will often appoint an expert to assist with technical matters, will base its judgment on the expert's report, and will not require the attendance of the expert.

FINAL HEARING DOCUMENTS

The claimant must have all supporting documents prepared and translated to submit in Arabic. Local counsel should have their Power of Attorney in place before the first hearing. The documents submitted by the claimant will then be received by the respondent's local counsel, in order for a response to the submission to be drafted and prepared for the next hearing.

NO TRIAL

In practice, there is no trial in onshore litigation. The court simply receives the final written submission or evidence from a party and notifies the parties that the matter is now closed so that the court can enter judgment.

Considerations applicable to offshore litigation and arbitration

In contrast to onshore litigation, the final hearing in offshore litigation and arbitration is usually the centrally important point of the case and can last weeks. It therefore requires very careful preparation. There are a number of considerations that are applicable to both offshore litigation and to arbitration hearings, which are detailed below. Those preparatory considerations which are specific to one or the other forum are set out under separate headings below.

PERSONNEL LOGISTICS

If those attending the hearing (legal team, factual witnesses, expert witnesses, translators) do not live in the same location as where the hearing is taking place, it may be necessary to arrange travel and accommodation for these personnel. It may also be necessary to consider whether anyone (counsel, lawyers, experts, etc.) requires documents to be shipped for the hearing, so that shipping can be arranged in advance. For those individuals that require accommodation, it is a good idea to ensure they are based close to the venue

where the hearing is taking place, and (if possible) within the same venue, as this avoids undue travel-related stress on the mornings of the hearing and aids pre-hearing and post-hearing briefing sessions. It is wise to ensure that a list is circulated containing the contact details (mobile numbers and email addresses) of all attendees and anyone that may need to be contacted at short notice.

WITNESSES

In offshore litigation and arbitration, witnesses will be called to be cross-examined based on the content of their witness statement(s) and will be required to provide responses by way of oral testimony. Appearing at a hearing and giving oral testimony may be a daunting prospect for some individuals, and there are steps that can be taken to mitigate that anxiety, such as witness familiarization training. It is possible to instruct independent, specialist companies to provide this service (under English law, lawyers involved in a case are prohibited from "coaching" witnesses in preparation for the hearing). Training can be tailored based on the witnesses' needs but may entail an explanation of the hearing process, what is expected from the witness (how they should direct their answers, navigating a trial bundle, techniques for dealing with cross-examination, etc.) and a mock cross-examination. Often, the lawyers instructed will be able to recommend witness familiarization courses and assist with arranging this training.

FINAL HEARING DOCUMENTS

Often in offshore litigation, such as in the Dubai International Financial Centre (DIFC) Courts (see Part 35.21 of the Rules of the DIFC Courts passed by the DIFC Authority (RDC)), and in arbitration, the claimant will be responsible for the preparation of the trial bundle. The purpose of the trial bundle is to collate all of the relevant material to which the parties wish to refer during the hearing, so that the proceedings can run as efficiently and smoothly as possible. The preparation of the bundle can be a time-consuming process, requiring the consensus of both parties; however, it is an important step and can impact the smooth running of the trial. The trial bundle may be in hard copy, electronic form, or a combination of the two. If an electronic bundle is used, consider whether it is necessary for anyone to receive training in advance of the hearing on how to use the electronic platform. In terms of other documents for the final hearing, it is likely that the procedural timetable or pre-trial checklist will already provide for the production of a dramatis personae, chronology and list of issues, but if it does not, consider proposing that the parties come to an agreement on these three items. These documents will greatly assist the court / arbitral tribunal during the proceedings.

SETTLEMENT

Exploring settlement options, even at this stage, may save time and costs and has the benefit of reducing the uncertainties that are an inherent element of going to trial. Please see Volume 9 "**Settlement**" for further information.

Offshore litigation

PRE-TRIAL REVIEW

Part 26 of the RDC concerns Case Management, and Part 26.72 gives the court discretion to order a Pre-Trial Review, which is normally scheduled to take place between four to eight weeks before the date fixed for trial. Pre-Trial Reviews are often conducted by the trial judge, and attended by the legal representatives who are to appear at the trial. Prior to the Pre-Trial Review, the parties are required to try to agree to timetable for the trial (providing (as appropriate) for (a) oral submissions (b) factual witness evidence and (c) expert evidence) and must file a copy of the proposed timetable at least two days before the date of the Pre-Trial Review, identifying any differences of view between the parties. At the Pre-Trial Review, the judge may give directions regarding the conduct of the trial, and may set the trial timetable.

