

An aerial photograph of the Dubai skyline, featuring the Burj Khalifa on the left and a complex highway interchange in the foreground. The sky is blue with light clouds.

# DISPUTE RESOLUTION IN THE MIDDLE EAST

*Enforcement*



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## ENFORCEMENT

### GENERAL OVERVIEW

This volume deals with the various options available for the enforcement of court judgments and arbitral awards (both foreign and domestic) in the United Arab Emirates (UAE) and addresses the difficulties that parties may typically face when attempting to enforce in this complex region.

Enforcement is of fundamental importance and should be considered at the very outset, ie when negotiating the contract or otherwise entering into a business relationship. Agreeing a contract with an appropriate and clear dispute resolution mechanism can be the difference between enforcement being straightforward and quick, or enforcement being nearly impossible. Given the potential risks of obtaining a judgment or arbitral award that cannot be enforced, the enforcement position should be carefully considered before any dispute resolution mechanism is finalized and any claim is initiated, or before any positive steps are taken to defend such a claim.

When considering enforcement action in the UAE, judgment and arbitral award creditors should be wary of the increased cost and delay that such action is likely to entail relative to other jurisdictions. Broad rights of appeal and the fact that legal fees are largely not recoverable in onshore litigation are factors which contribute significantly to the risks and uncertainties of enforcing in the region. Of course, costs and delays at the enforcement stage will normally be especially unpalatable to the creditor because they will be additional to those already incurred in successfully pursuing the substantive claim. In problematic cases, it can cost substantial sums and take up to two years or more to have a judgment or arbitral award recognized in the UAE. Only at that stage will the creditor be in a position to embark on the execution action which, depending on the nature of the debtor's assets in the region, can take a further five to eight months.

Having said this, the enforcement landscape in the UAE is clearly changing, and changing for the better. The introduction of a new arbitration law, UAE Federal Law No. 6 of 2018 (the "Arbitration Law"), which came into force on 16 June 2018, has also clarified the procedural grounds to challenge enforcement of an arbitral award before the onshore UAE courts.

There have also been DIFC Court judgments which suggest that it is permissible for it to be used as a "conduit" jurisdiction for the enforcement of foreign arbitral awards in onshore Dubai and the wider UAE. This new approach, however, should be treated with caution. There is, after all, no long-running or established track record of creditors successfully achieving enforcement against assets held in onshore UAE via the DIFC Courts. The establishment of a Joint Judicial Committee by the Government of Dubai on 9 June 2016 to review and resolve "conflicts of jurisdiction" between the DIFC Courts and the Dubai Courts also appears to have created another "roadblock" to enforcement by this method. Whilst there are certainly encouraging signs, there remains a considerable degree of uncertainty around the enforcement regime in the UAE, which is complex and constantly developing, meaning that parties looking to enforce in the region will generally have to pay a high price, both in terms of time and money. In these circumstances, it is important that judgment and arbitral award creditors:

- consider the difficulties of enforcement in the UAE from the outset of any action;
- ensure that the arbitration process and award(s) do not themselves raise issues in a later enforcement action;
- evaluate on a commercial and realistic basis the cost-effectiveness of any enforcement action before committing substantial resources towards it;

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- consider whether there are assets in other jurisdictions against which enforcement action could be taken; and
- instruct legal counsel with both an in-depth understanding of the interplay between the UAE's onshore and offshore jurisdictions and a wealth of experience in applying their differing enforcement regimes in practice.

## ONSHORE LITIGATION

This section of the volume focuses on the enforcement of domestic and foreign judgments in onshore UAE, which consists of the federal judicial system in place in the Emirates of Abu Dhabi, Ajman, Fujairah, Sharjah and Umm Al-Quwain as well as the separate court systems retained by Dubai and Ras Al Khaimah.

At this stage, an award creditor will also want to consider the position in relation to any assets that were the subject of an earlier attachment order obtained prior to commencement, or during the course of, the proceedings. Such orders are considered in detail in Volume 7 of this Guide "[Interim and Conservatory Measures](#)".

