

Enforcing Foreign Judgments in the UAE: The Uncertain Future of the DIFC Courts as a Conduit Jurisdiction

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It is often said that the foremost consideration to commencing litigation is the prospect of enforcement against the intended respondent. Otherwise, a successful claimant may be left with nothing more than an expensive piece of paper and an empty victory. That consideration becomes more pronounced in a context where the respondent's assets are located overseas, necessitating enforcement of the court judgment in an unfamiliar legal jurisdiction.

The successful enforcement of a foreign court judgment in the United Arab Emirates (UAE) depends on a number of legislative factors, which have been subject to uncertain application by the 'onshore' Dubai courts. While recent Dubai court decisions have trended positively towards enforcing foreign judgments, the Dubai court enforcement process can be long and convoluted, with judgment debtors having recourse to multiple levels of appeal.

Enter the courts of the Dubai International Financial Centre (DIFC), an 'offshore' free zone and legal jurisdiction within Dubai. Enforcement of foreign judgments is largely more intuitive for foreign judgment debtors before the 'offshore' DIFC Courts (as contrasted with the 'onshore' Dubai courts), as the former maintain a legislative mechanism for the mutual recognition and enforcement of judgments with the Dubai courts. It may therefore be possible for a party to seek recognition of a foreign court judgment in the DIFC Courts and then convert the resulting DIFC Court judgment into a

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judgment of the Dubai courts for the purposes of enforcement, even where there is no other link between the judgment and the DIFC. In this way, the DIFC has come to be known as a ‘conduit jurisdiction’.¹

While a recent DIFC Court judgment has opened the door to using the DIFC Courts as a conduit jurisdiction for the enforcement of foreign court judgments in the onshore Dubai courts, the mechanism remains as yet untested (at least fully) and has given rise to concerns about parties misusing the legislative mechanism for mutual enforcement. Possibly in response to those concerns, the Ruler of Dubai passed a decree establishing a judicial committee with the objective of resolving jurisdictional conflicts between the DIFC Courts and Dubai courts.

This article is in four parts. First, this article will describe the legislative framework for enforcing foreign judgments in the UAE and examine certain challenges that foreign judgment holders have faced. Secondly, the article will provide an overview of the foreign judgment enforcement regime in the DIFC and analyse the use of the DIFC Courts as a conduit jurisdiction. Thirdly, the article will review the recent establishment of the judicial committee and its early decisions in cases of alleged jurisdictional conflicts. Finally, the article will offer some observations on the uncertain future of the use of the DIFC Courts as a conduit jurisdiction for enforcing foreign judgments elsewhere in the UAE.

Enforcing foreign judgments in the UAE

The conditions for the enforcement of foreign judgments in the UAE courts are listed under Article 235 of the UAE Civil Procedure Law.² Notwithstanding

- 1 While the term ‘conduit jurisdiction’ has also been used in the context of enforcing arbitral awards, a discussion of using that mechanism for the enforcement of foreign arbitral awards is beyond the scope of this article.
- 2 Art 235 of the UAE Civil Procedure Law, Federal Law No (11) of 1992, as amended by the Federal Law No (30) of 2005:

‘[J]udgments and orders issued in a foreign country may be ordered to be enforced in the UAE on the same conditions as prescribed in the laws of that country for the enforcement of similar judgments and orders issued in the UAE. An enforcement order shall be applied for under the normal litigation procedure in the court of first instance within whose jurisdiction the enforcement is required. Enforcement may not be ordered until the following has been verified:

 - a) that the UAE courts do not have jurisdiction in the dispute in which the judgment has been given or the order made, and that the foreign courts which issued it have jurisdiction therein under the international rules for legal jurisdiction prescribed in their laws.
 - b) that the judgment or order has been issued by a court having jurisdiction under the law of the country in which it was issued.
 - c) that the opposing parties in the case in which the judgment was given were summoned to appear and duly appeared.
 - d) that the judgment or order has acquired the force of a *fait accompli* under the law of the court which issued it.
 - e) that it does not conflict with a judgment or order previously issued by a court in the UAE and contains nothing in breach of public morals or order in the UAE.’

that provision, in practice, difficulties may arise, particularly in the absence of a treaty for the mutual recognition and enforcement of court judgments between the UAE and another country. Where there is no international treaty between the UAE and the foreign country whose judgment is sought to be enforced, the UAE courts (seated outside of the DIFC) typically refuse to enforce foreign court judgments.

