

## The Plea of Lack of Jurisdiction of the Foreign Law in Disputes Involving Foreign Elements

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### Abstract

*Determining the applicable law in disputes involving a foreign element is one of the critical issues that typically has not yet received broad jurisprudential and legislative attention due to the nature of the issues regulating it. Basically, disputes related to international relationships are treated through rules called 'Attribution.' These rules typically serve as guidelines demonstrating which applicable law should be resorted to in the prevailing disputes. Locally, despite the efforts the Jordanian lawmakers made to regulate International' foreign' relationships, some of these regulations are inadequate, particularly in cases related to the adversaries' right to claim a lack of jurisdiction of the Foreign Law specified under the attribution rules. Since the subject of pleading this issue was not regulated by clear and explicit texts in Jordanian legislation, the deficiency, ambiguity, and shortcomings were the primary features of these rules, and given the importance of this issue, we present this research to elucidate and analysis the suitability of the rules concerned with regulating the plea of lack of jurisdiction of the foreign law and the legal effect of this plea.*

**Keywords:** *Substantive Defenses, Foreign Element, Private International Relationship, Procedural Defenses.*

### INTRODUCTION

The judge has a substantial role in subjects pertaining to international disputes since he primarily can be tasked with interpreting and deciding the applicable law by following the attribution rules, which involve establishing which actions or omissions can be attributed to a state. Similarly, the Jordanian legislature established specific rules that courts must follow when determining which law applies (the substantive rules). The application of these substantive rules, which are primarily based on the rules of attribution, is only possible through the attribution procedure, which the competent judge carries out to ascertain the legal character of the dispute's subject matter and choose the relevant legal text before assigning the decision he has made that will be upheld on this dispute.

Generally speaking, determining the precise statute the judge applied to reach the best decision to resolve the dispute emphasizes the significance of the attribution procedure. When the legislator determines the rule of attribution, he assigns it solely to a specific legal case. Therefore, the judge's first step in defining the applicable law begins with the attribution process to determine the type of these relationships and whether they fall within legal texts pertaining to personal rights, rights in rem, or both.

Consequently, if a conflict involving international private relations is brought before a Jordanian court, the relationship or association needs unique substantive procedures, exemplified by adapting the subject matter and identifying its legal nature to ascertain the applicable law. Using unique guidelines known as attribution rules, the judge decides whether or not the national court has jurisdiction. This illustrates judges' crucial role in cross-border private interactions involving foreign elements and the significance of attribution rules in determining the law applies.

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Nonetheless, the attribution procedure mainly relies on each nation's rules, which serve as the foundation for transferring the rule of law from a theoretical form to a practical, enforceable one. This procedure results in the application of a nation's legal system.

After the judge makes a decision on the applicable law, the stage of resolving the dispute before the court begins. It should be noted that it is not necessary for the rules for resolving the dispute to be domestic, as the rules of attribution may suggest the application of a foreign law. In this case, questions arise about whether the decision taken by the judge based on the rules of attribution is subject to appeal and whether the adversaries have the right to appeal against the application of the foreign law recommended in the rule of attribution.

Based on those as mentioned earlier and considering the significance of this instrument for settling international private disputes, can the adversaries argue to the judge's application of the attribution rule, and if so, does this imply an objection to the attribution process as well as an objection to the application of due law? Is this objection a procedural or substantive defense, and how does it relate to public order? Thus, this study aimed to clarify the adversaries' ability to challenge the judge's application of the attribution rule.

This study aimed to investigate, elucidate, and analyze the texts of the Jordanian Civil Code, the Jordanian Code of Civil Procedure, and some legislation to address the right of adversaries to challenge the application of the rules of attribution, given their significance on determining the applicable law in international disputes.

### **Research Importance**

The importance of this research stems from the importance of elucidating the legal rules regulating Jordanian legislation and some Arab legislation to clarify the right of adversaries to challenge the application of the attribution rules in international private relations and its legal effects.

