

MEMORANDUM OF GUIDANCE

between the

DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS



and the

SUPREME COURT OF NEW SOUTH WALES



9 September 2013

Introduction

1. The purpose of this memorandum is to set out the parties' understanding of the procedures for the enforcement of each party's money judgments in the other party's courts. This memorandum is concerned only with judgments requiring a person to pay a sum of money to another person.
2. This memorandum has no binding legal effect. It does not constitute a treaty or legislation, is not binding on the judges of either party and does not supersede any existing laws, judicial decisions or court rules. It is not intended to be exhaustive and is not intended to create or alter any existing legal rights or relations.
3. The parties desire and believe that the cooperation demonstrated by this memorandum will promote a mutual understanding of their laws and judicial processes and will improve public perception and understanding.

The Supreme Court

4. The Supreme Court of New South Wales is the highest state court of the Australian State of New South Wales. It has unlimited jurisdiction within the state in civil matters, and hears the most serious criminal matters. Matters of appeal can be submitted to the New South Wales Court of Appeal and Court of Criminal Appeal, both of which are constituted by members of the Supreme Court, in the case of the Court of Appeal from those who have been commissioned as judges of appeal. The Supreme Court consists of 48 judges, including the Chief Justice of New South Wales, the President of the Court of Appeal, nine Judges of Appeal, the Chief Judge in Equity, and the Chief Judge in Common Law. The Supreme Court operates under the Constitution Act 1902 (NSW), the Supreme Court Act 1970 (NSW) and the Civil Procedure Act 2005 (NSW). It is a court required to be maintained under Ch III of the Constitution of Australia. The Supreme Court building is physically located in Queen's Square, Sydney, New South Wales. The Court is internationally recognised for its experience and expertise in dispute resolution.

The DIFC Courts

5. The DIFC Courts form part of the legal system of the United Arab Emirates, albeit that this memorandum only states the position as it applies to the DIFC Courts. They deal with civil and commercial disputes which are connected to the Dubai International Financial Centre or in respect of which the parties have agreed that the DIFC Courts should have jurisdiction. The DIFC Courts consist of a Small Claims Tribunal (SCT), a Court of First Instance and a Court of Appeal. They were established by Dubai Laws 9 and 12 of 2004 and operate as a common law court, applying the highest international standards of legal procedure. The Courts' judiciary is selected from common law jurisdictions around the world and from Dubai and enjoy the highest international renown.

Application of the common law of England and Wales and of Australia

6. There is currently no treaty in place pursuant to which either party's judgments may be enforced by the other party's courts.
7. In the Supreme Court, in the absence of a relevant treaty or the foreign court being a court to which the Foreign Judgments Act 1998 (Cth) applies, a foreign judgment may be enforced

by a claim made at common law, in accordance with the principles and practice described below.

8. Under the common law, where a foreign court of competent jurisdiction has determined that a certain sum is due from one person to another, a legal obligation arises on the debtor to pay that sum. The creditor may bring a claim to enforce that obligation as a debt.
9. The approach of the DIFC Courts to the enforcement of Supreme Court judgments is based on the common law and the same approach is applied.

The requirements for enforcement of DIFC Courts' judgments in the Supreme Court

10. In order to be sued upon in the Supreme Court, a judgment of the DIFC Courts must be final and conclusive. It may be final and conclusive even though it is subject to an appeal.
11. The Supreme Court will not enforce certain types of DIFC Court judgments, for example judgments ordering the payment of taxes, fines or penalties.
12. The DIFC Courts must have had jurisdiction, according to the Australian rules of the conflict of laws, to determine the subject matter of the dispute and the parties to the DIFC Courts' judgment and the enforcement proceedings must be the same. In addition, the enforcement proceedings in the Supreme Court must be in respect of the money judgment issued by the DIFC Courts. The Supreme Court will generally consider the DIFC Courts to have had the required jurisdiction only where the person against whom the judgment was given:
 - (a) was, at the time the proceedings were commenced, present in the jurisdiction; or
 - (b) was the claimant, or counterclaimant, in the proceedings; or
 - (c) submitted to the jurisdiction of the DIFC Courts; or
 - (d) agreed, before commencement, in respect of the subject matter of the proceedings, to submit to the jurisdiction of the DIFC Courts.
13. Where the above requirements are established to the satisfaction of the Supreme Court, a DIFC Court judgment may be challenged in the Supreme Court only on limited grounds. Those grounds include (but are not limited to):
 - (a) where the judgment was obtained by fraud;
 - (b) where the judgment is contrary to Australian public policy; and
 - (c) where the proceedings were conducted in a manner which the Supreme Court regards as contrary to the principles of natural justice.
14. The Supreme Court will not re-examine the merits of a DIFC Court judgment. The judgment may not be challenged on the grounds that it contains an error of fact or law. A DIFC Court judgment will be enforced on the basis that the defendant has a legal obligation, recognised by the Supreme Court, to satisfy a judgment of the DIFC Courts.