In a 2006 decision, the plaintiff sought to have its UK money judgment enforced against the defendant in Dubai. Both the Court of First Instance and the Dubai Court of Appeal refused the plaintiff's request, and so the plaintiff appealed to the Court of Cassation – Dubai's highest court – which also refused to enforce the judgment on the basis that the plaintiff had failed to provide sufficient proof of a reciprocal enforcement law between the UK and the UAE (as one did not exist).³

Similarly, in a 2014 case, a California court judgment holder sought enforcement in the Dubai courts.⁴ Although the Court of First Instance rejected the enforcement request on the basis that there was no reciprocal enforcement treaty between the UAE and the United States, the Court of Appeal reversed the lower court's ruling and granted enforcement, finding that the requirements of Article 235 were met. The plaintiff's victory was short-lived, however, and the Court of Cassation reversed the Court of Appeal decision.

These judgments of the Dubai courts confirm that, while it may be possible to enforce a foreign judgment in the absence of treaty-based reciprocity, that absence will create a substantial barrier to enforcement. Even the presence of a reciprocal agreement is no guarantee for enforcement and UAE courts have been known to refuse enforcement in those circumstances, highlighting the difficulty encountered by foreign judgment holders.⁵ These challenges with enforcement in the UAE have given rise to more creative enforcement solutions, and in particular, via the DIFC Courts, which may help parties avoid the arduous – and sometimes uncertain – enforcement criteria of the local Dubai courts.

3 Dubai Court of Cassation, Petition No 269 (civil) 26 February 2006.

4 Dubai Court of Cassation, Petition No 517 (civil) 28 August 2016.

5 The UAE has entered into and ratified a number of reciprocal enforcement treaties. These include, for example, the Gulf Countries Convention for the Execution of Judgments (the 'GCC Convention' of 1996); the Convention on Judicial Assistance, Recognition and Enforcement of Judgments in Civil and Commercial matters signed between France and the UAE (the 'Paris Convention' of 1992); and the Agreement between the UAE and India on Juridical and Judicial Cooperation in Civil and Commercial matters. The UAE has also entered into a cooperative arrangement with Egypt known as the 'Legal and Judicial Cooperation Agreement between the UAE and the Arab Republic of Egypt' of 2000.

The DIFC as a conduit jurisdiction for enforcing foreign judgments

The DIFC is an autonomous ‘offshore’ financial free zone and legal jurisdiction, physically located within the Emirate of Dubai, established under Dubai Law No 12 of 2004 (‘the DIFC Judicial Authority Law’), with the intention of creating an international business and commercial centre within Dubai.⁶

DIFC Law No 10 of 2004 (‘the DIFC Court Law’) provides for the independent administration of justice in the DIFC.⁷ Article 24 of the DIFC Court Law states that the DIFC Courts have jurisdiction to ratify any judgment, order or award of, among others, any recognised foreign court.⁸

In 2009, the DIFC Courts and the Dubai courts entered into a Memorandum of Understanding,⁹ as well as a Protocol for Enforcement,¹⁰ dealing with the mutual enforcement of judgments. Later, the DIFC Judicial Authority Law was amended by Dubai Law No 16 of 2011 to allow for the enforcement of DIFC Court judgments in the Dubai courts upon the satisfaction of certain conditions, including that the judgment be: (1) final and executory; (2) legally translated into Arabic; and (3) certified by the DIFC Courts for execution and have a formula of execution affixed by the courts.¹¹

The DIFC Courts have reported recently that ‘enforcement in Dubai of money judgments from the DIFC Courts has proved a reliable procedure to date’¹² and that there ‘are a number of cases where DIFC Court orders, decisions and judgments have been enforced by the Dubai Courts.’¹³ It may therefore be possible for a party to seek recognition of a foreign judgment in the DIFC Courts and then convert the resulting DIFC Court judgment into a judgment of the Dubai courts for the purposes of enforcement, even where there is no other link between the judgment and the DIFC. In this way, the DIFC has come to be known as a potential ‘conduit jurisdiction’.

6 Dubai Law No 12 of 2004; see: <http://difccourts.ae/legal-framework/>.

7 DIFC Court Law No 10 of 2004, Art 6; see: www.difc.ae/laws-regulations/legal-database.

8 *Ibid*, Art 24.