### **Objectives**

The research aims to address the right of adversaries to challenge the application of attribution rules in terms of considering them within the substantive rules, either within the formal rules or having a particular nature in terms of appeal and objection to it.

### **Research Problem**

The problem of this research manifested in investigating the adequacy of the legal rules to demonstrate the right of adversaries to challenge the application of a foreign law, which the judge determined in reference to the rule of attribution.

## **RESEARCH METHODOLOGY**

In this research, the descriptive approach was adopted by presenting the nature of the adversaries' right to challenge the application of the rule of attribution and explaining the types of defenses. An analytical approach was used to analyze relevant texts.

### **Research Plan**

#### **Introduction**

**Section One:** The Right to Plea lack of jurisdiction of the Foreign Law Determined Through the Attribution Rule

**Section Two:** The Legal Effect of The Appeal against Applying the Rule of Attribution.

Conclusion

Results

Recommendations

References

## **Section One**

### **The Right to Plea lack of jurisdiction of the Foreign Law Determined Through the Attribution Rule**

Explaining the legal nature of the plea against lack of jurisdiction of foreign law contributes to clarifying the type of defense that will fall under it. Is it a category of substantive or procedural defenses, or does it have a unique nature? This part will address the following question: What is the nature of the challenge against the application of the foreign law that was determined in reference to the attribution rule?

The right to defense is considered one of the sacred rights widely recognized by most legislation, including Jordanian legislation, which stipulates this right in the Code of Civil Procedure n. 24 of 1988. Accordingly, the plaintiff or defendant can defend the allegations against him or change or reject the ruling therein. For the defense to have a probative force, it must be legal and substantive. Simultaneously, its subject must assert a legal or procedural right or position related to the case's subject. Therefore, the defense of the lack of foreign law's jurisdiction is raised by the plaintiff or the defendant to challenge the judge's failure to adapt this dispute appropriately.

By using their right to object, a party hopes to postpone the case's resolution and contest the rules of law that the judge will apply in resolving the dispute. Thus, the primary focus of this argument is the power conferred upon the judge overseeing the dispute to use the attribution process to determine the applicable law. Since the judge carried out the attribution process, the adversaries are responsible for raising this defense before the court rather than the judge. On the other hand, if the right holder provides proof of the application of a law and the judge accepts this law, then the legitimation is raised before the judge by the adversary.

The litigant typically has the right to challenge the lack of jurisdiction of the foreign law if he deems that the court's decision to apply a foreign law is considered a violation of law and that the reasons it is based on were insufficient to approve the applicability of the foreign law to the raised dispute which has an international private relations essence. As a result, this is regarded as a unique form of defense that grants the plaintiff or the defendant the right to postpone deliberating the main points of the claim.

Accordingly, is this defense considered one of the procedural defenses that do not touch upon the origin of the right or one of the substantive defenses that relate to the origin of the right? The answer will be discussed as follows:

### **Substantive Defenses**

The conditions for the application of the legal rule depend on two pillars. The first is the assumption based on describing the conditions that resulted in a legal effect. The second pillar is the solution stipulated by the law, called the ruling. Since the disputed rule is essentially a legal rule, it similarly contains the same elements. The pillar of the hypothesis is the legal issue, and it is not related to explaining the concept of the event or behavior as it is in the ordinary rules. In contrast, the second pillar is determined by deciding the law that will be applied to this dispute, called the ruling.

Therefore, the fundamental role of these rules is to help determine the relevant law. Therefore, the defense of the lack of jurisdiction of the foreign law referred to by the rule of attribution will be among the substantive defenses, considering that the rule of attribution is one of the substantive rules that end litigation or is one of the formal substantive rules related to litigation procedures. However, does the judge's decision regarding defining the applicable law have temporary or permanent probative validity, meaning, is it permissible to appeal this decision or not? Furthermore, there are several concerns pertaining to the date for appealing this decision. In this section, we will clarify what substantive defenses mean and whether the defense of the lack of jurisdiction of foreign law will fall under substantive defenses. Explaining what substantive defense means requires us first to study its nature and then define it.

