



CONSULTATION PAPER NO. 1

May 2024

**Proposed amendments to the Law on the Application
of Civil and Commercial Laws in the DIFC**

CONSULTATION PAPER NO. 1 OF 2024

PROPOSED AMENDMENTS TO THE LAW ON THE APPLICATION OF CIVIL AND COMMERCIAL LAWS IN THE DIFC

Why are we issuing this paper?

1. The Dubai International Financial Centre Authority (“**DIFCA**”) invites public comment on proposed amendments to the Law on the Application of Civil and Commercial Laws in the DIFC, DIFC Law No. 3 of 2004 (the “**Application Law**”).
2. The proposed amendments will be enacted through the DIFC Amendment Law, DIFC Law No. [6] of 2024 (the “**Proposed Legislation**”).

Who should read this paper?

3. The Proposed Legislation: (i) clarifies the source and content of DIFC law; and (ii) provides guidance on the interpretation of DIFC Statutes and will therefore be of interest to all individuals and organisations operating or intending to operate in the DIFC and their professional advisors.
4. Legal practitioners providing DIFC law related advice and acting in DIFC-related disputes will have a particular interest.

How to provide comments

5. All comments should be provided to the person specified below:

Jacques Visser
Chief Legal Officer
DIFC Authority
Level 14, The Gate, P. O. Box 74777
Dubai, United Arab Emirates
or e-mailed to: consultation@difc.ae

6. You may choose to identify the organisation you represent in your comments.
7. DIFCA reserves the right to publish, on its website or elsewhere, any comments you provide, unless you expressly request otherwise at the time the comments are made.

What happens next?

8. The deadline for providing comments on the proposals in this Consultation Paper is 1 June 2024.
9. Once we receive your comments, we will consider if any further refinements are required to the proposed amendments. Once DIFCA considers the changes to be in a suitable form, the Proposed Legislation will be enacted, to come in to force on a date specified and published.

10. The Proposed Legislation is in draft form only. You should not act on it until it is formally enacted. We will issue a notice on our website when this happens.

Defined terms

11. Various terms are expressly defined in this paper or in the Proposed Legislation. Those defined terms are identified throughout this paper by the capitalisation of the initial letter of a word or of each word in a phrase. Unless the context otherwise requires, where capitalisation of the initial letter is not used, the expression has its natural meaning.

Background

12. Since the inception of the DIFC, it has been understood by practitioners that DIFC Statutes are supplemented, or “backstopped”, by English Common Law. In particular, the judgment in [The Industrial Group Limited v Abdelazim EL Sheikh EL Fadil Hamid \[2022\] DIFC CA 005/006](#) (“**Industrial Group**”), raises two issues of DIFC law that the Proposed Legislation addresses. These are referred to below as the “**Source of Law Issue**” and the “**Interpretation Issue**”. DIFCA is of the view that it is desirable to provide statutory certainty as to the Source of Law Issue and Interpretation Issue.

Source of Law Issue

13. Industrial Group found that DIFC law is essentially statutory: [105]-[112], [120]. Judges and Arbitrators cannot find that a common law or equitable doctrine, cause of action, defence or remedy exists in DIFC law, unless there is a DIFC Statute to that effect.

Interpretation Issue

14. The Industrial Group also discussed the approach to interpretation of DIFC Statutes, finding:
- a) The source of DIFC law is not confined to the law of England and Wales, for example the DIFC Contract Law is based on the *UNIDROIT Principles of International Commercial Contracts* (“**UNIDROIT Principles**”) and the DIFC Arbitration Law is based on the *UNCITRAL Model Law*. [111].
 - b) Where a DIFC Statute is based on principles which come from other jurisdictions, the Court will look to those jurisdictions to determine the content of the principles in question, and their incremental development: [105].
15. Given these findings, it is uncertain whether the common law can be used as an interpretative aid in respect of DIFC Statutes that are of a non-common law origin, such as the DIFC Contract Law and the DIFC Arbitration Law.

