



DISPUTE RESOLUTION IN THE MIDDLE EAST

Jurisdictional challenges



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JURISDICTIONAL CHALLENGES

GENERAL OVERVIEW

Jurisdiction

Jurisdiction is the authority granted to a formally constituted legal body or forum (ie court or arbitral tribunal) to administer and decide legal matters. Jurisdiction clauses in contracts usually specify the court or tribunal which will have (exclusive or non-exclusive) jurisdiction to determine the disputes that may arise out of, or in connection with, the contract.

Jurisdictional challenges can play a significant role in the progress made by parties in resolving their disputes. They can be costly and time-consuming to resolve, which can lead to delays in dealing with the substantive dispute, and increase the acrimony in an already contentious setting. It is therefore vital that parties give proper thought at the point of entering into an agreement as to the forum in which they wish disputes to be heard. Any contractual provisions should accurately reflect their wishes, ensuring that any jurisdictional challenges which may be brought are quickly and easily dismissed - allowing the parties to focus their efforts on resolving the substantive claims.

Challenging jurisdiction

Jurisdictional challenges can be raised by any of the parties. Challenges are sometimes used in an attempt to delay and/or to frustrate the proceedings. If the basis for challenge is inconsistent with a party's previous position, the court or tribunal should decide whether the party making the challenge is deemed to have waived its right to challenge (because there is no good reason for its delay in bringing the challenge). Where a court or arbitral tribunal itself identifies a jurisdictional issue which the parties have not raised, in some situations it may be appropriate for the court or tribunal to do so on its own initiative.

Grounds for jurisdictional challenges

Generally, parties may challenge the jurisdiction of a particular court or tribunal on the ground that the jurisdiction clause in their contract was invalid. The technical basis for claiming such invalidity will depend upon the provisions of the relevant laws.

ONSHORE LITIGATION

Introduction

In the United Emirates (UAE), Article 20 of the UAE Federal Law No. 11 of 1992 ("the Civil Procedure Law") states that "*With the exception of actions in rem relating to real property abroad, the courts shall have jurisdiction to hear actions brought against nationals and claims brought against foreigners having a domicile or place of residence in the State.*" Claims will usually be brought in the courts of the Emirate in which the relevant defendant resides. Article 21 then sets out the circumstances in which the UAE onshore courts have jurisdiction to hear actions against foreigners who do not have a domicile or residency in the state.

The UAE onshore courts will not generally uphold an agreement which gives jurisdiction to a foreign court in circumstances where they would otherwise have jurisdiction. This would include, for example, disputes involving the ownership of property situated within the UAE, a contract that was executed and/or largely

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performed in the UAE, and/or a dispute in which a UAE national or resident is a defendant. In circumstances where there is a dispute between the parties as to the competent UAE court, the Union Supreme Court rules on any conflict – often staying ongoing proceedings pending its decision.

Jurisdiction within the UAE (and challenging a particular Emirate's jurisdiction)

The starting point is that (unless the contract contains an exclusive jurisdiction clause in favor of a particular Emirate's court) the place of residence of a defendant will dictate which Emirate's court has jurisdiction over a dispute in the UAE. There are certain circumstances which may cause this general rule to be varied. For example, in real estate disputes, the court of the Emirate where the property is situated can take jurisdiction. A litigant filing a claim in a particular court may be met by a counterparty challenging the jurisdiction of that court, arguing that the court of a different Emirate should have jurisdiction over the dispute (for example, where a contract has been executed in another Emirate).

Challenges seeking to assert the jurisdiction of the DIFC Courts

Generally, choosing the "Dubai Courts" in a dispute resolution clause will mean that the Dubai onshore courts are intended to take jurisdiction over any dispute under the relevant agreement. However, this wording will not preclude an argument being raised that it was intended that the Dubai International Financial Centre (DIFC) courts could have jurisdiction. Therefore, particularly in circumstances where one or more of the parties are based in the DIFC; hold assets in the DIFC; or where the contract is executed or performed (in whole or part) in the DIFC, the parties should ensure (assuming that this is what they wish) that they make clear that it is the Dubai onshore courts, and not the DIFC courts, which have jurisdiction over their dispute. In 2016, a Joint Judicial Committee was established by the Government of Dubai to resolve conflicts of jurisdiction between the Dubai onshore courts and the DIFC courts.

Challenges seeking to assert the validity of an arbitration agreement

As mentioned above, the UAE onshore courts are often reluctant to cede jurisdiction over a dispute which has a connection with the UAE to a foreign court. Historically, the UAE onshore courts have dealt with many cases by exercising jurisdiction, notwithstanding attempts by the parties to "contract out" of the national courts by agreeing to submit exclusively to the courts of another jurisdiction. The UAE onshore courts have ignored such agreements as a matter of public policy, and relied on the jurisdiction conferred by Articles 20 and 21 of the Civil Procedure Law. As a result, parties should be aware that the only effective method permitted by UAE law to "contract out" of the jurisdiction of the UAE onshore courts is for the parties to execute a valid arbitration agreement. They will, however, need to ensure that they fully comply with all technical requirements under the relevant law in drafting such an agreement, to avoid the jurisdictional challenges set out below.