### Enforcing onshore judgments

A judgment of the onshore courts cannot be enforced in the UAE's onshore jurisdictions unless it is final (ie not subject to any right of further appeal) and has been certified by the Execution Court.

If the judgment is not satisfied the judgment creditor can apply to the Execution Court to enforce the judgment against the debtor. An execution fee (which in Dubai is 1 percent of the monetary value claimed, but varies depending on the Emirate in which enforcement is taking place) will be payable at this stage. A court bailiff will then serve a notice on the judgment debtor requiring it to pay the amount owed (or otherwise satisfy the court's order) within 15 days, failing which the judgment creditor may apply to the Execution Court requesting that it take any of the following enforcement steps:

- attach and sell any of the debtor's assets and bank accounts in the jurisdiction;
- sell (by following a prescribed and often lengthy auction process) any assets that were attached by the court prior to commencement of the action;
- release any amount deposited with the court as security against the claim;
- serve notice on any guarantor who has guaranteed the debt that it is now payable;
- write to banks (and/or other private or public sector departments or institutions, as appropriate) to enquire about any assets held by the judgment debtor in the jurisdiction; and/or
- grant the judgment creditor an order to search for the debtor's assets.

However, there are many grounds on which a judgment debtor may apply to the court challenging the execution proceedings. In this event, there will often be several hearings before the case is reserved for judgment, causing further cost and delay. Moreover, the outcome of the challenge proceedings may be appealed and the appeal process (which should be limited to the enforcement action and should not address the merits of the underlying case) will suspend any enforcement action.

Unfortunately for those seeking to enforce, an appeal is often used as a means to delay execution and,

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ultimately, prevent the judgment creditor from receiving payment.

## Enforcing foreign judgments

The UAE is party to a number of treaties and conventions which relate to judicial cooperation and affect the enforcement of foreign judgments in the country. Two notable examples are the *Riyadh Arab Agreement for Judicial Co-operation* and the *GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications*, which create reciprocal enforcement obligations between the signatory states and, where applicable, will (at least in theory) ease the path to enforcement. However, the reality is that, even where one such agreement applies, the enforcement of a foreign judgment in the onshore UAE courts is rarely straightforward.

Procedurally, the party seeking enforcement should file a petition for an execution order with the relevant Court of First Instance by producing a duly certified and legalized copy of the foreign judgment, together with proof that it is enforceable under the law of the country of origin. Difficulties tend to arise because the applicable treaty will contain its own conditions for enforcement and the local judicial authorities are empowered to analyze those conditions and consider their application in each case, leaving considerable scope for unpredictable (and unhelpful) decisions.

Where no treaty applies then in theory, pursuant to Articles 235-238 of the *UAE Civil Procedure Law (Federal Law no. 11 of 1992)* (CPL), judgments and orders passed in a foreign country may be executed within the UAE under the same conditions provided for by the laws of the foreign state, so long as the following conditions are satisfied:

- the onshore UAE Courts do not have jurisdiction over the substantive dispute;
- the judgment or order was issued by a competent court under the law of the foreign country;
- the defendant in the foreign proceedings was summoned and duly represented;
- the judgment or order is final and binding pursuant to the law of the foreign country; and
- the judgment or order is not inconsistent with that of a court in the UAE and does not contradict any moral code or violate public order in the UAE,

(together the "CPL Conditions").

The CPL Conditions, however, are difficult to satisfy and leave considerable scope for unhelpful judicial intervention. While the court should not examine the merits of the underlying case, in practice, the judgment debtor will often exploit the breadth of the CPL Conditions during an appeal in an attempt to re-litigate the issues already decided in the substantive dispute. In practice therefore, in circumstances where no treaty applies, a foreign judgment is highly unlikely to be enforced and therefore a judgment creditor will find himself having to start proceedings from the very beginning in the onshore UAE courts.