The requirements for enforcing Supreme Court judgments in the DIFC Courts

15. The same principles set out above will be applied to determine whether a party may sue on a Supreme Court judgment in the DIFC Courts.

16. In order to be sued upon in the DIFC Courts, a judgment of the Supreme Court must be final and conclusive. It may be final and conclusive even though it is subject to an appeal.
17. The DIFC Courts will not enforce certain types of Supreme Court judgment, for example judgments ordering the payment of taxes, fines or penalties.
18. The Supreme Court must have had jurisdiction, according to the DIFC rules on the conflict of laws, to determine the dispute. The DIFC Courts will generally consider the Supreme Court to have had the required jurisdiction only where the person against whom the judgment was given:
 - (a) was, at the time the proceedings were commenced, present in the jurisdiction; or
 - (b) was the claimant, or counterclaimant, in the proceedings; or
 - (c) submitted to the jurisdiction of the Supreme Court; or
 - (d) agreed, before commencement, in respect of the subject matter of the proceedings, to submit to the jurisdiction of the Supreme Court.
19. Where the above requirements are established to the satisfaction of the DIFC Courts, a Supreme Court judgment may be challenged in the DIFC Courts only on limited grounds. Those grounds include (but are not limited to):
 - (a) where the judgment was obtained by fraud;
 - (b) where the judgment is contrary to public policy; and
 - (c) where the proceedings were conducted in a manner which the DIFC Courts regard as contrary to the principles of natural justice.
20. The DIFC Courts will not re-examine the merits of a Supreme Court judgment. The judgment may not be challenged on the grounds that it contains an error of fact or law. A Supreme Court judgment will be enforced on the basis that the defendant has a legal obligation, recognised by the DIFC Courts, to satisfy a judgment of the Supreme Court.

The procedure for enforcement of DIFC Court judgments in the Supreme Court

21. In order to enforce a judgment of the DIFC Courts in the Supreme Court, a party must issue a summons in the Commercial Division of the Supreme Court, providing a concise statement of the nature of the claim and claiming the amount of the judgment debt. A certified copy of the judgment should be exhibited to the summons.
22. A party may obtain a certified copy of a DIFC Court judgment by making an application to the DIFC Courts. The application may be made without notice and must exhibit a copy of the judgment which is required to be certified. Where the DIFC Courts provide a certified copy of a DIFC Court judgment, it will provide a copy of the judgment on which will be endorsed a certificate that it is a true copy. The certificate will be signed by a Judge or by the Registrar. The certified copy of the judgment will be sealed with the seal of the DIFC Courts.
23. If, following service, the defendant does not respond to the claim, the claimant will be entitled to obtain judgment in default under Rule 16.6 of the Uniform Civil Procedure Rules 2005 (NSW). However, it remains open to the defendant to challenge the jurisdiction of the Supreme Court.

24. In most cases, a party will be entitled to apply to obtain summary judgment without trial under Part 13 of the Uniform Civil Procedure Rules, unless the debtor can satisfy the Court that it has a real prospect of establishing at trial one of the grounds set out in paragraph 13 above. Applications for summary judgment are dealt with swiftly, generally without the need for oral evidence.
25. If the claim on the DIFC Court judgment is successful, the judgment creditor will then have the benefit of a Supreme Court judgment. The judgment creditor will be entitled, if necessary, to use the procedures of the Australian Courts to enforce the judgment, including:
 - (a) third party debt orders, requiring third parties who are indebted to the judgment debtor to pay the sum owed to the judgment creditor;
 - (b) charging orders, imposing charges over the judgment debtor's property in favour of the judgment creditor;
 - (c) orders for possession of land;
 - (d) orders for sale of land or other property over which the judgment creditor has the benefit of a charge;
 - (e) orders requiring judgment debtors to provide information about their assets;
 - (f) orders appointing enforcement officers to seize and sell the judgment debtor's goods;
 - (g) orders appointing receivers;
 - (h) orders for committal for contempt of court;
 - (i) orders relating to insolvency procedures.