OFFSHORE LITIGATION

In 2011, the jurisdiction of the DIFC courts was significantly expanded through the promulgation of Dubai Law No. 16 of 2011, which permitted contracting parties to refer their civil and commercial disputes to the DIFC courts irrespective of whether their contract had any nexus to the DIFC (as long as that agreement was clear and in writing).

Under Rule 12.1 of the Rules of the DIFC Courts (RDC), a defendant who wishes to dispute the court's jurisdiction "may apply to the Court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have." A defendant wishing to exercise this right must file an acknowledgement of service in accordance with Part 11 (which will not waive their right to dispute the Court's jurisdiction (see RDC

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12.2-3)). Unless jurisdiction is disputed within 14 days of filing the acknowledgement, the defendant will be treated as having accepted the court's jurisdiction (see RDC 12.5). By way of example as to the possible grounds on which jurisdiction may be challenged, a party may seek to rely on an arbitration agreement, or may claim that another court has jurisdiction over the dispute.

The Abu Dhabi Global Market (ADGM) is an international financial free zone in Abu Dhabi. The ADGM Courts were established in 2015, and became fully operational in 2016, offering an independent common law framework which is broadly modelled on the English judicial system. Rule 38.1 of the ADGM Court Procedure Rules largely mirrors that of Rule 12.1 of the RDC mentioned above. Under Rule 38(1) of the ADGM Court Procedure Rules, a defendant wishing to dispute the court's jurisdiction "*may apply to the Court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.*" A defendant wishing to do so must first file and serve an acknowledgement of service. Any application disputing jurisdiction must be made within 28 days after filing and serving the acknowledgement of service, and be supported by written evidence (Rule 38 (4)).

ARBITRATION

Introduction

An arbitral tribunal's jurisdiction to determine the merits of a dispute arises out of a valid and enforceable arbitration agreement, which must be broad enough in scope to encompass the claims made by the parties. Once arbitrators have been appointed to determine a given dispute, their jurisdiction usually subsists until they render a final arbitral award. However, should one or more of the parties challenge the arbitral tribunal's jurisdiction during the course of the proceedings, their authority may become an issue.

The fact that a party has challenged the arbitral tribunal's jurisdiction does not prevent it from determining whether it has jurisdiction. *Kompetenz-Kompetenz* is a universally accepted principle in modern international arbitration (which is recognized under Article 19 of the Federal Law No. 6 of 2018 on Arbitration (the "**Arbitration Law**")). This principle recognizes that arbitrators have the inherent power to determine the nature and scope of their own jurisdiction.

Challenges to an arbitral tribunal's jurisdiction can sometimes be used for purely tactical reasons – to delay proceedings and/or cause the opposing party to incur greater costs through defending the application. Although such challenges are usually made at the beginning of the arbitral process, they can arise at any time throughout the arbitration, and even after an arbitral award has been rendered. The majority of national laws and arbitration rules, however, provide that a party seeking to challenge the arbitrators' jurisdiction should raise their objection at the outset or as soon as they are aware of the grounds for challenge.

Types of jurisdictional challenges

A jurisdictional challenge can be made:

- in respect of a party - eg a party is not a party to the relevant contract or clause;
- in respect of the arbitration agreement itself - eg the clause is void or invalid; or
- in respect of a claim - eg the claim does not fall within the scope of the dispute resolution clause/is not arbitrable.

Dealing with jurisdictional challenges

Tribunals have broad discretion as to the timing and process by which they deal with a jurisdictional challenge. If they decide to reject the challenge, and confirm that they do have jurisdiction, they can either issue their decision as an award or a procedural order. Tribunals can either determine such challenges as a preliminary matter or deal with it as part of their final award on the merits. If they consider that they do not have jurisdiction, the tribunal should issue a final arbitral award or (depending on the circumstances) a decision declining to decide the case for lack of jurisdiction.

Offshore arbitration

The UAE currently has one offshore arbitral institution in Dubai, the DIFC-LCIA Arbitration Centre (DIFC-LCIA), which is a joint venture between the DIFC and the London Court of International Arbitration. Under Article 23.1 of the DIFC-LCIA Rules, the arbitral tribunal "*shall have the power to rule on its own jurisdiction, including any objection to the initial or continuing existence, validity or effectiveness of the Arbitration Agreement*". The article makes clear that, for this purpose, an arbitration clause is to be treated as an independent agreement to the agreement it is contained within.