Explanation of Proposed Legislation – Source of Law Issue

16. The Proposed Legislation addresses the Source of Law Issue by inserting a new Article 8A into the Application Law titled “**Content of DIFC law**”. In summary, Article 8A states as follows:
- a) The content of DIFC law is to be determined in the first instance by the applicable DIFC Statute(s) (as interpreted/developed by the DIFC Courts in a manner consistent with the Proposed Legislation).
 - b) However, where a doctrine, cause of action, defence or remedy exists under the common law of England & Wales (including in equity), but has not been expressly incorporated into DIFC law by a DIFC Statute, the DIFC Court may find that the doctrine, cause of action, defence or remedy exists in DIFC Law, and apply it in the case before them. The DIFC Court’s discretion is expressly constrained by the requirements that the finding be appropriate, and subject to such modification and development as those circumstances require.
 - c) 16(b) is not permissible where the common law doctrine, cause of action, defence or remedy has been expressly or impliedly excluded by a DIFC Statute (as to which see further below).
 - d) DIFC common law (including that imported under 16(b) above) is subject to modification by a DIFC Statute, which prevails to the extent of any inconsistency.
17. The rationale for these amendments is as follows:
- a) The DIFC’s chosen legal model – i.e. Statutes supplemented by the common law – has been highly successful over its 20-year history, and remains the optimal structure for creating a common law free-zone within a broader civil law system. In keeping with the DIFC’s status as a leading international financial centre, the implementation of overarching Statutes governing specific subject-matter means that international best practice can be selectively identified, amended to suit the DIFC, and then applied. The common law is then used in two ways: (1) as an interpretive guide for DIFC Statutes; and (2) as a supplement to DIFC Statutes where there is a gap in the law that should be filled. This ensures that the common law, and all the benefits that come with it, remain a core component of DIFC law, as discussed immediately below. The DIFC’s hybrid-approach has been critically assessed as world’s best practice – for example regarding the Trusts Law (DIFC Law No. 4 of 2018). The Industrial Group, in finding that DIFC Statutes ‘cover the field’ to the exclusion of the common law tends too far towards a code-based system.
 - b) The law of England and Wales is widely regarded as the premier choice of law in international commerce, particularly in financial matters. This is due to the: (i) inherent

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flexibility and certainty of outcome; (ii) quality and breadth of the jurisprudence issued by the Courts of England & Wales; (iii) international familiarity with the common law; and (iv) access to a deep, skilled bench of international practitioners and supporting professionals. It is for this reason that DIFC law has, historically, drawn considerably from the law of England and Wales, and DIFC Judges and legal practitioners are regularly of a common law background.

- c) By 'backstopping' DIFC law with the common law of England & Wales, where appropriate, it ensures that DIFC law retains a strong link with the world's leading choice of law. This eases the legislative development burden on DIFC Bodies, and ensures that DIFC law remains current, familiar to international parties, and predictable.
 - d) It will also work to prevent DIFC law from become overly specialised, meaning the DIFC can continue to draw on, and benefit from, the talent pool of professionals with a common law background.
 - e) It is also advantageous for DIFC law to remain linked to common law developments in a more mature jurisdiction, simply because the volume of cases in England & Wales is far higher. The Courts of England and Wales are thus more likely to deal with novel legal issues first, and can guide the approach of the DIFC Courts.
18. DIFCA considered two potential ways that DIFC law could be 'backstopped' with the common law of England and Wales in order to address the Source of Law Issue: (i) a mandatory/automatic incorporation of English common law into the DIFC, as has been done in one regional commercial centre; or (ii) granting the DIFC Courts discretion to find that the common law of England & Wales exists in DIFC law, where appropriate, and where there is not DIFC Statute law to the contrary.
19. A mandatory/automatic incorporation of English law into DIFC law will create significant complication and require very prescriptive and detailed rules as to what is included and what is excluded. That is all the more true in the DIFC where there is an existing body of jurisprudence and Statutes. The DIFC's legal structure is functioning well and does not require this kind of recalibration. Further, the automatic 'shoehorning' of common law in its entirety into the DIFC may result in the incorporation of sub-optimal concepts and principles into DIFC law.
20. The preferred approach is therefore the second option – that is, if a 'gap' in DIFC Statute law is identified, the DIFC Courts are expressly granted discretion to find that common law/equitable principles from England & Wales exist in DIFC law, modify them as appropriate, and then over time develop them. In reality this is what was previously occurring, prior to Industrial Group. The proposed Article 8A is therefore a return to the *status quo ante*, albeit now underpinned by statutory certainty.