The procedure for enforcement of Supreme Court judgments in the DIFC Courts

26. In order to enforce a Supreme Court judgment in the DIFC Courts, the procedure is very similar.
27. In order to enforce a Supreme Court judgment in the DIFC Courts, a party must issue a Claim Form in the DIFC Courts, providing a concise statement of the nature of the claim and claiming the amount of the judgment debt. A certified copy of the judgment should be exhibited to the claim form.
28. A party may obtain a certified copy of a Supreme Court judgment by making an application to the Supreme Court. The application may be made without notice and must exhibit a copy of the judgment which is required to be certified. Where the Supreme Court provides a certified copy of a Supreme Court judgment, it will provide a copy of the judgment on which will be endorsed a certificate that it is a true copy. The certificate will be signed by a Judge. The certified copy of the judgment will be sealed with the seal of the Supreme Court.
29. Under Rule 9.52 of the Rules of the DIFC Courts 2011, there is no requirement to obtain the permission of the DIFC Courts before serving proceedings outside the DIFC. However, it remains open to the defendant to challenge the jurisdiction of the DIFC Courts.

30. If, following service, the defendant does not respond to the claim, the claimant will be entitled to obtain judgment in default under Part 13 of the Rules of the DIFC Courts 2011.
31. If the defendant acknowledges service, the claimant must file and serve Particulars of Claim, setting out a concise statement of the facts relied on in support of the claim. The Particulars of Claim should contain a statement that the Supreme Court had jurisdiction on the grounds set out in paragraph 18 above.
32. In most cases, a party will be entitled to apply to obtain summary judgment without trial under Part 24 of the Rules of the DIFC Courts 2011 (as amended), unless the debtor can satisfy the Court that it has a real prospect of establishing at trial one of the grounds set out in paragraph 19 above. Applications for summary judgment are dealt with swiftly, without the need for oral evidence.
33. If the claim on the Supreme Court judgment is successful, the judgment creditor will then have the benefit of a DIFC Court judgment. The judgment creditor will be entitled, if necessary, to use the procedures of the DIFC Courts to enforce the judgment, including:
 - (a) third party debt orders, requiring third parties who are indebted to the judgment debtor to pay the sum owed to the judgment creditor;
 - (b) charging orders, imposing charges over the judgment debtor's property in favour of the judgment creditor;
 - (c) orders for possession of land;
 - (d) orders for sale of land or other property over which the judgment creditor has the benefit of a charge;
 - (e) orders requiring judgment debtors to provide information about their assets;
 - (f) orders appointing enforcement officers to seize and sell the judgment debtor's goods;
 - (g) orders appointing receivers;
 - (h) orders for committal for contempt of court;
 - (i) orders relating to insolvency procedures.

Contacting the Courts

34. Further information about the Supreme Court can be obtained:
 - (a) by visiting the website of the Supreme Court at http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/sco2_index.html
 - (b) by contacting the Registry or Listing Office of the Supreme Court:
 - i. at Supreme Court of NSW, Law Courts Building, Queens Square, 184 Phillip Street, Sydney, NSW 2000, Australia
 - ii. by telephone on +612 1300 679 272; or
 - iii. by email at supremecourt.enquiries@courts.nsw.gov.au
35. Further information about the DIFC Courts can be obtained:

- (a) By visiting the website of the DIFC Courts at <http://www.difccourts.ae/Default.aspx>;
- (b) By contacting the DIFC Courts Registry:
 - i. at Ground Floor, Building 4, The Gate District, PO Box 211724, Dubai, UAE;
 - ii. by telephone on +971 4 427 3333; or
 - iii. by email at registry@difccourts.ae.

Signed this 9th day of September 2013 by:

Michael Hwang SC
Chief Justice
DIFC Courts

The Hon T F Bathurst
Chief Justice
Supreme Court of New South Wales