9 Memorandum of Understanding (MOU) between Dubai Courts and DIFC Courts (16 June 2009); see: <http://difccourts.ae/2009-memorandum-of-understanding-between-dubai-courts-and-difc-courts/>.

10 Protocol of Enforcement between the DIFC Courts and the Dubai Courts (23 April 2009); see: <http://difccourts.ae/wp-content/uploads/2015/08/Protocol-of-Enforcement-between-the-DIFC-Courts-and-Dubai-Courts-23-April-2009.pdf>.

11 Dubai Law No 16 of 2011, Art 7.

12 DIFC Courts Enforcement Guide, Edition 4, 3 January 2016, para 12; see: <http://difccourts.ae/enforcing-difc-court-judgments-and-orders-outside-the-difc1/>.

13 *Ibid*, para 15.

In *DNB Bank ASA v Gulf Eyadah Corporation & Gulf Navigation Holding PJSC*,¹⁴ the DIFC Court of First Instance cast some doubt on the use of the DIFC as a conduit jurisdiction for foreign court judgments.¹⁵ In that 2014 case, the applicant sought to enforce, in the DIFC Court, an English court judgment requiring the respondents to pay US\$8.7m.¹⁶ The respondent contested the jurisdiction of the DIFC Courts to enforce the foreign judgment, arguing that neither the parties nor the assets against which the applicant sought enforcement had any connection with the DIFC and, further, that the applicant's attempt to enforce in the DIFC was an abuse of process.¹⁷

The DIFC Court of First Instance rejected the respondent's protests, holding that it had jurisdiction to enforce a foreign judgment, irrespective of the connection of the parties or the assets with the DIFC.¹⁸ However, in allowing the application for enforcement, the DIFC Court of First Instance commented that the DIFC Courts could not be said to be a 'conduit jurisdiction Court' for foreign judgments and that, although the DIFC Courts had jurisdiction to enforce foreign judgments, that power could not extend beyond the DIFC to the Dubai courts.¹⁹

Although the DIFC Court of First Instance had ruled in the applicant's favour, the applicant appealed on the basis that the lower court had erred in finding that the DIFC Courts had no power to refer a foreign judgment to the Dubai courts for execution.²⁰

The DIFC Court of Appeal agreed with the applicant and ruled that:²¹
'from the perspective of the DIFC Courts, it is not wrong to use the DIFC Courts as a conduit jurisdiction to enforce a foreign judgment and then use reciprocal mechanisms to execute against assets in another jurisdiction. The DIFC Courts are not concerned with what happens in the Dubai Courts in which the Claimant seeks to enforce its judgment as it does not have the jurisdiction to dictate what they should do.'

The DIFC Court of Appeal therefore left open the possibility that foreign judgment holders seeking to enforce against parties and assets in the

14 *DNB Bank ASA v Gulf Eyadah Corporation & Gulf Navigation Holding PJSC* (CFI-043-2014); see: <http://difccourts.ae/cfi-0432014-dnb-bank-asa-v-1-gulf-eyadah-corporation-2-gulf-navigation-holding-pjsc/>.

15 *Ibid*, para 49.

16 *Ibid*, para 1.

17 *Ibid*, para 2.

18 *Ibid*, paras 49 and 52.

19 *Ibid*.

20 *DNB Bank ASA v Gulf Eyadah Corporation & Gulf Navigation Holdings PJSC* (CA 007-2015), para 2.

21 *Ibid*, para 129.

onshore Dubai courts may seek to enforce their judgments via the DIFC Courts, but offered no guarantee on the ultimate outcome before those Dubai courts. As of the date of this article, there do not appear to be any reported attempts to enforce a foreign court judgment, which has already been enforced in the DIFC Courts, in the Dubai courts. Accordingly, the word of the Dubai courts on the permissibility, or not, of this mechanism for enforcement remains unknown.