### **First: The Definition of Substantive Defense**

Substantive defense challenges the plaintiff's or prosecution's claims by asserting that the underlying facts or law do not support the case against the defendant. It is sometimes referred to as formal or procedural defense

or procedural defense if it is related to procedures followed. Others called it a plea of inadmissibility if it is associated with the adversary's right to claim.

Legally, they are the instruments that the opponent resorts to, during which he does not challenge the validity of the procedures in order not to judge him temporarily but instead challenges the origin of the right claimed.

### **Substantive Defense from Jurisprudential Standpoint**

It is defined as the defenses related to the subject of the case and the opponent challenging the right claimed, such as denying the debt or claiming its fulfillment or limitations and such issues that fall under the substantive defenses. Those are negative means aimed at avoiding ruling.

Some describe it as a measure that aims to cease an illegal claim or one that is not based on a valid basis. Accordingly, defense is a legal measure to protect individuals' rights and the public interest. Others see it as a lawsuit raised by the defendant, intended to ward off the dispute or invalidate the plaintiff's lawsuit.

### **Substantive Defense from A Legal Standpoint**

The Lebanese lawmaker defined the defense as "Every reason the opponent uses to deny his challenger's claim due to its invalidity after examining the subject matter." The Iraqi lawmaker defined defense in Article (8) of the Civil Procedure Law as: "The plea is a challenge presented by the defendant to rebut the plaintiff's claim, whether in whole or in part."

The Algerian legislator describes substantive defenses as a means to refute the opponent's claims, which can be presented at any case stage. However, the Jordanian legislator did not set a clear and explicit definition for the substantive defenses, as did the Algerian lawmaker. However, in the sense of violating the text of Article (110), what is meant by substantive defenses are arguments that are not related to the procedures and may be related to the public order or not and which are not required to be presented before any procedural defense. The appellant's right to these defenses is not forfeited if he does not submit them in the appeal statement.

Accordingly, the researcher defines substantive defenses as pleas relating to the claimed right's origin. Every claim related to the origin of the right is considered a substantive defense, as an appellant can appeal any accusation that would affect or relate to the right itself. We will confine our analysis to the characteristics that define objective defenses, which include features they have in common with other types of defenses and certain specific features.

### **Second:** Characteristics of the substantive defense and the defense of lack of jurisdiction of foreign law

It can be submitted at any stage of the legitimation.

Submitting substantive arguments all at once is not mandatory, and the right is not forfeited if they are not submitted.

The substantive defense doesn't need to be related to the public order to be upheld at any legitimation stage.

Acceptance of the substantive defense is considered a ruling on the case's merits. It is not permissible to file a renewal claim because the ruling has ended the dispute over the origin of the right.

Possibility of waiving the substantive defense.

The judge may raise it on his initiative.

A substantive defense does not result in the competent court relinquishing its jurisdiction over the case.

The verdict issued in the substantive defense acquires the probative value.

After addressing the characteristics of the substantive defenses, the researcher will present the types of substantive defenses and the defense of lack of jurisdiction of foreign law in terms of its relation to the public order.

**Third:** Defenses related to public order

### **Defenses Related to Public Order**

Public order defenses are particularly important since the judge has the right to bring them up on his initiative. Furthermore, the parties to the dispute can raise these defenses at any stage during the litigation. However, when the attribution rules serve as a framework for identifying the applicable legal statute, they are deemed a component of public order. In that case, the judge must independently apply these criteria to determine the applicable law.

Similarly, if these guidelines are regarded as substantive defenses, the parties may contend that the foreign law in question is not subject to jurisdiction at any point in the litigation.

