



# Dispute Resolution in the Middle East

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PRE-ACTION

# Pre-action

## General overview

The pre-action stage covers any stage before the commencement of the formal claim. The pre-action stage may therefore also include the commencement of actions for interim and/or conservatory remedies (such as injunctions or freezing orders over assets). Given their scope and importance, such actions form the subject of a separate volume of this guide (see Volume 7, "**Interim and Conservatory Measures**").

It is critical that the pre-action stage is effectively managed, both by parties planning to bring, and those defending, claims. This is because the commencement of the claim will (among other things) lead to restrictions on what the parties can do, the timetable to which they must operate and the costs and other consequences associated with their actions. Each party should therefore take the opportunity afforded by the pre-action stage to carefully consider its objectives and the strategy which is most likely to achieve those objectives. It is therefore critical that:

- legal advice is sought before any positive action is undertaken, however innocuous or insignificant that action may seem; and
- an effective litigation strategy is formulated, agreed and implemented on the basis of that legal advice.

The following are just a few examples of important pre-action considerations of general application:

### CONTRACTUAL NOTIFICATION

It is common for certain types of contracts to contain provisions regulating the notification and substantiation of claims. Depending on how such provisions are drafted, and depending on the law which governs the contract, a failure to comply with such contractual requirements can be fatal as they may bar a would-be claimant from pursuing its claims at all. Advice taken at the pre-action stage can help avoid such risks.

### DISPUTE RESOLUTION MECHANISM

A contract may contain other restrictions regarding the commencement of a claim. For example, it may require the claimant to escalate the dispute through various levels of senior management, require attempts at amicable settlement between the parties or it may purport to grant one party unilateral options regarding the conduct of any dispute. It is essential that the legal effect of such clauses is properly understood and the commencement of the claim managed accordingly before any positive action is taken. Commencing a claim without having complied with mandatory pre-dispute procedures can lead to costly, and potentially fatal, jurisdictional challenges.

### IDENTITY AND STANDING OF DEFENDANT

It is essential that the correct defendant(s) are identified before any claim is commenced. In many instances this will be obvious but there are exceptions, for example where there are multiple companies or individuals which may be jointly responsible for loss incurred (which may be sufficient to found, for example, a conspiracy claim), where the defendant operates through a branch in the jurisdiction where a contract was performed, or where shareholders are dissatisfied with the way the affairs of their company have been conducted. It may also be prudent to consider the solvency (or otherwise) of the defendant. It is also important to identify the correct claimant.

### INTERIM RELIEF

It is possible to obtain interim relief prior to the commencement of proceedings, provided certain threshold tests are met. This forms the subject of a separate volume of this guide (see Volume 7, "**Interim and Conservatory Measures**").

### REQUISITE AUTHORITY

It is important, at the outset, to ensure that requisite authorities are granted to those whom will represent the client in any proceedings. Given the importance of this issue, it forms the subject of a separate volume in this guide (see Volume 1, "**Powers of Attorney**").

### ADVICE ON THE MERITS (AND SOMETIMES QUANTUM)

An early assessment of the merits of the claim and the potential for any counterclaim should usually be made before any claim is commenced. It is obviously unwise for a party to pursue litigation that is unlikely to achieve its objectives, but there are also more specific matters to be aware of. For example, a party may be minded to commence a claim to exert pressure, but without intending to pursue the claim to a final judgment. However, such a claimant should be aware that it may lose the ability to unilaterally discontinue

the claim, particularly where counterclaims are introduced, in effect committing to a costly process in which there is no alternative but to participate. It can also be important in some disputes to obtain early advice from quantum or other technical experts to ensure that a claim is framed in the correct way (and to ensure that you have a good idea of the real value of the claim).

## EVIDENCE

An assessment should be made of the evidence that is needed to prove the claim in the relevant forum before it is commenced. It may be, for example, that the relevant documents are being held by a third party which may be unwilling to provide them once a formal dispute has arisen, or that steps need to be taken to identify and safeguard evidence already within the claimant's possession (for example, by suspending policies relating to the automatic deletion of emails and other records).

## INSURANCE AND FUNDING

Before commencing a claim, it may be prudent for a claimant to consider whether it would be possible to take advantage of any insurance policies that can help manage the risk and/or cost of litigation, or the possibility of procuring funding for the costs of pursuing the claim through specialist third-party funders, who are becoming more active in the region.

## ENFORCEMENT

The ability to enforce (and thereby obtain the benefit of) any favorable judgment or arbitral award should be a key consideration when taking the decision to litigate. Given the scope and importance of this issue, it forms the subject of a separate volume of this guide (see Volume 15, "[Enforcement](#)").

Legal advice should be obtained in respect of the above matters at the earliest stage. The legal position is rarely straightforward and any misunderstanding will decrease the chances of a party's objectives being achieved.