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21. In short, the amendments aim to ensure continued common law/equitable flexibility to DIFC law and ensure that DIFC law remains internationally familiar and competitive. At the discretion of the DIFC Court, and if consistent with DIFC Statute, the corpus of English common law precedent (as it develops over time) is a permitted source of DIFC law.
22. Pursuant to the proposed Article 8A, the Court effectively acts as a ‘filter’, preventing the application of undesirable common law in the DIFC. While this puts the onus on the DIFC Court, Judges (particularly those from common law jurisdictions), are experienced with identifying gaps and incrementally developing the law as necessary.
23. Importantly, the Court’s discretion is not unconstrained. Firstly, the DIFC Court is required to consider whether a particular common law principle is appropriate in the DIFC, and whether, if it is to apply, it needs to be modified or developed in some way to suit the DIFC. DIFCA anticipates that, over time, the DIFC Court will develop jurisprudence regarding the meaning of “*appropriate in the circumstances*” and the need for modification or development. The preference is to allow that process to occur incrementally in the DIFC Courts on a case-by-case basis, rather than to take an overly prescriptive approach in the Application Law as to what is and is not appropriate.
24. Secondly, the Proposed Legislation contains the following two express limitations:
 - a) There can be no importation of a common law concept if there has been an express or implied exclusion of the same by a DIFC Statute. This includes where the DIFC Statute is intended to codify an area of law in its entirety.
 - b) DIFC common law is at all times subject to DIFC Statute law (so a DIFC Statute can always modify or remove entirely a common law principle from DIFC law).
25. The “*express or implied*” exclusion language has been kept deliberately broad. The intention is that legal practitioners and the DIFC Courts are required by Statute to consider whether a particular common law principle from England & Wales has been intentionally excluded.
26. Inevitably, there will be argument in cases before the DIFC Courts as to whether an existing DIFC Statute impliedly ‘covers the field’ as regards an area of law, such that a finding under the proposed Article 8A is not permissible. This should not be a problematic exercise for the DIFC Courts to undertake, with the assistance of the parties. It is envisaged that this will only be an issue in a small minority of cases. Further, after a period of years, which DIFC Statutes are exclusive (if any) and which are not will be established by precedent and no longer controversial.
27. DIFCA considered broadening the scope of Article 8A to permit the DIFC Court to find that a common law principle from *any* established common law jurisdiction existed in DIFC law, rather than confining Article 8A to the common law of England & Wales. However, it was decided to

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focus on England & Wales in order to narrow the scope of Article 8A and therefore create less complexity and administrative burden for entities operating in the DIFC, as well as the DIFC Courts and legal practitioners. In any event, because the DIFC Courts are required to develop and modify the English common law principle under consideration to suit the circumstances of the DIFC, there is scope for the DIFC Courts to amend the same based on the approaches in other common law jurisdictions, if the approach in that second jurisdiction is preferable. In this way, the approaches in other leading common law jurisdictions remain relevant to the DIFC.