### **Defenses Not Related to the Public Order**

In this kind of dispute, the litigants must bring up the lack of jurisdiction of foreign law in compliance with the attribution rules pertaining to this relationship or matter. The litigants' right is deemed to have been implicitly waived if they choose not to raise this defense. The failure of the litigants to raise the defense after the judge issued a decision to apply his national law is deemed a waiver of this defense, which may be raised before the Court of Appeal. This is because the judge is not authorized to raise the defense of lack of jurisdiction of national law. After all, defenses related to the lack of jurisdiction of foreign law are not related to public order.

**Fourth:** Differences between substantive defenses and defenses of lack of jurisdiction of foreign law

The lack of jurisdiction of foreign law claims is not considered one claim that falls under substantive defense. This point is supported by the differences between both defenses, which we briefly state below:

By raising substantive defenses, the litigant seeks to challenge the recognition of the claimed right that is the subject of the dispute and seeks its protection. Conversely, the defense of lack of jurisdiction of foreign law does not directly seek to plea for the recognition of the claimed right or the origin of the debt in question. However, rules of attribution are resorted to when determining the applicable law rather than examining the right's origin. Principally, the purpose of the attribution rules is not to explore the substantive origin of the right itself, even though they direct how the law is applied to situations with foreign elements.

The substantive defenses involve issuing verdicts that settle the dispute through the competent court. The decision to accept the substantive defense is considered an enforceable verdict. It has the authority of the res judicata in terms of the merits. In contrast, the defense of lack of jurisdiction of foreign law does not involve the resolution of the dispute; instead, it aims to direct the judge to the applicable law.

Substantive rules aim to reach final, non-controversial decisions. In contrast, arguing that the applicable law lacks jurisdiction seeks to alter the relevant legal framework, thereby transferring jurisdiction from one legal system to another, different from the one designated by the attribution rule.

Substantive defenses are based on the origin of the disputed and claimed right. Conversely, challenging the lack of jurisdiction of foreign law challenges the lack of jurisdiction of foreign law for the existing dispute; attribution rules are considered an instrument for guiding the judge to the best applicable law (substantive rules) for the raised issue. This method is regarded as the best means established by the national legislator to choose the most competing statutes that can govern the international private relationship.

Substantive rules are considered direct rules of resolution. In contrast, the rule of attribution does not apply directly to the dispute, so it is viewed as a rule for selecting the law that applies to the dispute. Therefore, the rule of attribution does not include material rulings on the dispute, while substantive defenses aim to reach final binding rulings.

Defenses on the lack of jurisdiction of foreign law are arguments that result in postponing the decision on the case, thus avoiding the substantive ruling and resolving the dispute without resolving the dispute or delaying the decision regarding the dispute.

Determining the applicable foreign law is based solely on attribution rules, through which the judge applies substantive rules to end disputes related to a foreign element. Therefore, the rules of attribution do not end the conflict with a foreign element but rather guide the applicable law in the international private relationship.

It is concluded that the challenge to the lack of jurisdiction of foreign law, which was determined based on the rule of attribution, cannot be considered among the substantive defenses since they relate to the origin or essence of the right. Furthermore, this challenge does not end the dispute, but rather, it temporarily ceases the verdict. However, the claim of lack of jurisdiction of foreign law is permissible at any stage of the case.

After the researcher in the first section attempted to establish the defense of the lack of jurisdiction of foreign law as one of the substantive defenses, however, due to the unique nature of the rules of attribution that are relied upon to reach foreign law in a dispute tinged with a foreign element, this was denied. Based on the above, we will examine the second type of defense that the legislator created to frame this defense and indicate whether it is consistent. This will be answered as follows:

### **Lack Of Jurisdiction of the Foreign Law as Procedural Defenses**

The legislator and jurisprudence have created a group of means to avoid a decision or disrupt a decision on a dispute. Among these means is the procedures plea, which focuses on the legal procedures and technical aspects of a case rather than the substantive merits of the claims. In the following section, we will address the definition of procedural defenses.

Procedural defenses or pleas aim to challenge the judicial litigation procedures or specific aspects of those procedures to temporarily prevent a ruling on the case's merits.