Article 23.2 of the DIFC-LCIA Rules provides that any challenge to the arbitrators' jurisdiction should be raised as soon as possible, but not later than the service of the Statement of Defence (if the respondent is submitting the challenge) or service of the Defence to Counterclaim (if the claimant is submitting the challenge). Otherwise, a party is deemed to waive their right to challenge jurisdiction. However, the arbitral tribunal may admit an untimely plea if it considers the delay to be justified in the particular circumstances.

Article 23.3 of the DIFC-LCIA Rules provides that the arbitral tribunal may rule on any jurisdictional challenge in an award on jurisdiction or later in an award on the merits, as it considers appropriate.

Further, Chapter 4 of the DIFC Arbitration Law (2008) contains provisions as to the jurisdiction of the arbitral tribunal. These provisions support the DIFC-LCIA Rules above, and confirm (in Article 23 of the law) that: (i) the arbitral tribunal may rule on its own jurisdiction, including any objections relating to the arbitration agreement itself (which for this purpose is deemed to be independent of the other terms of the contract it is contained within); (ii) any plea must be raised before the submission of the Defence (with the fact that a party has participated in appointing an arbitrator not precluding them from raising any plea); (iii) a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings (a later plea may be considered if the delay is justified); and (iv) the arbitral tribunal may rule on a plea either as a preliminary question or in an award on the merits.

RDC 43.47 provides that "*an arbitration claim for the determination of a preliminary question as to the substantive jurisdiction of the Arbitral Tribunal under Article 23(3) of the Arbitration Law must be made within 30 days after receipt of notice of the ruling by the Arbitral Tribunal as a preliminary question that it has jurisdiction.*"

The other offshore arbitration centre based in the UAE is in Abu Dhabi, in the ADGM. This is a hearing centre rather than an arbitral institution. The ADGM has agreed with the International Court of Arbitration of the International Chamber of Commerce (ICC Court) to launch a Middle East representative office in the ADGM, but any arbitrations conducted in the ADGM using the ICC Rules will be administered from the ICC's Paris base. This is in contrast with the joint venture set up in the DIFC between the DIFC and LCIA.

Parties can agree to apply the rules of any arbitral institution to arbitrations conducted in the ADGM. In considering jurisdiction challenges, parties should look to the rules governing their proceedings, as well as the ADGM Arbitration Regulations 2015. Under those regulations, the tribunal has the power to rule on their own

jurisdiction (see Article 24 (1)). Under Article 25, an objection that the tribunal lacks jurisdiction "*must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction*". Any objection during the course of the proceedings that the tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.

In either case, the tribunal may rule on an objection as a preliminary question or in an award on the merits (Article 25 (3)).

Onshore arbitration

There are various "technical" grounds on which an arbitration clause can be declared invalid under UAE law, thereby denying the arbitral tribunal jurisdiction over a particular dispute. While such arguments may be raised in arbitrations seated in the DIFC, they are more likely to find traction in an arbitration seated in onshore Dubai (whether under the rules of the Dubai International Arbitration Centre (DIAC), another arbitral institution or in an ad hoc arbitration). Jurisdictional challenges typically address whether:

- the arbitration agreement exists (ie whether the relevant contract entered into by the parties contained an agreement to arbitrate);
- the arbitration agreement is pathological (ie whether an arbitration agreement is incomplete, ambiguous, incoherent or contradictory – for example, where a clause erroneously described a non-existent arbitral institution or named a deceased arbitrator); and
- the arbitration agreement was made in the required form (ie whether the arbitration agreement satisfies the requirements which arise from the law governing the arbitration agreement or the law applicable to the relevant party). For example, in onshore Dubai, among other things, the arbitration agreement must be in writing (Article 7(1) of the UAE Arbitration Law) and signed by a person capable of binding the party in question to arbitration.

Other points to note include:

- Article 8 of the UAE Arbitration Law provides that, if a dispute (regarding which there is a valid arbitration agreement) is brought before the UAE courts, as long as one party to the dispute pleads the existence of an arbitration agreement in relation to that dispute prior to filing any demand or defence before the court, that court must reject the court case.
- Article 43 of the UAE Arbitration Law provides that if, during the course of an arbitration, a preliminary issue which is outside the jurisdiction of the arbitrators arises; a challenge has been filed that a document is forged; or criminal proceedings have been taken regarding such forgery (or for any other criminal incident), the arbitrator may continue with the arbitration if it finds that disposing of the matter or forgery or criminal act is not necessary for settling the subject matter of the dispute (otherwise the arbitrator shall suspend the proceedings until a final judgment on the issue has been issued).

The DIAC is the principal arbitral institution in onshore Dubai. In terms of the DIAC's rules relating to jurisdictional challenges, Article 6.3 provides that a party's jurisdictional challenge "*...shall be raised not later than in the statement of defence or, with respect to the counterclaim, in any reply to the counterclaim.*" Article 6.4 states that "*In general, the Tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the Tribunal may proceed with the arbitration and rule on such a plea in the arbitral award.*"

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