## OFFSHORE LITIGATION

This section of the volume deals with the enforcement of domestic and foreign judgments in the Dubai International Financial Centre (DIFC).

## Enforcing local judgments

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The broad rights of appeal available in the UAE's onshore jurisdictions can be obstructive to a creditor's enforcement action. In the DIFC, however, rights of appeal are more limited and, unless the lower court orders otherwise, an appeal will not stay its decision. Helpfully for the creditor, this means that, irrespective of any subsequent appeal, the DIFC Court's judgment on enforcement will be considered final and the enforcement action can proceed unhindered.

In Dubai, there is a reciprocal protocol of enforcement between the courts of the DIFC and onshore Dubai contained in Dubai Law No. 12 of 2004 (as amended by Dubai Law No. 16 of 2011) (the "Judicial Authority Law"), pursuant to which a judgment of the Dubai Courts can, subject to certain procedural formalities being met, be enforced in the DIFC as if it were a DIFC Court judgment. It also works in the opposite direction, such that a DIFC Court judgment can be enforced in Dubai in the same way and is a tried and tested method of enforcing domestic judgments in the UAE. As at 2 July 2014, there had been 61 apparently successful enforcement actions between the DIFC and onshore Dubai courts between 2008 and 2014.

In Abu Dhabi, the Abu Dhabi Global Market Courts ("ADGM Courts") has also executed a Memorandum of Understanding ("MoU") with the Abu Dhabi Judicial Department ("ADJD") for the reciprocal enforcement of their judgments, decisions and orders and the arbitral awards ratified or recognized by them.

## Enforcing foreign judgments

In addition to the various treaties to which the UAE is a party (which also bind the DIFC Courts), the DIFC Courts have themselves signed helpful memoranda relating to reciprocal enforcement with certain foreign courts and authorities. For example, the DIFC Courts have entered into such arrangements with the Commercial Court (Queen's Bench Division) of England and Wales, the Supreme Court of Singapore and the Federal Court of Australia.

Unlike with the onshore courts of the UAE, there is a presumption in the DIFC Courts that a foreign judgment is conclusive and, as such, there is less of a risk of the court reopening the merits of the case at the enforcement stage. Further, by contrast to the CPL Conditions which apply onshore, the objections to enforcement that can be raised in the DIFC Courts are more limited and include the following:

- that the foreign court did not have jurisdiction to try the case;
- that the judgment is not for a liquidated sum of money (a foreign judgment can only be enforced if it is finally quantified); and
- that the judgment is not final and conclusive.

The prospects of success for a party seeking to enforce a foreign judgment in the DIFC (and the wider UAE) were affected significantly by the decision in *DNB Bank ASA v Gulf Eyadah Corporation and another*, in which the claimant sought to enforce an order issued by the English Commercial Court. The DIFC Courts dismissed an application by the defendants contesting the jurisdiction of the DIFC Courts and held that the foreign court judgment could be recognized and enforced within the DIFC.

This case confirmed that, once the DIFC Court recognizes and enforces a foreign order (pursuant to its more generous enforcement laws) and issues a fresh DIFC Court judgment or order in the same terms, that new judgment or order can then be enforced in onshore Dubai pursuant to the Judicial Authority Law. The Dubai Courts are not permitted to analyze the merits of the DIFC Court judgment.

On the face of it, it therefore appeared that, by enforcing via the DIFC Court, a judgment creditor could

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pursue assets held onshore without needing to comply with the more problematic onshore enforcement regime. However, the status of the DIFC as a possible "conduit" jurisdiction in respect of foreign arbitral awards is outlined further below. Given the recent developments in this regard, there is considerably uncertainty as regards the availability of the DIFC Court as a "conduit" for enforcement of foreign judgments in onshore UAE and this pathway to enforcement could be undermined by annulment proceedings brought by the foreign judgment debtor in the "onshore" Dubai Courts.

## ARBITRATION

This section of the volume addresses the enforcement of domestic and foreign arbitral awards in the UAE.