Abu Al-Wafa describes them as arguments raised at adversarial procedures without prejudice to the origin of the claimed right, intending to end the dispute without deciding the matter or delaying it. It was also defined as temporary obstacles often related to the integrity of the lawsuit procedures and their compliance with the Civil Procedure Code without discussing its subject matter. Others see it as pleas pertaining to the validity of the dispute before the court or some of its procedures, such as the pleas that the court lacks jurisdiction, that the case is referred to another court, or that the summons document is invalid, or any procedural pleas related to the procedures.

It was defined by French jurisprudence as: "an argument by which the opponent intends to avoid a temporary ruling against him and to challenge it in the litigation procedures, either because they were brought to a court without jurisdiction, or an invalid procedure brought them, or its procedures must suspend for a specific period until one of the procedures is completed, and all of that." Without prejudice to the origin of the claimed right, what distinguishes the formal defense is that it is challenged in adversarial procedures and is intended to avoid ruling on the matter temporarily.

From a legislative standpoint, The Lebanese legislator defined procedural defenses as every reason the opponent seeks to declare the trial illegal, dismiss it, or suspend its progress.

The Algerian lawmaker defined it as every means to declare the procedures' invalidity, expiration, or cessation. The Jordanian lawmaker defines it as before handling the case subject; the litigant can request the Court to issue the decision with the following arguments on condition they have submitted altogether and in a separate application...."

The researcher defines procedural defenses as those used by one of the litigants to refute the other party's claims or even those related to the court decisions regarding the dispute that are not associated with the origin of the right.

### **Characteristics of Procedural Defenses**

Procedural defenses shall be used prior to handling the case subject it is not related to public order.

Procedural defense does not result in arguing the court's authority for the subject matter.

The ruling issued in the procedural defense acquires relative validity.

It came exclusively.

However, the ruling issued concerning the formal procedures does not acquire the strength of the *res judicata* because it is possible to file a new lawsuit to claim the same right through new procedures, which means that the ruling in the procedural defense has relative authority.

### **Procedural Defenses Conditions**

To be requested prior to handling the case subject

Submit a request to the competent court.

All defenses related to public order must be raised before dealing with the subject of the case.

### **Types of Procedural Defenses**

#### **Lack of Jurisdiction**

The litigant has the right to plead lack of jurisdiction in the event of non-compliance with specific, local, and spatial jurisdiction rules. This defense must be made before every plea or defense because the litigants may not raise it at any stage of the case unless the judgment is *in absentia*.

#### **Referral**

In this type, the litigants have the right to demand that the lawsuit be transferred from the court hearing the dispute to another competent court with jurisdiction over the kind of subject matter of the lawsuit.

#### **Claiming Nullity**

The court taking specific procedures grants the litigants or the harmed person the right to claim to nullify this procedure.

Defenses related to the procedures are considered procedural defenses since they focus on the procedures associated with the lawsuit, whether in terms of jurisdiction or the method of proceeding with it or filing it. Therefore, their purpose is not to delve into the origin of the right but rather to cease the lawsuit before proceeding with the lawsuit. Thus, the challenge is related to the method for submitting the request or the form of the request without denying the right involved or entering into its subject matter is considered a non-substantive defense.

Accordingly, every procedure aiming to suspend the lawsuit without being related to the origin or subject of the right and before proceeding with the lawsuit falls under the procedures of the lawsuit, whether in terms of the jurisdiction of the competent court or filing it, or proceeding with it.

Claiming lack of jurisdiction based on the rules of attribution, which determined the suitable applicable law does not fall under substantive defense, and what supports this point of view is the following explanation of the distinctions between them, as follows:

Procedural defenses must be raised before initiating the defense of the lack of jurisdiction of the foreign law because the defense of lack of the jurisdiction of the foreign law does not take place until the competent court establishes its jurisdiction over the relationship involving a foreign element.

Procedural defenses, some of which are related to public order, others are not related to public order. Some defenses of lack of jurisdiction of the foreign law are related to public order, and some of which are not related to public order.

