

An aerial photograph of the Dubai skyline, featuring the Burj Khalifa on the left and a complex highway interchange in the foreground. The sky is blue with light clouds.

# DISPUTE RESOLUTION IN THE MIDDLE EAST

*Interim and conservatory measures*



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## INTERIM AND CONSERVATORY MEASURES

### GENERAL OVERVIEW

Interim and conservatory measures, which are also referred to as interim remedies, precautionary measures or provisional relief, are orders of a court or arbitral tribunal that are usually granted at an early stage in the proceedings, or before the merits of a dispute are examined. These are distinguished from final remedies which ordinarily form part of the final judgments, orders or arbitral awards that dispose of a dispute. There are a wide range of these orders; they usually act to maintain the status quo between the parties. Examples of such orders include:

- freezing, attachment or other orders that prevent the dissipation of assets; and
- orders requiring the collection, disclosure and preservation of evidence.

Interim measures can also be stand-alone in their nature. An example of such a measure is an anti-suit injunction, which prevents or restricts a party's ability to commence or continue legal proceedings in a particular forum.

Depending on the forum of the proceedings, the interim remedies potentially available to a party will differ vastly. Therefore, when drafting dispute resolution clauses, and throughout the life of a dispute, there are a number of considerations that should be borne in mind in respect of interim remedies, including:

- their availability generally and the types potentially available;
- their enforceability outside the jurisdictions in which they are granted; and
- costs implications.

These considerations are inter-linked and the reasoning behind them is fairly straightforward. By way of example, in instances where all of the assets of a contracting party are located outside the jurisdiction, or out of the immediate reach of the other contracting party, a serious consideration when drafting a dispute resolution clause, or when the likelihood of a dispute becomes apparent, is the ability to ring-fence those assets to prevent their dissipation.

Furthermore, and although not covered in this volume, an important consideration in respect of interim remedies is their enforceability outside the jurisdiction in which they are granted. For example, a party may obtain an order from the Dubai International Financial Centre (DIFC) courts against a party or assets located outside the DIFC, for example in onshore Dubai or even outside the United Arab Emirates (UAE). An assessment will need to be made as to the enforceability of such an order. There is often little point in obtaining an interim remedy that is unlikely to be enforced in the jurisdiction where it is ultimately needed.

Finally, and in relation to costs, a party must be careful in deploying any application for an interim remedy. Being unsuccessful in such an application, or arriving in a scenario where it transpires that an application has been wrongfully granted, may have serious costs consequences. By way of example, parties who are successful in obtaining freezing orders from the DIFC courts are generally required to provide a cross-undertaking in damages should they be unsuccessful in their case. Similarly, in onshore litigation, an applicant for a precautionary attachment must post an indemnity letter with the court. Furthermore, a party which has wrongfully had a precautionary attachment levied against it and suffered loss as a result, may bring a claim in damages against the applicant.

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This volume will provide a summary of the availability and types of interim remedies before the various courts of the UAE and arbitration proceedings seated in the UAE.

## ONSHORE LITIGATION

By way of example, the UAE Federal Law No. 11 of 1992 ("the Civil Procedure Law"), which governs the litigation process in the onshore courts of the UAE, does not recognize the concept of interim or injunctive relief. That said, the Civil Procedure Law provides a provisional form of relief which empowers a UAE court to "attach" or temporarily freeze the assets of a party. Such orders are referred to as "provisional attachment orders" or "precautionary attachments". Volume Three, Chapter Two of the Civil Procedure Law deals with attachments generally and sets out a party's ability to apply for precautionary attachments and the requirements of such an application.

Under the Civil Procedure Law, in order for such an application to be successful, a UAE court will need to be satisfied that:

- the applicant has a prima facie case against the party which the attachment is sought; and
- there is a risk of dissipation of the assets which are to be attached which would prevent the applicant from being able to enforce any judgment debt.