### Enforcing domestic arbitral awards

The Arbitration Law repeals and replaces Articles 203 to 218 of the CPL, which previously governed arbitrations seated in onshore UAE.

Article 52 of the Arbitration Law states that an arbitral award made in accordance with the Arbitration Law has the same binding force on the parties as a court ruling. The award can be enforced directly before the UAE federal or local Courts of Appeal (rather having first to go through the Court of First Instance to receive ratification) and an enforcement order should be given by the Court within 60 days of a request for enforcement under Article 53. However, there are eight grounds on which an award debtor may apply to the court challenging the execution proceedings (Article 53) within 30 days from receipt of notification of the award (Article 54(2)). Those eight grounds are considered in Volume 14 "Appeals" of this guide.

In this event, the court may suspend enforcement proceedings for up to 60 days to give the Tribunal an opportunity to eliminate grounds for setting aside the award, where appropriate (Article 54(6)). Any remaining grounds will be referred to the Court of Appeal, which will review the submissions and evidence of the parties (typically at several hearings) before deciding whether to ratify or annul the arbitral award. In making this decision, the court should not consider the merits of the arbitral tribunal's findings and should only annul an award if one of the procedural grounds contained in Article 53 of the Arbitration Law is applicable.

As with the enforcement of judgments, the losing party is entitled to appeal the court's decision with a single round of appeal provided for in Article 54(1) to the Court of Cassation.

### Enforcing foreign arbitral awards

While it has historically been difficult to enforce foreign arbitral awards in the UAE, the landscape changed significantly when the country became a signatory to the *UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* or "the New York Convention" (NYC) in November 2006. Further, many of the bilateral or multilateral treaties to which the UAE is a party deal with the enforcement of arbitral awards and, where one of these is applicable, this may provide an alternative route of enforcement.

Since the accession to the NYC, there has been a steady transition towards a more "arbitration friendly" judicial approach in the UAE. It is now settled, for example, that the courts should apply the NYC's more liberal enforcement regime (as opposed to the CPL Grounds) when considering whether to enforce a foreign arbitration award. Pursuant to the NYC, the enforcement of a foreign award may only be refused on the following grounds:

- the parties to the arbitration agreement were under some incapacity or the arbitration agreement is not valid under the law to which the parties subjected it or the law of the country where the arbitral award

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was made;

- the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the proceedings, or was otherwise unable to present its case;
- the arbitral award deals with a difference not contemplated or falling within the terms of the submission to arbitration;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the parties' agreement or the law of the seat of arbitration;
- the arbitral award has not yet become binding on the parties or has been set aside or suspended by the courts at the seat of arbitration;
- the subject matter of the difference is not capable of settlement by arbitration under the law of the country where enforcement is sought (ie UAE law in this case); or
- enforcement would be contrary to the public policy of the state in which enforcement is sought (ie the UAE),

(together the "NYC Grounds").

While the applicable law differs, the practical process for the ratification of a foreign arbitral award is the same as for a domestic award (ie, as set out in Article 53 of the Arbitration Law and described above).

An example of the gradual shift towards a more "pro-enforcement" attitude in onshore UAE came with the recent Dubai Court of Cassation Commercial Appeal No. 693 of 2015, in which the respondent to arbitration proceedings commenced in London objected to enforcement in Dubai on the basis that (1) it was not properly served with notice of the arbitration proceedings and (2) the respondent's signatory to the agreement containing the arbitration clause was not properly authorized to bind the respondent.

Hearteningly for arbitral award creditors, the Court of Cassation dismissed these arguments and found that these technical questions fell to be decided according to the laws of the country that issued the arbitral award (in this case English law).

While there is clearly a positive trend in terms of the enforcement of foreign arbitral awards in the UAE, this positivity should be tempered by the reality that surprising and disconcerting judgments are still being handed down by the courts. As recently as March 2016, for example, the Dubai Court of Appeal refused to enforce an arbitral award rendered in London for the remarkable reason that it was not satisfied that the UK was a signatory to the NYC. However, this decision was corrected in the Court of Cassation.