By raising procedural defenses, the litigants seek not to delve into the non-recognition of the claimed right that is the subject of the dispute and which is sought to be protected but rather to obstruct the issuance of the ruling temporarily. In contrast, the defense of the lack of jurisdiction of foreign law, what is intended is to obstruct access to the claimed right.

Procedure defenses seek to issue temporary relative rulings for the dispute in the subject matter of the dispute through the competent court. The court decides on these procedural defenses, and its verdict is valid. In contrast, it does not have the validity of the *res judicata* in terms of the merits. On the other hand, the defense of the lack of jurisdiction of foreign law does not aim to resolve the dispute. Instead, it issues a ruling specifying the foreign law that enjoys the *res judicata* validity.

The court decides on these procedural defenses, and its ruling is valid, but it does not have the authority of the *res judicata* regarding the merits. Similarly, the defense of lack of the jurisdiction of the foreign law does not aim to decide the subject matter of the dispute, but issuing a ruling specifying the foreign law gains the authority of *res judicata*.

While the defense of lack of jurisdiction of foreign law seeks to transfer jurisdiction from one law to another, including the law to which the contested attribution rule relates, one of the objectives of the procedural defenses can be to alter the competent court.

The challenge to the lack of the jurisdiction of foreign law is determined by the attribution rules, which propose the applicable law (substantive rules). Procedural defenses are not applied to the origin of the contested and claimed right. This procedure is thought to be the most effective one in determining the most competing legislation, typically selected by the national legislature to oversee the international special relationship.

Procedural rules are related to litigation procedures, and the appeal concerns adversarial procedures; therefore, they do not apply to the origin of the claimed right. In comparison, the claim of the lack of foreign law's jurisdiction is not related to adversarial procedures because it is brought before a court that does not have jurisdiction or was brought by an invalid procedure. The rule of attribution does not apply directly to the dispute, so it is considered a rule in the absence of the law that applies to the dispute. Therefore, the rule of attribution does not include provisions on the subject of the dispute.

Defense of the lack of jurisdiction of foreign law results in delaying the decision on the case, thus avoiding the substantive ruling and ending the dispute without resolving the dispute or postponing the decision.

The litigants' denial of the claimed right is not the goal of procedural defenses.

The procedural defenses came exclusively, and the legislator did not stipulate the case of defending the lack of jurisdiction of the foreign law.

After reviewing the types of defenses, the researcher contends that the defense of the lack of jurisdiction of foreign law combines substantive defenses and procedural defenses in some of its characteristics.

## **CONCLUSION**

The research concluded with the following results:

No clear and explicit legal text specifies under what type the claim of lack of jurisdiction of the foreign law, which the attribution rule proposes, falls.

The rules of attribution through which foreign law is determined have an exceptional nature, represented by guiding the judge to the applicable law through which the judge can issue a ruling resolving the dispute.

The Jordanian lawmaker did not define objective defenses as the Algerian legislator did.

The Jordanian lawmaker did not stipulate the grounds that must be met regarding substantive conditions.

The substantive defenses are not limited to one another.

Substantive defenses always relate to the right's origin, the right's entity, and the right's subject.

The Jordanian lawmaker has stipulated types of procedural defenses, but he has not considered the defense of the lack of jurisdiction of foreign law one of the formal texts.

Procedural defenses are always related to the procedures of the lawsuit, and the defense of lack of jurisdiction of foreign law is not considered a defense related to procedures.



The lack of jurisdiction in foreign law has a unique nature.

## **Recommendations**

Based on the results of this research, the researcher recommends the following points:

Establishing special provisions and grounds for the substantive defenses. We hope the Jordanian lawmaker stipulates special conditions determining what grounds must be met to consider a defense of a substantive nature.

Stipulating special legal rules for challenging the lack of jurisdiction of the foreign law, which is determined by the attribution rules, to be commensurate with its exceptional nature.

It is hoped that Jordanian lawmakers will develop a specific definition of substantive defenses, as the Algerian lawmakers did.

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