

Security for costs in the DIFC Courts

The Defendants they are suing in such proceedings will, however, often be located in the DIFC and have assets there or elsewhere in the UAE, making them susceptible to enforcement proceedings brought by successful Claimants. Although it is usually only worth suing Defendants who are solvent, there is less to stop a financially fragile Claimant with no assets in the DIFC (or anywhere else in the UAE) from filing a claim in the DIFC Courts.

When it comes to parties' legal costs, the DIFC Courts follow the common law principle that the successful party at trial is usually entitled to recover a significant share, sometimes the entire share, of its costs from the losing party following the trial. If a losing Claimant does not have the funds to satisfy a resulting costs order or simply refuses to comply with it and the winning Defendant is unable to enforce the costs order in another jurisdiction (where the losing Claimant has assets), the Defendant's trial victory may be pyrrhic if the considerable financial cost of achieving it cannot be recovered from the Claimant in practice. The enforceability of Court judgments and orders in other jurisdictions is, even if possible, often complicated and slow. This is particularly relevant to proceedings before the DIFC Courts, given the relatively transient nature of Dubai and the ease with which assets can be moved out of the jurisdiction at short notice if a party feels its assets are vulnerable to a Court judgment or order.

From a Defendant's perspective, the scenario outlined above gives rise to the possibility of relatively risk-free litigation on the part of a Claimant with a weak claim and who may have few if any assets. One option available to a Defendant in the DIFC Courts to lessen the risk of being left to bear significant costs even if it wins a trial is to make a security for costs application against the Claimant pursuant to Part 25 of the Rules of the DIFC Courts (RDC). Such an application, if successful, involves the Respondent (Claimant) paying specified funds into the Court's account to ensure that its costs liabilities can and will be met should the Court order it to pay a portion of the Applicant's (Defendant's) costs following a trial. Apart from providing Defendants with the intended costs security, such applications also help to weed out weak claims at a relatively early stage because Claimants will need to think long and hard before parting with significant funds relatively soon after filing a claim they may themselves not have full confidence in.

The DIFC Courts will consider a number of factors when determining a security for costs application and will order security for costs to be provided if they are satisfied, having regard to all the circumstances of the case, that it is just to make such an order and if one or more of the conditions set out in Rule 25.102 of the RDC are met. The key conditions are that the Respondent: (1) is resident outside the UAE; (2) is a company or other body and there is reason to believe it will be unable to pay the Applicant's costs if ordered to do so; (3) the Respondent has changed addresses since the claim was filed in order to evade the consequences of litigation; (4) the Respondent did not include its (correct) address in the claim form; or (5) the Respondent has taken steps in relation to its assets that would make it difficult to enforce a costs order against it.

It is clear that these conditions give the DIFC Courts a wide discretion to grant security for costs, but this discretion must be exercised in accordance with established principles and with regard to the underlying purpose of such orders. This was stated by the DIFC Court of Appeal in *Rafed Abden Mohsen Bader Al Khorafi, Mrs Amrah Ali Abdel Latif Al Hamad and Mrs Alia Mohamed Sulaiman Al Rifa v Bank Sarasin-Alpen Limited* (CA 001/2010 and CA 002/2010), where the following passage of the judgment in the English case of *De Bry v Fitzgerald* ([1990] 1 WLR 352) was cited with approval:

"a defendant should be entitled to security if there is reason to believe that, in the event of his succeeding and being awarded the costs of the action, he will have real difficulty in enforcing that order.....If this difficulty [in enforcing the order] would arise from the impecuniosity of the plaintiff, the court will of course have to take an account of the likelihood of his succeeding in his claim, for it would be a total denial of

justice that poverty should bar him from putting forward what is prima facie a good claim.....If, on the other hand, the problem is not that the plaintiff is impecunious but that, by reason of the way in which he orders his affairs, including where he chooses to live and where he chooses to keep his assets, an order for costs against him is likely to be unenforceable, or enforceable only by significant expenditure of time and money, the defendant should be entitled to security."

In overturning the order of DIFC Court of First Instance requiring security for costs from the Claimants, the DIFC Court of Appeal stated that the burden of establishing facts sufficient to justify such an order rests on the applicant and that the difficulty of enforcing a costs order (in another jurisdiction) is a material consideration. The Claimants in Al Khorafi are Kuwaiti nationals and the applicant Defendant had not met the burden of proving that a costs order could not be enforced against the Claimants in Kuwait, according to the DIFC Court of Appeal. The "conflicting evidence" on this particular question included the Riyadh Arab Agreement for Judicial Cooperation (commonly known as the Riyadh Convention), pursuant to which a costs order of the DIFC Courts should be enforceable by the Kuwaiti Courts, although the DIFC Court of Appeal itself was not able to reach any conclusion as to the risk that such enforcement would not in fact be possible. In Al Khorafi, the DIFC Court of Appeal also stated that applicants for security for costs are required to provide a detailed schedule showing the breakdown of their total figure for the requested security.

In summary, while few parties have a desire to be sued, the DIFC Courts do at least provide a Defendant with the useful tool of a security for costs application to: (a) help protect its costs position should it choose to see a claim through to trial; and (b) make a Claimant consider the costs and merits of its claim more thoroughly than it may have otherwise done. However, the prospects of succeeding with such an application will depend, in particular, on the location of the Claimant and its assets, its financial standing and the legal and practical difficulties faced by the Defendant in enforcing any eventual costs order against the Claimant.