

Pre-Action Letters: Overview (the Dubai International Financial Centre)

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A Practice Note providing an overview of the key issues to consider before issuing or responding to a pre-action letter in the Dubai International Financial Centre (DIFC).

When instructing local counsel or dealing with a dispute with an international element or regulatory perspective, a legal practitioner needs to know about the pre-action requirements, including the rules and legal practice in relation to pre-action letters. In most jurisdictions, it is not mandatory to send or respond to a pre-action letter for many types of action. In these cases, parties can commence proceedings without making an offer of compromise or taking any other step.

Regardless of any pre-action requirements, it is generally customary for parties to send a warning or demand letter to the adverse party before commencing court proceedings. It is also customary for adverse parties to reply, even if there is no requirement to respond. This is usually the case unless the situation demands otherwise (see *Disputes not Suitable for Pre-Action Letters*).

This Note provides an overview of the rules in relation to pre-action correspondence from a potential claimant or their lawyer before initiating legal proceedings, which addresses a potential claim or suit, or defence to a potential claim or suit. It explains the practice of notifying the prospective defendant before an action commences in the Dubai International Financial Centre (DIFC) and its use and effectiveness in resolving disputes amicably. It also provides practical drafting tips for both drafting and responding to pre-action correspondence.

Rules on Pre-Action Letters

It is standard practice to send a pre-action letter before issuing a claim. However, it is not mandatory, and there are no rules, legal provisions, or pre-action protocols that require the sending of a pre-action letter before issuing a claim.

Sending a pre-action letter may be of benefit in relation to costs, since when considering costs, the DIFC courts must have regard to all the circumstances, including the parties' conduct (Rule 38.8, Rules of the DIFC Courts (RDC)). The courts will consider conduct before, as well as during the proceedings, and attempts to prevent a claim from reaching the courts will be viewed favourably (Rule 38.9, RDC).

Disputes Suitable for Pre-Action Letters

Generally, all disputes may warrant the sending of pre-action letters, since pre-action letters could assist parties in resolving the dispute without resorting to court action.

Disputes Not Suitable for Pre-Action Letters

Pre-action letters are suitable in the vast majority of cases, however it may not be strategically beneficial to send a pre-action letter for certain applications for without notice orders, such as injunctions or freezing orders, among other things.

Pre-Action Procedures for Different Types of Disputes

There are no specific rules or pre-action procedures for different types of cases.

Who Can Send a Pre-Action Letter?

A pre-action letter may be sent by an in-house lawyer or the party itself. If external lawyers are retained, the pre-action letters should ideally be sent by recognised DIFC court practitioners, as only DIFC court practitioners are authorised to conduct proceedings in the DIFC.

Contents of Pre-Action Letter

There are no mandatory requirements, but it is usual to include:

- A brief statement as to the basis of the claim. Generally, this would include the basis of any obligations (for example, under contract or tort) owed to the claimant, how the obligations have been breached, and the consequent entitlement to a claim against the defendant. Supporting documents are generally not included at this stage.
- The claim value.
- The time within which a response is expected.

The process would not vary notably, although technical claims such as those relating to construction may require additional requirements depending on the agreement among the parties relating to dispute resolution.

Response to a Pre-Action Letter

It is customary to include a denial of the matters set out in the pre-action letter and to explain the basis of the denial. It is also typical to warn the other party of costs implications if that party chooses to proceed with the action.

Standard Forms

There are no standard forms for pre-action letters in the DIFC.

Time Limit for Response

The DIFC does not mandate a particular time limit to respond to pre-action letters, however it is general practice to respond by the time specified in the pre-action letter itself (see *Contents of Pre-Action Letter*), or to ask for further time to respond.

Failure to Respond

Non-response to a Pre-Action letter may be negatively construed in any determination by the court as to costs (see *Rules on Pre-Action Letters*). A party initiating action may also plead in its claim that the failure to respond is evidence that the defendant has no defence to its claims or that the claimant has no other option but to initiate action in court, or both. Failure to respond to a pre-action letter that gives notice of interim injunctions could be used by a claimant to their benefit as it demonstrates that the respondent has failed to engage with them, strengthening the case that an interim injunction is the most appropriate remedy.

Suspension of Limitation Period

Sending a pre-action letter does not interrupt any limitation periods. It is advisable to issue a claim form in the DIFC courts before any limitation period expires.

Issuing a claim form is the first step to initiate action. The claim form may be accompanied by a Particulars of Claim if required (although it is not necessary to do so if the intent is only to interrupt limitation periods). A pre-action letter may be used to invite the defendant to agree to the limitation periods being suspended or to accept the breach of obligations detailed in the letter before action. Limitation periods would be suspended from the date of the agreement or acceptance. Once a claim form has been filed, a party may request that the proceedings be suspended if there are reasons for the suspension (these could include the claimant's right to preserve its position pending further action). The decision on this request would be at the discretion of the court, based on the facts and circumstances of each case.

Effectiveness of a Pre-Action Letter

Pre-action letters can be effective in disposing with the need for a court hearing, or in shortening a court hearing. They can also be useful in avoiding court proceedings altogether in certain cases. For example, in a complex spring-board injunction application, the pre-action letter attaching a draft order requested by the claimant can enable parties to agree on most aspects of the order, leaving only a few issues to be determined by the court.

Practical Tips

The contents of a pre-action letter will depend on the nature of the dispute; if the claimant has a strong case, it may be ideal to set out its full case and request that the defendant agree to its demands.

The contents of the response will also depend on the nature of the dispute. If an unequivocally strong defence exists, it is advisable to specify the details of the defence in the response.

Standard Clauses in a Pre-Action Letter

Without Prejudice

If the claimant intends to rely on the contents of the letter, the letter should not say that it is sent "without prejudice." If the claimant only intends to rely on the letter in relation to costs, it should state that it is sent "without prejudice save as to costs."

Discovery Process (Paragraph 3(B))

This is not typically included in a pre-action letter. There is no obligation to disclose any documents that a claimant demands. Any required disclosure should be by way of a request for disclosure during court proceedings or by a court order.

Funding Arrangements (Paragraph 5)

It is not necessary to disclose funding arrangements in pre-action letters; any funding arrangements should be disclosed when submitting the claim form (Practice Direction No. 2 of 2017 on Third Party Funding in the DIFC Courts).

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