

Legally Bombed: A Guide to Recognising and Enforcing Foreign Judgments in the UAE

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Introduction

One size does not fit all when it comes to the strategy of enforcing foreign judgments and arbitral awards in the UAE and in the wider region. The strategy to be adopted when enforcing will depend on a number of factors, and prominent among these are the origin of the judgment or award to be enforced and the location of the assets. It is worth keeping in mind that “enforcement” is actually divided into two distinct procedural elements: firstly the ratification element; and secondly the actual enforcement or execution of the judgment or award.

The UAE is a signatory to two regional Conventions which significantly impact on the enforceability of foreign judgments in the region and the time it takes to do so, those being the GCC and Riyadh Conventions. The UAE is also a signatory to the New York Convention, the widely ratified international Convention for the enforcement of foreign arbitral awards. In addition, the DIFC Courts and the ADGM Courts have entered into memoranda of understanding with a number of leading commercial courts in respect of the mutual enforcement and recognition of foreign judgments, which facilitate and provide guidance to practitioners on matters of procedure and on the tests mutually applied.

This article sets out the different procedures for enforcing foreign judgments from Convention states and, of greater practical significance, from further afield, both before the DIFC Courts and before the onshore Courts of Dubai and other Emirates. In a second article, to follow in the next edition of Law Update, the procedures for enforcing arbitration awards will be described.

Recognition and enforcement procedures

Onshore Courts

A person seeking to ratify a foreign judgment in the Courts of Dubai may file a petition directly to the Execution Judge sitting in the Court of First Instance, who has three days to issue an order on the papers. The order of the Execution Judge is subject to appeal to the Court of Appeal, however an appeal does not automatically stay enforcement and if a stay is sought it must be made by way of an application.

The Execution Judge must be satisfied that there is reciprocity with respect to the enforcement of foreign judgments as between the foreign state which issued the judgment and the UAE and that the following conditions have been fulfilled:

1. that the Courts of the UAE do not have exclusive jurisdiction over the dispute on which the judgment or order has been issued, and that the foreign Court that issued the judgment has jurisdiction according to the rules of international jurisdiction prescribed in its law;
2. that the judgment or order has been issued by a Court in accordance with the law of the state in which the judgment or order has been issued and duly certified;
3. that the parties to the lawsuit on which the foreign judgment is issued had been required to appear and were properly represented;
4. that the judgment or order has acquired the legal effect of *res judicata* according to the law of the issuing Court, provided that a certificate shall be furnished indicating that the judgment has acquired the legal effect of *res judicata*, or where the same is already stated in the judgment itself; and
5. that the judgment neither conflicts with a judgment or an order previously issued by a Court of the state nor involves anything that violates public order or morality.

Accordingly, the onshore UAE Courts may ratify final orders or judgments of a foreign court, including orders by way of summary judgment. In practice however, the requirement of reciprocity in UAE law for the recognition of foreign judgments can often give rise to an insuperable difficulty. In particular, there are often challenges, in practice, in seeking to demonstrate to the satisfaction of the onshore UAE Courts that an equivalent UAE judgment would be enforced in the other jurisdiction.

This has the consequence, as a matter of practicality, that it is almost always preferable, in respect of judgments emanating from countries outside the Riyadh and GCC Convention countries, to seek recognition and enforcement before the DIFC Courts. As noted below, the DIFC Courts remain the offshore conduit jurisdiction of choice in this context because the ADGM Courts do not exercise an equivalent conduit recognition and enforcement regime, other than in the limited exception where the originating judgment comes from another court within the Emirate of Abu Dhabi. The Chief Justice of the ADGM Courts has the power to direct that a foreign court that has agreed to provide reciprocal recognition and enforcement of ADGM judgments be a recognised foreign court, however the conduit limitation will apply to those recognised courts as well.

DIFC Courts - Generally

The DIFC Courts have jurisdiction to ratify any judgment of a *recognised* foreign Court pursuant to Article 24 of the DIFC Court Law. In order for the judgment and order to be recognised, it must be *final* within the meaning of the common law rules.

The recognition and enforcement claim proceeds as a Part 7 (plenary) claim in the same way as any other Part 7 claim, grounded upon a Part 7 Claim Form plus an Application Notice and supporting witness statement and draft Recognition and Enforcement Order.

Where the Claim Form is accompanied by the Particulars of Claim and the defendant is located in the DIFC or Dubai, the defendant will have 14 days within which to acknowledge service and a further 14 days within which to file its Defence. Where the defendant is located outside Dubai, the time periods are 28 days and 45 days respectively.

If, following service, the defendant does not respond to the claim, the claimant will be entitled to obtain judgment in default under Part 13 of the Rules of the DIFC Courts.

More usually, and in the majority of cases, the proceedings will be determined by way of an immediate judgment application pursuant to RDC Part 24. The procedure to apply for immediate judgment is straight forward with the application often determined at a hearing, but may be on the papers with the agreement of the parties, or if the Court considers it appropriate.

