

Empty Judgments in the UAE: Who to Blame?

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However, the picture is not always as rosy. Sometimes the successful litigant is faced with the realisation that the judgment debtor has no substantial assets for the enforcement and recovery of the awarded sums. What is left is an 'empty' judgment.

This article will attempt to discuss the situation of empty judgments, what brings them about, ways to prevent them, as well as some practical recommendation and suggestions from our practice and experience.

We will also look at the definition of the Execution Instrument (or Enforcement Instrument) and its process in the context of the civil and commercial matters. This article will not discuss judgments that are subject to Urgent Orders for Execution (Al Nafath Al Moajjal).

Definition and Process

General procedures for the execution and enforcement of judgments are set out in Articles 219 – 246 (Book 3) of the Federal Law No 11 of 1992 and its amendments, otherwise known as the Civil Procedures Law ("CPL").

Execution Instruments are defined as instruments that give effect to an established and existing right and of an ascertained amount due and payable.

As per Article 225, instruments that are subject to enforcement are as follows:

- Judgments and Orders
- Attested and certified documents
- Minutes of settlements certified by the courts
- Other papers on which the law confers such status.

What Brings About Empty Judgments?

In principal judgments that are subject to enforcement and execution are those judgments issued by the Court of Appeal, unless stayed by the Court of Cassation. This is different from other GCC jurisdictions (including the DIFC), where judgments of First Instance are subject to immediate enforcement.

Once a judgment is issued by the Court of Appeal, the judgment is considered to be final and a Judgment Creditor can proceed to enforcement. The creditor can request the judgment be sealed by Execution Seal which effectively gives the order for the enforcement of the judgment.

The Judgment Creditor will then approach the Execution Court (which is the department responsible for the enforcement of judgments) and file for the enforcement. The Court will then serve a notice upon the

Judgment Debtor to make payment within at least 15 days from the date of the actual service of the notice.

Fast forward and after dealing with any objections, grievances and appeals that the Judgment Debtor may have raised, and assuming that the Judgment Debtor fails to satisfy the Execution Order voluntarily, the Court will then use its powers and the legal tools available to it to impose certain measures for the enforcement of the judgment. These measures will include issuing attachment orders on bank accounts, shares, stocks and bonds as well as on any real or tangible assets that the Judgment Debtor may have in the UAE. If the Judgment Debtor is a company, the Court may order the blocking of any activities on its trade license or even order the imprisonment of the Judgment Debtor's manager, as the case may be. A travel ban may sometimes be imposed.

Despite all these measures the Court may not find any meaningful assets that can be subject to enforcement in a manner that satisfies the Judgment Creditor who is expecting to receive what he had fought for and been awarded.

At this stage the Judgment Creditor realises that the judgment he obtained is effectively an empty judgment.

Who to Blame?

The Debtor has a legal obligation to satisfy the judgment, and its failure to do so will result in the Debtor facing sanctions from the court (as detailed above).

The claimant also needs to be aware when initiating litigation whether the defendant has assets against which any judgment can be enforced. Identifying such assets is not always easy in the UAE, but some investigations can be undertaken. If the claimant is not sure what assets the defendant has, then it must accept the risk that even if successful there may not be enough assets to enforce against.

Most lawyers would advise that efforts should be taken to avoid litigation if possible, and instead bring a closure to any dispute by amicable means. However inevitably there will be times when this is not possible.

Furthermore, it can happen that a company has several creditors so that although it may have assets to cover the debt of one creditor, it does not have sufficient assets to satisfy all the creditors.

It should be noted that in some cases an empty judgment is an answer by itself, such as where a final judgment is required for the Judgment Creditor to obtain the judgment amount from its insurers.

What Should be Done?

The risk of empty judgment will remain so long as the causes leading to it exist or are capable of existence. However, the risk of having an empty judgment can be minimised to a certain extent, by implementing and imposing some measures to force the Judgment Debtor to make payment.

Below is a list of some of these measures, some of which are stipulated by law and some of which have been developed through practice:

a. Precautionary/ preventive Measures

The available precautionary and preventive measures are stipulated under Articles 252 – 270 of the CPL. These measures are meant to be taken before filing the claim, but can be taken later. They consist of precautionary attachment of real, moveable properties or debts owing to its debtor in the hands of third parties. The order can be requested before or after the claim is filed and the Claimant will need to satisfy certain requirements before the order can be granted, such as that there is evidence that the Debtor is winding up its business or dissipating its assets. This requirement is not necessary if the Claimant obtains

a favorable judgment before the Court of First Instance.

b. Measures During Execution Stage

If an attachment order is granted then, once a final judgment issued, the Judgment Creditor can proceed against the assets that were attached by filing an application with the Execution Court which will then act upon it if the Judgment Debtor fails to make payment equivalent to the assets under attachment. These measures are meant to expedite the Execution of judgments.

c. Measures after Execution Fails

One of the possible measures that a Judgment Creditor will consider after exhausting all avenues for the enforcement of its judgment is filing a fresh claim. This action has to be taken after careful consideration of the facts and circumstances and shall be dealt with on a case to case basis. This action can be against the debtor's shareholders, owners or board of directors if there are good reasons to convince the judge that they are liable for the debt or the company's failure to pay the debt. The reasons could vary, but might include a failure to observe some of their obligations under law.

d. Bankruptcy Measures

There is an additional measure that should be considered; which is filing for bankruptcy as set out in Book 5 of the Commercial Transaction Law, Federal Law No 18 of 1998 ("Commercial Law").

By filing for bankruptcy against debtors, a creditor avails himself a set of proceedings and procedures that may secure his debt. The creditor may also benefit from any scheme of settlement with the debtor which will enable a creditor to recover at least some of what it is owed. Bankruptcy case can be filed against the debtor before or after obtaining a final judgment.

It should be noted that the current bankruptcy provisions have not been frequently tested, as Courts have been reluctant to apply them.

The most notable case in which bankruptcy was ordered is Appeal No. 703-2007 dated 26 May 2009, Dubai Court of Cassation.

It is worth mentioning that a draft bankruptcy law was approved by the UAE's Cabinet in July. The new law is expected to be issued soon and it aims at regulating accumulated debts and to support companies in financial difficulties.

e. Other Practical Measures

Before starting litigation the creditor should consider hiring a company specialized in asset tracing. Although these companies charge significant sums for their services (and cannot of course guarantee that assets will be found), their research will enable the claimant to make an informed decision regarding the prospects of enforcement.

The claimant should also consider filing a claim for an expert report (a 'status quo' application). This will result in an expert being appointed by the court to make findings of fact regarding the parties relationship, and information regarding the opposing party's assets may emerge.

Finally, a judgment creditor may also try to utilize the enforcement mechanisms available in the DIFC Courts. The DIFC courts can compel a debtor to attend court to answer questions on oath regarding the debtors assets. A failure to comply with such an order would place the debtor in contempt of court and make the subject to criminal sanctions.

Recommendations

Companies should carry out risk analysis for any activity or business that they are doing to ensure that they know who they are dealing with, their financial ability, source of funding, shareholders, customers, supplies and contractors. Furthermore, additional securities should always be requested such as security cheques, parent company or personal guarantees. These precautions will be helpful at times of difficulties and will, as far as possible, avoid ending up with an empty judgment.

We believe that many of these issues will be ironed out by the issuance of the new bankruptcy law. In addition, there is a need for a new policy under the Civil Procedures Law (similar to other jurisdictions including the DIFC) which will allow the Court to order the defendant to declare their assets.