The granting of a precautionary attachment is a matter for the court's discretion, and it is for the applicant to prove that the relevant requirements have been satisfied. Under the Civil Procedure Law, a UAE court has the power to require the applicant to provide any additional or further evidence it deems necessary in making its judgment. The Civil Procedure Law further requires the applicant to file a substantive claim within eight days from the date on which the attachment is imposed.

As to jurisdiction, the UAE courts will generally have jurisdiction to issue precautionary attachment orders even where they do not have jurisdiction to entertain the substantive dispute, for example, where the contract out of which the dispute arises is subject to arbitration.

It is also worth noting that precautionary attachments do not give rise to, or create preferential rights or liens over, the attached asset in favor of the creditor that has applied for and/or obtained them.

## OFFSHORE LITIGATION

The ability to grant and apply for interim remedies is enshrined in the court laws and procedural rules of both the Dubai International Financial Centre (DIFC) Court (RDC) and Abu Dhabi Global Market (ADGM) court. Whilst the ADGM courts are in their infancy, the DIFC courts have either granted or heard applications for various interim remedies, including:

- freezing orders (including worldwide freezing orders);
- disclosure orders;
- anti-suit injunctions; and
- interim payment orders.

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The RDC and rules of the ADGM court provide that they are able to grant a number of interim remedies, including:

- interim injunctions;
- interim declarations;
- property preservation and inspection orders;
- orders for the sale of property;
- freezing orders;
- disclosure and search orders; and
- interim payment orders.

Although the legal framework for interim remedies for the DIFC and ADGM courts are similar, due to their shared common law roots, the RDC are currently more extensive. The RDC set out a number of additional procedural and substantive requirements in respect of interim remedies, including:

- the requirements for applications for interim remedies where there is no related claim;
- the requirements for contents and form of freezing orders and search orders;
- the status of interim remedies where claims are stayed or struck out; and
- detailed requirements for the application and procedure for interim payments.

Before entertaining any substantive application for interim relief, the party seeking an interim remedy from either the DIFC or ADGM courts will first need to establish that the relevant court has jurisdiction under its relevant jurisdiction rules. When deciding the substantive application, DIFC court case law illustrates that the court's approach generally follows the principles for obtaining equitable relief in the English courts. The applicable tests are different depending on the relief sought; however, for freezing orders, those elements include:

- the existence of assets in the jurisdiction and the real risk of the dissipation of assets;
- a good arguable case;
- whether there is a serious question to be tried;
- whether damages would be an adequate remedy; and
- the balance of convenience between the parties.

## ARBITRATION

As above, interim relief can be obtained from courts even where there is a valid arbitration clause, for example where a tribunal has not been constituted or in cases of exceptional urgency.

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The ability to apply for and obtain interim remedies from the arbitral tribunal will depend on where the arbitration is seated.

In circumstances where the arbitration is seated onshore in the UAE, Federal Law No. 6 of 2018 on Arbitration (the "**Arbitration Law**") will apply. The Arbitration Law grants wide-ranging powers to arbitral tribunals to order the parties to take precautionary measures which it considers necessary. These powers centre around:

- maintaining, or reinstating, the status quo;
- preserving evidence and property; and
- ordering parties not to take particular action.

The Arbitration Law also provides various mechanisms for the enforcement of these orders through the onshore UAE courts. That said, whether or how certain types of interim relief (such as prohibitory injunctions) can and will be enforced remains unclear as the Arbitration Law has only recently come into force.

In respect of arbitrations seated offshore in the DIFC and the ADGM, their respective arbitration laws (each of which are based on the UNCITRAL Model Law) will apply. However, each of the DIFC and ADGM arbitration laws empower arbitral tribunals to order interim measures, unless the parties have expressly agreed otherwise.

## Emergency arbitrators

In certain circumstances where parties are subject to a valid arbitration agreement and urgent interim or conservatory measures are required prior to the constitution of the arbitral tribunal, it may be possible for an emergency arbitrator to be appointed pursuant to the institutional rules applicable to the arbitration (eg Article 29 of the International Chamber of Commerce Rules of Arbitration) in order to consider any application for such relief.

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