## Onshore litigation

### DOCUMENT PRODUCTION

There is no document production process in the onshore courts which is analogous to the common law concept of "disclosure" or "discovery", and no general pre-action disclosure process. A party should therefore think carefully about whether it has, or can obtain, the documents necessary to prove its case by some other method before commencing its claim.

### ORIGINAL DOCUMENTS

The onshore courts are much more likely to require a party to produce original documents in order to substantiate a claim as compared with arbitration or offshore litigation (where disputes regarding the authenticity of documents are rare). In addition, the rules of evidence before the onshore courts give primacy to certain types of documents (eg official government documents, documents bearing signatures) which may impact significantly on how the court assesses the parties' respective evidence.

### LANGUAGE OF PROCEEDINGS

All proceedings before the onshore courts are in Arabic and all non-Arabic documents relied upon must be translated. This may give rise to a "translation risk" (ie that the Arabic translation will be interpreted as meaning something different to the source document). Translation can also be a significant expense where a large volume of documentation is put into evidence.

### COSTS ORDERS

The concept of "costs follow the event" does not apply before the onshore courts, which will only award nominal "advocate fees" to a successful party. This is unlikely to be a significant proportion of the successful party's total legal spend, even in relatively minor cases. In addition, onshore courts will not make adverse costs awards even in respect of hopeless claims which ultimately fail, meaning that such claims are often included, notwithstanding their weakness.

## Offshore litigation

### JURISDICTION

The precise nature and extent of the jurisdiction of offshore courts (such as the Courts of the Dubai International Financial Centre (DIFC), Abu Dhabi Global Market (ADGM) or Qatar Financial Centre (QFC)) must be reviewed carefully, as their relative immaturity means the scope of their jurisdiction changes periodically through legislation or case law. Given the breadth and importance of this subject, this is addressed in a separate volume of this guide (see Volume 5, "[Jurisdictional Challenges](#)"), but these issues give rise to important pre-action considerations. For example, a party may be tempted to commence parallel proceedings in another forum in order to exert additional pressure (as a claimant) or to complicate the process (as a defendant). However, in most cases, the offshore (and onshore) courts still have discretion to decline to exercise jurisdiction in circumstances where it considers that another court is the more appropriate forum.

### DOCUMENT PRODUCTION

The offshore courts have a very different approach to document production (sometimes referred to as "disclosure" or "discovery") compared to the onshore courts, and are much more likely to compel the parties to produce documents in their possession and/or control which are adverse to their case. Disclosure is generally addressed in a separate volume of this guide (see Volume 10, "**Document Production**"). However, relevantly for present purposes, the DIFC (Rule 28.47) and ADGM Courts (Rule 86(1)) include procedures for documents to be requested before the commencement of litigation. Depending on the circumstances of the dispute, this may be a powerful tool in exerting pressure on the other side before the full costs of bringing a claim are incurred.

### **COSTS ORDERS**

The treatment of the parties' legal costs is considerably different in the offshore courts compared to the onshore courts. The general rule is that a successful party can expect to recover the majority of its legal costs (lawyer's fees, expert fees, etc.) from the losing party. However, the courts have a wide discretion and the conduct of the parties (including before the commencement of the claim) is a factor which may be taken into account (eg DIFC Court Rule 38.9(1)) when considering how to allocate costs.

## **Arbitration**

The pre-action considerations that apply to a specific arbitration will depend on a wide range of factors, including the law of the seat of the arbitration (which may be different to the substantive law governing the dispute), the institutional rules (if any) which apply to the arbitration and the terms of the agreement to arbitrate itself. Considerations may include the following:

### **THE LAW OF THE SEAT**

An understanding of the law of the seat is important from a number of perspectives, but fundamentally it is that law which will govern the procedure of the arbitration, and the way in which the claim is presented may need to be adjusted accordingly. For example, most jurisdictions will consider at least some matters to be "non-arbitrable", or they may require a special procedure (possibly involving the local courts) to be followed when pursuing them. Consideration should therefore be given at the pre-action stage as to whether those elements of the claim can be omitted, presented differently, or whether the circumstances are such that attempting to raise the claim in an alternative forum would be desirable.

### **CHOICE OF ARBITRATOR**

Assuming that pursuant to the relevant arbitration agreement and/or the applicable institutional rules, a party will play a role in the selection of a sole arbitrator or a party-nominated arbitrator, consideration should also be given at an early stage to identifying the characteristics of a potential arbitrator that may be favorable to the party. For example, would an arbitrator a civil law or common law background (or both) be beneficial, or would a technically (as opposed legally) qualified arbitrator be more suitable?

### **COSTS**

The rules of certain institutions (eg ICC Rules 2017) require the parties to make certain non-refundable payments as well as an upfront payment intended to cover the costs of the entire arbitration at an early stage. Where the tribunal consists of three arbitrators and the amounts in dispute are large, this pre-payment may be substantial. The claimant may also be required to pay the respondent's share of these costs where the respondent refuses to cooperate. The ability to actually meet these costs should be considered before any unrecoverable costs are incurred (eg lawyer's fees, filing fees).







