

Development of a Jurisdiction: An update on the DIFC Courts

Robert Maxwell Marsh

r.maxwellmarsh@tamimi.com

Fatima Ali Alnumairy

f.alnumairy@tamimi.com

September 2015

As the only common law dispute resolution forum in the UAE, the DIFC Courts have helped to maintain the UAE's position on the world stage as a focal point for all local, regional and international business communities. This article explores four significant developments that have dominated the agenda of the DIFC Courts in the past year.

Developments in Enforcement: Expanded Reach of DIFC Courts' Judgments

The DIFC Courts have been actively signing memoranda of guidance on enforcement with judicial authorities across a number of international jurisdictions with the aim of facilitating the mutual recognition and enforcement of judgments and orders as between the DIFC and those jurisdictions. These memoranda aim to provide additional contractual certainty by establishing procedures for the mutual enforcement of money judgments among those respective jurisdictions.

- United States District Court for the Southern District of New York- 22 March 2015
- The Supreme Court of Singapore- 19 January 2015
- The Federal Court of Australia- 29 March 2014
- The High Court of Kenya (Commercial and Admiralty Division) – 27 November 2014
- Commercial Court of England and Wales- 23 January 2013
- The New South Wales Supreme Court- 9 September 2013

The main purpose of those agreements is to set out the parties' understanding of the procedures of recognition and enforcement of each other's money judgments in the counterparty's respective courts. These memoranda are only concerned with judgments requiring a person to pay a sum of money to another person.

While these memoranda do not have a binding legal effect on judges and do not constitute a treaty or legislation, they promote a mutual understanding of, and provide an explanatory guide to, the laws and judicial processes for enforcement in each party's desired jurisdiction. They provide an alternative route to enforcement while the party's existing legal rights remain unaltered. Part of the desired effect is also to promote the economic and commercial interests of the UAE and improve its international reputation.

The terms of mutual enforcement are similar in all the memoranda signed:

- The judgment must be final, conclusive on the merits of the case and enforceable; the fact that there is a pending appeal to a higher court does not prevent it from being final and conclusive;
- The sum of money sought must be fixed or ascertainable; and
- The issuing Court must have had jurisdiction to determine the subject matter of the dispute.

It is hoped that adherence to the provisions of the memoranda of guidance by the international courts will instil confidence in commercial communities worldwide that money judgments will be recoverable within many of the internationally accredited common law legal frameworks. In terms of DIFC Court judgments, it is hoped that the expanded reach of enforcement will enhance the appeal of opting in to the DIFC Courts' jurisdiction.

DIFC Courts Wills and Probate Registry

A Different Avenue to Take: Creating a Will based on Common Law Principles

As Dubai becomes more and more of a multi-national community, the need to cater to different nationalities has increased. In relation to wills and probate issues, people have been more inclined to keep their money outside the UAE in order to protect their successors' interests. That could be for an array of reasons; however, the most common one is that they do not wish for UAE law and principles to apply to those assets.

The DIFC Courts has recently taken a step towards ensuring that the needs of expatriates with assets in Dubai are being tended to without prejudicing the pre-existing functionality of the legal system.

Wills under Sharia Law and UAE Federal Law

Following a testator's death, the UAE courts will examine the estate and potentially distribute it in accordance with the UAE Law of Personal Status which is largely based on Sharia principles, where distributions are per fixed-share ratios.

Pursuant to the laws and principles of Sharia, a surviving wife who has children qualifies for one eighth of her husband's estate, whereas a surviving husband who has children qualifies for one quarter of his wife's estate. The remainder is distributed among other family members.

Furthermore, a surviving wife may not automatically be appointed as the legal guardian of any children of the marriage, however, she may be appointed as their custodian. Conversely, a surviving husband is the legal guardian of any children of the marriage and is likely to be appointed as a custodian as well.

Non-Muslims may create a will in accordance with UAE laws and procedures; however, the application of this will is at the full discretion of the UAE Courts. If such a will expresses the testator's intentions relating to the disposition of assets situated in the UAE, such wishes may be applied in accordance with the laws of their home country if this wish is expressed in the will and the executor/heirs fulfil the various procedural requirements. However, the degree of applicability of such laws in effecting the testator's wishes relating to the estate is often uncertain and is rarely without legal and procedural challenges or hurdles.

The ambiguity that arises in those situations has been the leading motivator for expatriates to retain their assets outside of the UAE.