LOGISTICAL ARRANGEMENTS

DIFC Court hearings will usually be conducted in the DIFC Court hearing room. The general rule is that DIFC Court hearings are public, unless the judge determines otherwise and so members of the public may be admitted to the hearing, where practicable. A similar rule, applies to hearings before the Abu Dhabi Global Market (ADGM) Courts. DIFC Court proceedings are recorded, unless ordered otherwise and the parties may request transcripts of the hearing recordings. The DIFC Court permits the attendance of translators where necessary to assist a witness with providing evidence.

WITNESS AVAILABILITY

The DIFC Court and ADGM Court may allow a witness to give evidence via video link or by other means, so if a witness cannot attend the hearing in person it may still be possible for them to testify before the court.

FINAL HEARING DOCUMENTS

The rules relating to trial bundles in DIFC Court proceedings are contained within the RDC at Part 35. These are generally more detailed and specific than the rules that apply to trial bundles in arbitration, as they set certain requirements for contents and organization. In particular, unless ordered otherwise, negotiations about the bundle should commence six weeks before the date fixed for trial, the trial bundle must be completed no later than 21 days before the date fixed for trial and a full set of trial bundles must be lodged with the

Listing Office at least 14 days before the date fixed for trial. In some cases, a special order for costs may be made against the party responsible for including unnecessary documents in the bundle. The use of IT at trial is encouraged (ie electronic bundles), but must be raised and agreed in advance, such as at the case management conference. The ADGM rules provide that the claimant must circulate the hearing bundle not less than seven business days before the commencement of the trial.

Often the court will set a timetable for the trial in consultation with the parties. However, if this does not happen, the parties will be required to submit a trial timetable. The parties may also be required to submit a reading list for the judge, skeleton arguments and legal authorities. The ADGM rules encourage, and sometimes require the parties to provide the court with an agreed list of issues to be litigated.

Arbitration

LOGISTICAL ARRANGEMENTS

Arbitration hearings are generally private, unless agreed otherwise (by way of example, see Article 28.3, Dubai International Arbitration Centre (DIAC) Rules 2007 and Article 19.4, DIFC-LCIA Arbitration Rules 2016). The DIFC-LCIA Arbitration Rules provide that a hearing may take place by video, teleconference, in person or a combination of all three (Article 19.2, DIFC-LCIA Arbitration Rules 2016). Often, one of the arbitral tribunal's early procedural orders will provide that the claimant is responsible for making the necessary bookings for the hearing, following consultation with the respondent. Where the hearing is taking place in person, bookings will often include hiring a venue for the hearing (quite often a large conference room in a hotel, with various breakout rooms), hiring the necessary IT equipment, instructing transcription providers (real-time is often the preference, but daily transcripts are an option) and translators, where necessary. It will be necessary to ensure the hearing room can accommodate all attendees and the preferred layout (which may be U-shaped or a more traditional trial set up, with the witness at one side). Usually half a day or a full day will be required to provide the technicians with enough time to prepare for the hearing. Refreshments are an additional consideration and cost that will need to be factored in.

COSTS

In arbitration, the parties will often have agreed, in the Terms of Reference, to share the costs of the hearing arrangements (venue, transcription, translation, etc.) subject to the arbitral tribunal's decision on the allocation of costs. It will therefore be necessary for the parties to liaise when undertaking the initial preparatory steps: for example, the claimant may be expected to provide three quotes for the various bookings, including venue, translators, transcribers, etc. and to obtain the respondent's agreement to the proposed arrangements.

WITNESS AVAILABILITY

The IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules), which are sometimes incorporated into the Terms of Reference, provide that, if a witness fails to appear for testimony, the arbitral tribunal has the discretion to disregard any witness statement by that witness. It is therefore important that witness availability is confirmed and communicated to the arbitral tribunal as promptly as possible, and that all necessary arrangements are taken to avoid the eventuality of statements being disregarded. This may include obtaining permission from the arbitral tribunal for the witness to appear via videoconference. The DIFC-LCIA Rules provide that the arbitral tribunal has discretion to determine the weight to place on the written testimony of a non-attending witness, including whether to exclude that witness's evidence, and the DIAC Rules provide that the Tribunal may make the admissibility of witness testimony conditional upon the witness providing oral testimony. In onshore-seated arbitrations, it will be important to agree the form of oath for each witness and to ensure that a copy of the relevant holy book is present in the hearing room.

FINAL HEARING DOCUMENTS

The arbitral tribunal will determine, via the procedural timetable, when the trial bundle is due. The rules relating to hearing bundles for arbitration are generally more relaxed than the rules relating to bundles for court hearings; but it is important for the parties to maintain good communication channels between them so unnecessary delays are avoided and trial preparation is not disrupted.

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