DIFC Courts - regional convention countries

For Riyadh and GCC Convention country judgments, the recognition and enforcement process before the DIFC Courts is by way of a Part 45 Application, which is a more streamlined and less costly process than ratification pursuant to Part 7 proceedings.

Provided that the criteria set out in the Conventions are satisfied, the ratification element of the enforcement process is relatively straight forward both in terms of procedure and the time it takes to do so.

Recognition and enforcement of a foreign judgment may only be challenged in the DIFC Courts on limited grounds. Those grounds include (but are not limited to): where the judgment was obtained by fraud; where the judgment is contrary to public policy; and where the proceedings were conducted in a manner which the DIFC Courts regard as contrary to the principles of natural justice and in the case of Part 45 enforcement action, if the judgment does comply with the conditions set out in the treaty or convention. For a consideration of the pitfalls of not complying with the criteria set out in the Conventions when seeking enforcement in the DIFC Courts, please see our Credit Suisse article.

The DIFC Courts will not re-examine the merits of a foreign judgment the subject of a recognition and enforcement application. The foreign judgment may not be challenged on the grounds that it contains an error of fact or law, and will, rather be recognised and enforced on the basis that the defendant has a legal obligation, recognised by the DIFC Courts, to satisfy a judgment of the foreign court.

ADGM Courts - limited to ADGM enforcement and conduit enforcement of judgments of Abu Dhabi Courts

The ADGM Court Regulations at Articles 170, 171 and 180 of chapter 10 of the ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointment Regulations 2015 allow for the enforcement of foreign judgments and foreign arbitral awards to be recognised by the ADGM Courts provided that the UAE has entered into an applicable treaty with the country in which the foreign award was rendered. In the absence of a treaty, the Chief Justice of the ADGM Courts will need to be satisfied that the foreign courts, which rendered the foreign judgment, have agreed to provide reciprocal treatment of recognition and enforcement for ADGM judgments.

The ADGM Courts and the Abu Dhabi Judicial Department ('ADJD') signed a memorandum of understanding ('MoU') which allows for the mutual and reciprocal recognition and enforcement of judgments, decisions, orders and ratified arbitral awards between the ADGM Courts and the onshore Abu Dhabi Courts which are overseen by the ADJD, without the need for the re-examination of the substance of the dispute on which

they have been issued.

In terms of the procedure for the enforcement of foreign judgments in the ADGM, this is similar to that detailed above in the DIFC Courts.

Freezing order remedies

Freezing order in support of recognition and enforcement proceedings

In an appropriate case, where there is a risk of dissipation, a freezing order can be sought in support of the DIFC Court recognition proceedings which may extend to assets in Dubai or any other Emirate in the UAE notwithstanding that there are no assets to freeze within the DIFC. This remedy may suggest itself where the less costly remedy of securing a precautionary attachment from the UAE Courts, considered below, is considered too uncertain.

The criteria and the procedure for granting freezing orders, and the practice and principles applied by the DIFC Court, closely mirror those in English law. For example, in respect of the critical requirement to demonstrate a risk of dissipation, the bulky nature of assets, and the likely time required to sell them, may point against any immediate and urgent risk of dissipation.

Precautionary attachment before onshore courts

It follows from what has been said above that the risk on reciprocity tends to make recognition proceedings before the UAE Courts a (sometimes distant) second choice to the more certain route of first obtaining a recognition and enforcement order from the DIFC Courts, and then bringing the DIFC Court order before the onshore execution Courts for enforcement purposes.

That is not to say however, that the onshore Courts have no immediate role at the recognition stage. To the contrary, in Dubai, an application for precautionary attachment can be made to the Civil Courts, freezing identified assets and funds on an interim basis, pending the determination of the DIFC Court recognition proceedings (or even potentially on the basis, directly, of the foreign proceedings pending the determination of the action for judgment abroad, although this is somewhat untested and uncertain).

An application for precautionary attachment can be made to the UAE Civil Courts, freezing identified assets and funds on an interim basis, pending the determination of the DIFC Court recognition proceedings (or even potentially on the basis, directly, of the foreign proceedings, although this is untested and uncertain).

As a result of recent practice changes, the application need no longer be followed by the filing of confirmatory proceedings before the UAE Court, it being sufficient that reference is made to the substantive action (whether foreign or domestic) in the original application. This change in UAE practice and procedure is therefore akin to allowing for precautionary attachment in aid of the foreign proceedings, although it is not known or conceived as such.

Interim relief in aid of foreign proceedings

As is the case in England & Wales, the DIFC Court will not recognise and enforce an interim injunction or order. In this, DIFC law mirrors the general common law position in respect of foreign interim orders, that

they cannot be the subject of recognition and enforcement proceedings. Thus, for example, the Memorandum of Guidance with the English Commercial Court applies only to money judgments.

Notwithstanding, in recent cases the DIFC Courts have confirmed their jurisdiction under the DIFC Court Law and the Rules of the DIFC Courts to grant interim freezing orders in aid of foreign proceedings, extending in appropriate cases to the assets of the defendants anywhere in the UAE. Such 'reflective' interim relief can be obtained, for example, in aid of an interim worldwide freezing order obtained before a common law court.