The DIFC Wills and Probate Registry

The DIFC will be the first jurisdiction in the MENA region where non-Muslims are able to register a will under common law rules. Providing non-Muslims with this option will hopefully create an element of certainty and security which was previously lacking. Being confident that their successors will benefit from their estate according to their wishes and that their family members will not be subject to the uncertainty of proceedings that can be encountered in the UAE Courts, are further incentives for expatriates to reside in the UAE and retain their investments and assets onshore.

The Wills and Probate Registry will be the administration of wills and probate of people who register with the Registry. The overriding objective is to enable such matters to be dealt with justly and expeditiously.

Registering a will at the DIFC Wills and Probate Registry

In order to register a will at the Wills and Probate Registry, the testator must:

- Not be of Muslim faith;
- Be over the age of 21 years; and
- Have assets situated in Dubai.

If a testator desires to express their intentions regarding the guardianship of their minor children, the children must be living with the testator in Dubai. Retaining a UAE residence visa is not a requirement to be eligible to register.

The fees attached to registering a will are proposed to be at USD 2,900 (approximately AED 10,000).

Expanding the Jurisdiction of the Small Claims Tribunal

In 2015, the DIFC Courts received AED 2.27 billion of claims, with the average claim amount in the Court of First Instance (“CFI”) increasing by 447% from AED 42 million per case in 2014 to AED 106.4 million. As the cases being brought before the courts are becoming increasingly large and complex, changes have been made to offer cheaper, faster and more discreet access to justice. The Small Claims Tribunal (“SCT”) has changed its jurisdiction so that it can now hear cases up to AED 500,000, regardless of the nature of the case.

This means that the CFI will hear cases greater than AED 500,000 in value. In doing so, it is hoped that the resources and expertise of the CFI are reserved for more technical cases which require more specific expertise.

SCT hearings are held in private with a presiding judge where parties are usually not represented by lawyers. Additionally, the DIFC Courts aim to settle the majority of SCT cases within four weeks from the commencement of the claim. By expanding the jurisdiction of the SCT, the DIFC Courts hope to widen the ambit of swift resolution without need for trial, which in turn should reduce the costs of access to justice and simplify the process.

DIFC Courts Spearhead the Conversion of Money Judgments to Arbitral Awards

The DIFC Courts are constitutionally a part of the Dubai Judicial System; therefore, enforcing its judgments is relatively simple as they carry the same weight as those of the Dubai Courts and there is a system in place to facilitate their enforcement. The same is true when enforcing DIFC Court judgements in countries which are parties to bilateral or multilateral treaties with the UAE for the mutual recognition and enforcement of judgments (such as the GCC and Riyadh Conventions). However, the enforceability of such judgments becomes less certain when there is no treaty or memorandum of guidance in place, and enforcement will instead depend on that particular state’s laws concerning the enforcement of foreign judgments.

The DIFC Courts have devised a new method by which parties can agree, in certain circumstances, to have a DIFC Courts’ judgment converted into an arbitral award, which can then be enforced in 152 states around the world (including the world’s major trading nations and business hubs), under the New York Convention. The state signatories to the New York Convention have agreed to enforce foreign awards in accordance with the test for enforcement laid out in the Convention, which consists only of narrow procedural grounds for objection.

Practice Direction No.2 of 2015

On 16 February 2015, the DIFC Courts Practice Direction No.2 of 2015, renamed “Referral of Judgment

Payment Disputes to Arbitration”, entered into force. On 27 May 2015, Practice Direction No.2 of 2015 was amended to clarify the manner in which it should be applied by the parties; in particular, to clarify it was an option open to the judgment creditor rather than a mandatory procedure (as amended, the “Direction”).

The Direction allows for the conversion of a DIFC Courts’ judgment into a DIFC arbitral award. Whilst it is common for parties to seek to ‘convert’ an arbitration award into a court judgment, the reverse represents a novel proposition. The implementation of this innovative mechanism is the first of its kind globally and has attracted a lot of controversy.

Key Features

1. Scope of the definition of “dispute”

First, the system can only apply to a money judgment for a set amount. If, following a demand for payment of a judgment sum pursuant to a money judgment of the DIFC Courts, payment is not made for any reason, the judgment creditor would have the option of referring the Judgment Payment Dispute to the DIFC-LCIA Arbitration Centre.

The Direction defines “Judgment Payment Dispute” as “any dispute about the ability or willingness of the judgment debtor to pay the outstanding portion of the judgment sum”. Admitting liability, but demonstrating an inability to pay, will not exclude the judgment creditor from satisfying the referral criterion.

The Chief Justice of the DIFC Courts, Michael Hwang SC (“CJ Hwang”) clarified, in an explanatory lecture, that there is jurisprudence in multiple common law jurisdictions which establishes that, for the purposes of arbitration, a “dispute” exists where one party makes a claim for payment of a sum and the respondent either refuses to pay or keeps silent, but in any event, does not make the payment. That is so even where the debt owed is beyond dispute.

