

Enforcing foreign court judgments in Dubai – one avenue less?

The Dubai International Financial Centre (DIFC) Court of First Instance has confirmed that it does not have the power to refer foreign court judgments or orders to the Dubai Courts for execution onshore in Dubai. While the ability of DIFC Courts to enforce foreign court judgments or orders within the DIFC has never been in question, the decision (subject to any appeal) confirms that the reach of foreign judgments stops at the borders of the DIFC.

Prior to the recent DIFC Court of First Instance's decision in *DNB Bank ASA v Gulf Eyadah Corporation & Gulf Navigation Holding PJSC* (CFI-043-2014), it was uncertain if (a) the DIFC Courts could refer a foreign court's judgment or order that it had ratified for execution within the DIFC to the Dubai Courts for execution onshore in Dubai or (b) the DIFC Courts would enforce judgments or orders of a foreign court within the DIFC even if there was no immediate nexus with the DIFC.

The DNB Bank case has clarified in relation to (a) that the DIFC Courts do not have the power to refer judgments or orders of foreign courts for execution to courts outside the DIFC.

However, in relation to (b), the case confirmed that the DIFC Courts could ratify such a judgment for execution within the DIFC.

In the DNB Bank case, DNB Bank ASA (Claimant) lodged an application in December 2014 with the DIFC Courts seeking the recognition and enforcement of a Judgment Order, issued by the English High Court, requiring Gulf Eyadah Corporation & Gulf Navigation Holding PJSC (Defendants) to pay US\$8.7 million

plus costs under various agreements.

The Defendants subsequently lodged an application with the DIFC Courts contesting its jurisdiction to enforce the Order of the English High Court on the basis that neither the parties nor the assets against which enforcement was sought had any nexus with the DIFC.

On 2 July 2015, H.E. Justice Ali Al Madhani dismissed the Defendant's application in a reasoned judgment. A key aspect of the judgment focused on Article 7(2) of the Judicial Authority Law¹ which provides that, where the assets against which enforcement is sought are outside the DIFC, the "*judgments, decisions and orders rendered by the [DIFC] Courts and the Arbitral Awards ratified by the [DIFC] Courts shall be executed by the competent entity having jurisdiction over such assets.*" [emphasis added]

In this case, the Defendant's assets were situated onshore in Dubai, and therefore the competent enforcing

entity would be the Dubai Courts.

In his judgment, H.E. Justice Ali Al Madhani reasoned that the wording of Article 7(2) of the Judicial Authority Law makes no reference at all to foreign judgments being recognised by the DIFC Courts. He further clarified that this was not by mistake but was instead intended to complement Articles 7(4) and 7(5) of the same law which provide for the execution by the DIFC Courts of judgments or orders rendered by the Dubai Courts and which again makes no reference to foreign judgments recognised by the Dubai Courts.

The key part of the judgment therefore appears to have rested on the fact that Article 7(2) does not make an express reference to judgments or orders of foreign courts.

Further, H.E. Justice Ali Al Madhani confirmed that a DIFC Courts judgment recognising a foreign court's judgment or order would not fall within the meaning of "*judgments, decisions and orders rendered by the [DIFC] Courts*" in Article 7 (2). The judgment made the distinction on the basis that Article 7 (2) included the words "*Arbitral Awards ratified by the [DIFC] Courts*" which would be redundant if

¹ Law No.12 of 2004 as amended by Law No. 16 of 2011

decisions of the DIFC Courts ratifying foreign arbitral awards were held to fall within "*judgments, decisions and orders rendered by the [DIFC] Courts*". By extension, His Excellency concluded that a distinction must be drawn between judgments or orders rendered by the DIFC Courts itself and judgments or orders rendered by foreign courts which are ratified by the DIFC Courts, with only the former coming within the ambit of Article 7(2). In this respect, the English Court Order did not qualify as a judgment *rendered by* the DIFC Courts.

Distinguishing arbitral awards

On the question of whether the DIFC Courts have jurisdiction to recognise and enforce the English High Court's Order within the DIFC, His Excellency found they had jurisdiction on the basis of Article 5 (A)(1)(e) of the Judicial Authority Law, which prescribes that the DIFC Court of First Instance shall have jurisdiction over a claim "*in accordance with any DIFC laws and regulations*".

This part of the judgment follows the reasoning adopted by the DIFC Court of Appeal in the recent decision of *Meydan Group LLC v Banyan Tree Corporate Pte Ltd* (CA-005-2014), where it was clarified that the DIFC Courts have the power, under the Judicial Authority Law, to ratify foreign arbitral awards because of key wording in Article 42 of the DIFC Arbitration Law even where, as in that case, neither the parties nor the assets against which enforcement was sought had any nexus with the DIFC. The Meydan case also confirmed that the arbitral award ratified by the DIFC Courts could then be referred for execution to the Dubai Courts under Article 7(2) of the Judicial Authority Law – in this respect, it is worth highlighting that Article 7(2) specifically refers to "*Arbitral Awards ratified by the*

Courts".

His Excellency distinguished the Meydan case from the DNB Bank case, noting that the former dealt with a foreign arbitral award rather than a foreign court judgment. In His Excellency's view, the careful and deliberate wording in Article 7(2) led to a different outcome with respect to the capacity for onshore execution.

An alternative avenue for foreign judgments?

While the judgment in the DNB Bank case could be appealed, it clarifies for the time being that the Judicial Authority Law does not provide the DIFC Courts with the power to refer a foreign court's judgment or order to an authority outside the DIFC (including the Dubai Courts) for execution.

However, this does not rule out the possibility that parties seeking enforcement against judgment debtors outside the DIFC could apply for a summary judgment from the DIFC Courts using the foreign court's judgment or order to support a claim that the other party has no real prospect of success in a DIFC Courts claim. This is different from seeking a DIFC Courts order for the "*recognition and enforcement*" of a foreign court's judgment or order as applied for in the DNB Bank case.

In relation to enforcing judgments or orders issued by the English High Court, this potential avenue is bolstered by the Memorandum of Guidance² (MoG) between the DIFC Courts and the English High Court. While not legally binding, the MoG confirms that a party is entitled to obtain a summary judgment from the

² Memorandum of Guidance as to Enforcement between the DIFC Courts and the Commercial Court, Queen's Bench Division, England & Wales dated 23 January 2013

DIFC Courts in relation to an English High Court's judgment or order unless the debtor can prove that it has a real prospect of establishing any one of three grounds for refusing enforcement as set out in the MoG.

A summary judgment of the DIFC Courts obtained in this manner would therefore be a judgment "*rendered by the [DIFC] Courts*" as required by Article 7 (2) of the Judicial Authority Law, which could then theoretically be referred to an authority outside the DIFC (including the Dubai Courts) for execution. At present, this avenue remains untested.

Practical implications

The DNB Bank case has closed an avenue for enforcing foreign court judgments and orders onshore in Dubai that, following the Meydan case, was thought to be a possibility.

Parties seeking the enforcement of judgments or orders of foreign courts against assets located outside the DIFC can either:

1. attempt to procure a summary judgment³ from the DIFC Courts which could be referred to courts outside the DIFC for execution (as described above); or
2. commence enforcement proceedings in the courts of the jurisdiction where the assets are located.

The first avenue, although untested, is an attractive and potentially quicker option than the second avenue for enforcement of a foreign court's judgment or order. That said, regional courts do not always like judgments obtained summarily when it comes to enforcement.

³ To obtain a summary judgment it is likely that the party would have to show a tangible nexus with the DIFC to avoid an argument by the judgment debtor that the DIFC Court lacks jurisdiction to issue a summary judgment.

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