## Enforcement of arbitral awards in the DIFC

As with elsewhere in the UAE, enforcement of an arbitral award rendered by an arbitral tribunal seated in the DIFC begins with an application to the DIFC Courts for recognition of the award. The grounds for refusal pursuant to the DIFC Arbitration Law essentially mirror the NYC Grounds.

As with foreign judgments, the Judicial Authority Law appears to allow a foreign award creditor to enforce a DIFC Court order (recognizing and enforcing the foreign award) in onshore Dubai as if it were an order of the

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Dubai Courts. That the DIFC Court may be used as a "conduit" jurisdiction for the enforcement of domestic and foreign arbitral awards (and indeed, judgments) against assets held in onshore UAE was confirmed in the landmark case of *Banyan Tree Corporate PTE Ltd v Meydan Group LLC*.

It was confirmed in the *Banyan Tree* case that it is possible to enforce via the DIFC Court in this way even in circumstances where the award or judgment debtor has no connection whatsoever with the DIFC. More remarkably, despite being the supervisory courts over the underlying DIAC arbitration, the Dubai Courts subsequently refused Meydan's application to annul the award on the basis of *res judicata* (ie because the DIFC Courts had already decided to enforce the award).

This decision, together with a number of other recent rulings along the same lines, is an encouraging example of cooperation between the courts of Dubai and the DIFC and is indicative of the general trend towards a more enforcement friendly environment in the UAE. Notwithstanding the above, while the DIFC Courts have done a great deal to progress Dubai's reputation as a robust jurisdiction for the enforcement of arbitral awards, the establishment of a Joint Judicial Committee (the "Committee") by the Government of Dubai on 9 June 2016 to review and resolve "conflicts of jurisdiction" between the DIFC Courts and the Dubai Courts has provided award debtors with a simple defence against enforcement through the DIFC Courts - file annulment proceedings with the local "onshore" Dubai Courts.

While the Committee has recently dismissed two separate cases (*Gulf Navigation Holding PJSC v DNB Bank ASA*, and *Marine Logistics Solutions LLC and another v Wadi Woraya LLC and others*) where the award debtor sought to have the decision annulled on the basis that the DIFC Courts had issued a final and conclusive decision and there were no parallel proceedings in the "onshore" Dubai Courts, the Committee has also determined in two cases (*Daman Real Capital Partners Company LLC v Oger Dubai LLC and Dubai Water Front LLC v Chenshan Liu*) that where enforcement proceedings have been brought before the DIFC Courts and, in parallel, annulment proceedings before the "onshore" Dubai Courts, the "onshore" Dubai Court will be deemed the competent Court and that all enforcement proceedings before the DIFC courts must cease.

In summary therefore, the Committee has issued a number of decisions that appear to have severely restricted the power of the DIFC Court to act as a "conduit" jurisdiction for the enforcement of arbitral awards in onshore Dubai. The Committee's decisions, which are final, binding and un-appealable, have been issued in relation to four DIFC cases relating to the enforcement of arbitral awards in onshore Dubai and have confirmed that:

- the DIFC Courts cannot be used as a conduit jurisdiction for the enforcement of arbitral awards rendered in non-DIFC onshore Dubai in circumstances where there are parallel annulment proceedings on foot in the onshore Dubai Courts; and
- the Committee will not intervene to prevent the DIFC Courts being used as a conduit jurisdiction for the enforcement of foreign arbitral awards and court judgments in onshore Dubai in circumstances where there are no onshore proceedings on foot involving the same parties and relating to the same subject matter.

Presently, it would appear that, as long as there is no conflict of jurisdiction between the two Dubai-based sister courts, the conduit route of enforcement for foreign judgments and arbitral awards remains intact. However, the Committee's approach to the question of the DIFC Court's status as a conduit jurisdiction for foreign decisions has yet to be tested in circumstances where there are parallel proceedings on foot in both the onshore Dubai courts and the DIFC Courts.



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