Only a clear and unequivocal admission of liability or actual payment will mean that there is no dispute. The definition also expressly excludes disputes relating to the validity or merits of the DIFC Court judgment, providing clarity that opportunistic debtors will not be able to raise arguments on the merits of the underlying dispute in any “conversion proceedings”.

2. Technicality of “conversion”

Referring the dispute to arbitration would not render any disadvantages to the judgment creditor; rather, it would augment the enforceability of the DIFC Courts judgment by providing additional avenues to utilise in order to secure payment of the judgment sum. That is so without affecting the enforceability of the judgment as the judgment creditor will not lose its rights in any way. CJ Hwang emphasised in his lecture that the term “conversion” is merely a metaphor as the judgment would remain intact and fully enforceable without regard to the progress of the arbitration.

3. Opt-in Jurisdiction

CJ Hwang acknowledged that the Direction does not affect the validity of the opt-in jurisdiction of the DIFC Courts, even in the absence of an adoption of the recommended arbitration agreement. In other words, one can opt in to the primary dispute jurisdiction being the DIFC Courts, without expressly adding that there may be submission to arbitration for post-judgment disputes. However, the arbitration agreement is predicated upon there being a DIFC Courts judgment to enforce, so it would normally follow an opt-in clause choosing the DIFC Courts as the dispute resolution forum.

4. Seat of Arbitration

CJ Hwang has insisted that in the terms of the Direction, parties remain free to choose another seat and institutional forum as a procedural framework for their arbitration. This being said, according to CJ Hwang, the conversion process would likely be facilitated if referred to arbitration before the DIFC-LCIA (as an institution that will be sensitive to and supportive of the Direction and therefore more likely to accept the validity of the clause).

Referral Criteria

The practice direction contains strict criteria that set out the circumstances in which parties to a dispute may utilise the method of conversion, which are as follows:

- The judgment has taken effect in accordance with RDC 36.30;
- The judgment is not in respect of an employment contract or consumer contract which is subject to Article 12(2) of the Arbitration Law 2008, precluding arbitration of such contracts;
- The judgment is not subject to any appeal, and the time permitted for a party of the judgment to apply for permission to appeal has expired;
- There is a Judgment Payment Dispute; and
- The judgment creditor and judgment debtor have agreed in writing that any Judgment Payment Dispute between them shall be referred to arbitration pursuant to this practice direction.
- The Success of the Direction

Like all untested procedures, there remain concerns as to whether the premise will be borne up by practice. A defaulting party is unlikely to agree to amend any original dispute resolution clauses and likewise, a party which only stands to be the money debtor and never the creditor, may have no motivation to agree to the original inclusion of this clause.

It should also be remembered that, in order for parties to avail themselves of the procedure, arbitrators will need to be appointed and their fees paid. Statements of Case for the arbitration will then have to be filed. Although, the arbitral award should not reconsider the merits of the DIFC Court judgment, a non-paying party may seek to stall or to rehearse their substantive case. This could lead to the possibility that an arbitrator will disagree with or seek to unpick the original judgment. Parallel enforcement proceedings may give rise to potentially contradictory outcomes.

CJ Hwang has called this “an experiment without parallel in arbitration history”. The workability of the mechanism envisaged by the Direction will ultimately turn on its proper implementation by arbitral tribunals and the receptiveness of state courts that are seized of the recognition and enforcement of DIFC judgment-converted-awards. Nevertheless, the Direction demonstrates the forward-thinking nature of the DIFC and its appetite to address big issues.

For those interested, the Arbitration Clause recommended by the DIFC Courts is as follows:

“Any Judgment Payment Dispute (as defined in DIFC Courts Practice Direction No 2 of 2015) that satisfies all of the Referral Criteria set out in the Practice Direction may be referred to arbitration by the judgment creditor, and such dispute shall be finally resolved by arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre, which Rules are deemed to be incorporated by reference into this clause. There shall be a single arbitrator to be appointed by the LCIA Court pursuant to Article 5.4 of the DIFC-LCIA Arbitration Rules. The seat, or legal place of arbitration, shall be the Dubai International Financial Centre. The language to be used in the arbitration shall be English.

This agreement for submission to arbitration shall in all respects including (but not limited to) its existence, validity, interpretation, performance, discharge and applicable remedies be governed by and construed in accordance with the laws of the Dubai International Financial Centre.”

For further information on DIFC Litigation, please contact: Rita Jaballah Partner, Head of DIFC Litigation r.jaballah@tamimi.com