28. Finally, as a housekeeping matter, the existing Article 8(2)(e) is proposed to be deleted. Article 8(2)(e) is the final limb in what has been labelled the 'Waterfall' of applicable law in the DIFC, and provides that if a choice of law is unable to be made under Articles 8(2)(a) to (d), the law of England & Wales shall apply.
29. Article 8(2)(e) has been interpreted inconsistently and is now effectively redundant, given the confirmation in the Industrial Group that the 'Waterfall' in Article 8(2) is purely a choice of law regime. A choice of law will always be made by the Court under Article 8(2)(d), if that point in the 'Waterfall' is reached.
30. This will also prevent any confusion/overlap in the future between Article 8(2)(e), and the proposed Article 8A, which is to govern the content of DIFC law and the 'backstopping' of the same with the common law of England & Wales.

Explanation of Proposed Legislation – The Interpretation Issue

31. The Proposed Legislation addresses the Interpretation Issue by inserting a new Article 8B into the Application Law. In summary, Article 8B states as follows:
 - a) The interpretation of a DIFC Statute may be guided by the principles developed in respect of analogous laws in established common law jurisdictions, such as England & Wales, Australia, or Singapore. (This is a non-exhaustive list and the approaches of other common law jurisdictions may be relevant, at the discretion of the DIFC Court).
 - b) The above approach to interpretation of DIFC Statutes applies irrespective of whether the DIFC Statute is based on international model law or another non-common law source.
32. Article 8B therefore gives the DIFC Courts/Arbitrators discretion to interpret all DIFC Statutes by reference to the approach to analogous laws in the common law world. However, consistent with the Industrial Group, where a DIFC Statute is based on principles which come from outside the common law, it is also legitimate to look to those non-common law jurisdictions to determine the content of the principles in question.
33. Critically, Article 8B is a non-binding directive. The Courts are permitted to take this approach; they are not mandated to do so. This flexibility again allows the Court to act as a 'filter' and

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prevent the interpretation of DIFC Statutes in a manner inappropriate to the circumstances of the DIFC.

34. In effect, the Proposed Legislation ensures that the common law will always be first port of call when interpreting DIFC Statutes, including, for instance, the DIFC Arbitration Law and the DIFC Contract Law (to the extent that is permissible under the text).
35. Expressly linking the interpretation of DIFC Statutes to the principles developed in respect of analogous laws in established common law jurisdictions is also desirable for the same reasons as identified above in respect of the Source of Law Issue.
36. For the avoidance of doubt, Article 8B(3) is intended to make clear that if the relevant DIFC Statute is based on an international model law, its interpretation may also be guided by international jurisprudence interpreting and applying the international model law, as well as interpretative aids and commentary published by international bodies regarding the international model law. For example, one of the reasons the UNCITRAL Model Law on Secured Transactions (the "**UMLST**") was adopted as the basis for the Law of Security (DIFC Law No. 4 of 2024), was the existence of the UMLST's Enactment Guide and Legislative Guide, which are intended to provide invaluable aids to interpretation for both the Courts and its users.

- Q1. Article 8A(3) allows the DIFC Courts, if appropriate in the circumstances, to modify or develop a doctrine, cause of action, defence or remedy that exists under English common law (but that has not been expressly incorporated into DIFC Law by DIFC Statute). See paragraph 27 of this Consultation Paper for further reference. Do you agree that it is sufficiently clear that in exercising its modification/development power, the DIFC Courts may have reference to other common law jurisdictions? If not, please provide details.**
- Q2. Do you have any comments, proposed amendments or other suggestions in respect of the Proposed Legislation?**
- Q3. Are there any issues not included in the Proposed Legislation, which warrant attention on this topic? If so, what are they, and why, and how should they be addressed?**
- Q4. If you do not agree with the approach set out in the Proposed Legislation (either in relation to the Source of Law Issue or the Interpretation issue, or both) what alternative approach would you suggest to dealing with the matters raised by Industrial Group?**
- Q5. Can you identify any 'gaps' in DIFC law that are not covered by a DIFC Statute, and which would require the importation of a common law doctrine, cause of action, defence and/or remedy to address?**

Legislative proposal

37. This legislative proposal contains the following:

- (a) the Proposed Law (at Annex A);
- (b) a table of comments to provide your views and comments on the consultation paper (at Annex B).