Introduction and rulings of the judicial committee

Against the backdrop of increasing controversy regarding the role of the DIFC Courts as a conduit jurisdiction, on 9 June 2016, the Ruler of Dubai issued Dubai Decree No 19 of 2016 (the 'Decree'), which established a new judicial tribunal tasked with resolving jurisdictional conflicts between the DIFC Courts and the Dubai courts (the 'Judicial Committee').²² The salient provisions in respect of the Judicial Committee are as follows:

- The Judicial Committee comprises seven members, including three from the Dubai courts, three from the DIFC Courts, and the Secretary General of the Dubai Judicial Council.²³ The Chairman of the Dubai courts has a casting vote.²⁴
- Among the Judicial Committee's responsibilities are to determine the competent court to hear a case when a conflict could arise as to which court has jurisdiction: Dubai or DIFC.²⁵
- Any party or the Attorney General of Dubai may apply for a determination of the competent court.²⁶
- Once such an application is made, the case is automatically stayed pending the Judicial Committee's decision.²⁷
- The Judicial Committee's deliberations are private, but its procedures and decisions are recorded in minutes signed by the members²⁸ and must be issued within 30 working days from the submission of the application.²⁹

After what appears to have been its first session on 19 December 2016, the Judicial Committee considered an application from the judgment

22 Dubai Decree No 19 of 2016 on the Formation of the Judicial Committee for the Courts of Dubai and the Courts of the Dubai International Finance Centre, issued in Dubai on 9 June 2016.

23 Dubai Decree No 19 of 2016, Art 1.

24 *Ibid.*

25 *Ibid.*, Art 2.

26 *Ibid.*, Art 4.

27 *Ibid.*, Art 5.

28 *Ibid.*, Art 3.

29 *Ibid.*, Art 3.

debtor in the *DNB Bank* case (discussed in the previous section) in which the DIFC Courts allowed the enforcement of an English court judgment, notwithstanding the lack of any connection of the parties or assets with the DIFC.

In *Gulf Navigation Holding PJSC v DNB Bank ASA*, the appellant applied to the Judicial Committee to annul the above-referenced judgment issued by the DIFC Courts on the basis that the DIFC Court did not have the jurisdiction to recognise the foreign judgment.³⁰ The Judicial Committee rejected the application on the basis that it did not have the jurisdiction to grant the appellant's request under section 4 of its constituting Decree. According to the Judicial Committee:

'...the Judicial Tribunal... can intervene in determine (sic) the competent court to entertain the case. These cases are if neither of the two courts has abandoned its jurisdiction for handling the case or if both courts have not abandoned their jurisdiction or if they issued conflicting judgments. Whereas this was not the position, and as the appellant has lodged only one case before DIFC Courts which issued a final and conclusive judgment, and there is no evidence in the file to show that the Appellant lodged a case before Dubai Courts with the same subject nor a judgment to abandon their competence; consequently a dispute about jurisdiction has not been raised, so there is no conflict of jurisdiction between Dubai Courts and the DIFC Courts.'³¹

The judgment in respect of the dismissal was unanimous among the six Judicial Committee members seized of the matter, including the three DIFC Court judges and the three Dubai court judges.

It would appear, therefore, that the Judicial Committee has defined its decreed role in resolving jurisdictional conflicts as falling into one of three categories: (1) where there are two contradictory judgments issued by the DIFC Courts and the Dubai courts; (2) where both courts have accepted jurisdiction; or (3) where both courts have declined jurisdiction.

This role refinement begs the question of whether the result would have been the same if the respondent had raised a case in the Dubai courts contemporaneously with the DIFC Courts enforcement action and then sought the Judicial Committee's intervention (a hypothetical that could never have been in the *DNB Bank* case since the Judicial Committee did not exist at the time of the DIFC Courts enforcement proceedings). Another recent decision from the Judicial Committee's session of 19 December 2016 – albeit in the context of arbitral awards and not foreign court judgments – may provide some guidance on this point.

³⁰ *Gulf Navigation Holding PJSC v DNB Bank ASA*, Cassation No 5/2016 (Judicial Tribunal), 2.

³¹ *Ibid*, 4–5.

In *Daman Real Capital Partners Company LLC v Oger Dubai LLC*, the applicant sought enforcement of an onshore Dubai arbitral award in the DIFC courts, while the respondent sought annulment of that same arbitral award in the Dubai courts.³² The respondent brought an application before the Judicial Committee, contending that a jurisdictional dispute would arise on the basis that it intended to appeal to the Dubai Court of Cassation.³³

The Judicial Committee agreed, finding that the case before the Dubai Courts was subject to the decision of the Dubai Court of Cassation and that, as such, there was a conflict of jurisdiction between the DIFC Courts and the Dubai courts, which the Judicial Committee had to resolve.³⁴ In the result, the Judicial Committee remitted the case to the Dubai courts.³⁵

Notably, the Judicial Committee's decision was by three-three majority, with the three Dubai courts members voting to remit the matter to the Dubai courts, and the three DIFC Courts members dissenting, without reasons.³⁶ The Secretary General is not listed as having participated and so, with the President of the Dubai Court of Cassation having the casting vote, the three Dubai court judges' decision carried the day.