The test for granting such an ancillary freezing order is the same as that under English Law, in particular the applicant must establish:

1. that there is a good arguable underlying case;
2. that there is either a good arguable case for the existence of assets belonging to the respondent, or at a minimum, that there are grounds to believe that such assets exist;
3. that there is a real risk that the respondent will dissipate its assets if the order is not given; and
4. that the order is appropriate (or just and convenient) in all the circumstances.

The availability of interim relief in aid of foreign proceedings, where the case discloses no connection to the DIFC and it is argued that nonetheless this absence can be overcome by other discretionary factors, presently remains somewhat untested in DIFC law. Notwithstanding, it is tolerably clear (and accords with principle and comparative common law precedent) that the absence of any specific nexus with the DIFC is not in itself a jurisdictional red light to the bringing of an ancillary freezing order application in respect of assets the subject of a worldwide freezing order that are located in onshore Dubai. Rather, in an appropriate case, we believe that other factors including the combating of international fraud and considerations of comity (and conversely the absence of countervailing comity considerations), as well as the capacity for DIFC Court orders to be enforced in onshore Dubai through the reciprocal statutory mechanism, could cumulatively weigh in favour of the discretionary grant of relief.

Execution

In cases where a foreign judgment is recognised by the onshore UAE Courts (including on appeal), the enforcement and execution measures available to the foreign judgment creditor will be the same as those available to a domestic judgment creditor (attachment and execution against assets), but these do not extend to information orders or Bankers Trust type relief.

As regards recognition and enforcement orders of the DIFC Court, in respect of DIFC based assets, the enforcement and execution measures available to claimants as judgment creditors will be the same as those available to a DIFC Court judgment creditor, including well charging orders and execution against assets.

Under Part 50 RDC, judgment debtors can be summoned for their examination on oath and the DIFC Court may conduct an inquiry into the debtor's assets and means. A failure or refusal of a defendant (or its officers or directors) to attend or to abide by directions on examination and inquiry may lead to a finding of contempt. Ultimately, the contempt power of the DIFC Courts to order committal for contempt depends upon the referral of the Court's contempt order to the Attorney General of the UAE.

In respect of assets outside the DIFC, the DIFC Court recognition and enforcement order is a judgment that will be enforced by the Courts of Dubai (and onwards as appropriate in other Emirates) through the special execution protocol for enforcement between the DIFC Courts and the Courts of Dubai. Alternatively, it may be enforced through the statutory processes for attachment and execution against assets in the Emirates other than Dubai, including notably in Abu Dhabi.

In either case, the enforcement process is undertaken in accordance with the UAE Civil Procedures Law, which generally involves applications to the Court to investigate the assets of the defendants, whether or not known or specifically identified, and for executionary attachment on those assets.

For onward enforcement in onshore Dubai or elsewhere in the UAE of the DIFC Court recognition and enforcement order, the onshore Courts do not review the merits of the claim and, apart from public policy considerations, will not look again into the formal conditions for recognition.

Conclusion

It follows from the above analysis that, potentially, it is open to a party to adopt a multitrack approach and to seek hybrid remedies before the DIFC Courts and the onshore Courts when seeking to enforce a foreign judgment or to freeze assets based on the existence of foreign proceedings.

In considering options, the key remedy is, very often, a recognition and enforcement order from the DIFC Court in respect of the foreign judgment and order. Allied with that order, other interim, onward and execution remedies can be considered.

In respect of enforcement against assets located in onshore Dubai, it may often be important to bear in mind the potential impact and tactical implications of Dubai Decree 19 of 2016 on the Formation of the Judicial Committee for the Courts of Dubai and the Courts of the Dubai International Finance Centre, establishing what is known as the Joint Judicial Committee ('JJC'). The practice of the JJC in resolving conflicts of jurisdiction between the Dubai Courts and the DIFC Courts, where concurrent proceedings relating to a foreign judgment are in being, is beyond the scope of this article. Nonetheless, as an overarching observation, greater caution will be required where the character of the DIFC recognition proceedings is in the nature of a pure conduit proceeding.

Ideally, the foreign judgment and order will have been obtained following a determination on its merits, i.e., on a full substantive or accelerated summary basis rather than upon a procedural default basis. Whilst the DIFC Court will recognise and enforce a default money judgment of a foreign court on satisfaction that the defendants were duly served but failed to appear and that the period for setting it aside has elapsed, it is preferable, particularly for jurisdictional questions and for onward enforcement purposes in Dubai or elsewhere in the UAE, that the foreign court will have adjudicated on the merits. That it has done so in the exercise of a summary jurisdiction will not generally give rise to any issues.

In some cases, it may be recommended to seek precautionary attachment before the Dubai Courts based on the underlying foreign proceedings (with any interim foreign worldwide freezing order used in support but not as a required element) and later, when the foreign judgment is handed down, to seek Part 7 recognition and enforcement before the DIFC Court, for subsequent enforcement onwards of the DIFC Court Recognition and Enforcement order through the Dubai and onshore Courts.

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