In the arbitral award context, it is not uncommon to see award debtors challenge an arbitral award in a jurisdiction different to that where the award holder seeks enforcement. Given the Judicial Committee's decision in the *Daman* case, debtors to arbitral awards may be tempted to bring challenges before the Dubai courts, at the same time as the arbitral award holders' are attempting to enforce in the DIFC Courts, as a way to seek intervening relief from the Judicial Committee, as was done in *Daman*.

In contrast, when it comes to foreign court judgments, there may not be an opportunity to commence a proceeding in the Dubai courts contemporaneously with an enforcement application before the DIFC Courts, since – at least in the UAE – there does not appear to be a mechanism to bring an application challenging a foreign court judgment. Rather, challenges to foreign court judgments are made in response to enforcement proceedings (or, to repurpose an old legal metaphor, only as a shield and not a sword). It may be, then, that judgment debtors will, instead, commence separate Dubai court proceedings in an attempt to create a conflict falling within the stated role of the Judicial Committee.

32 *Daman Real Capital Partners Company LLC v Oger Dubai LLC*, Cassation No 1/2016 (Judicial Tribunal), 3.

33 *Ibid.*

34 *Ibid.*

35 *Ibid.*, 3–4.

36 *Ibid.*, 4.

The uncertain future of the DIFC as a conduit jurisdiction

The initial prevailing view regarding the creation of the Judicial Committee was that it would serve, in the main, to reign in the DIFC Courts' jurisdiction, particularly *vis-à-vis* any attempts by parties to use the DIFC Courts as a conduit jurisdiction. The Judicial Committee's decision in the *DNB Bank* case may assist in softening those views or even support the (perhaps less sceptical) view that such a committee will merely help boost the credibility of Dubai's judicial system by providing a safety net to avoid conflicts in its multiple court jurisdictions.

Accordingly, the question of whether the Dubai courts will enforce a foreign court judgment that has been enforced in the DIFC Courts remains open. The DIFC Court of Appeal's judgment brought to the fore the opportunity to use the DIFC Courts as a conduit jurisdiction for the enforcement of foreign court judgments in Dubai. But even the DIFC Court of Appeal in the *DNB Bank* case, acknowledged the uncertainty when it warned: '[...] the holder of a DIFC Courts judgment recognising a foreign judgment will seek enforcement of the DIFC Courts judgment at its own risk.'³⁷

Thus, when seeking to enforce a foreign court judgment in onshore Dubai, parties may now have two options: (1) using the DIFC Courts as a conduit jurisdiction, pursuant to Article 24 of the DIFC Court Law and then, via Dubai Law No 16 of 2011, in the Dubai courts; or (2) directly before the Dubai courts, provided that the requirements of Article 235 of the UAE Civil Procedure Law are satisfied, particularly the existence of a reciprocal enforcement treaty with the country whose judgment is sought to be enforced (although even the existence of such a treaty is no guarantee of enforcement).

Until a foreign court judgment is enforced via the DIFC Courts and then in the Dubai courts, it is impossible to know for certain how the Dubai courts will react. Nevertheless, there are two considered possibilities; the Dubai Courts will either: (1) simply respect the terms of the DIFC Judicial Authority Law and enforce the foreign court judgment, as it would another DIFC Court judgment; or (2) consider that foreign court judgments go beyond the scope of the DIFC Judicial Authority Law and that, to enforce such a judgment, they must consider the factors prescribed by Article 235 of the UAE Civil Procedure Law.

While the DIFC Court option remains untested – at least, fully – foreign parties may find that its procedure is more familiar and intuitive, and could help circumvent the uncertainty of enforcement before the onshore Dubai courts. Whether the Dubai courts will permit this type of strategy

³⁷ See n20 above, para 129.

remains to be seen, but some may consider, from a policy perspective, that for the UAE to stay attractive to international business and continue to grow, a foreign investor's ability to enforce its foreign court judgments – be it via the DIFC or directly with the onshore courts – will have an impact on that growth.