

ENFORCEMENT OF UAE CIVIL AND COMMERCIAL JUDGEMENTS IN INDIA: A PRACTICAL OVERVIEW

On 17 January 2020, the Indian Government notified the UAE as a "Reciprocating Territory" (the "**Notification**") under Section 44A of the Indian Code of Civil Procedure, 1908 ("**CPC**"). This is a significant development that could provide a quicker avenue for enforcement of final UAE Court civil/commercial judgments (including DIFC and ADGM Court judgments) in India.

In this briefing we explore, along with Indian Law firm AK Law Chambers, the practical implications of this development for UAE based parties and what to expect in the execution process in India.

Background

While the UAE and India first signed a bilateral enforcement treaty on 25 October 1999¹ (the "**Treaty**"), the absence of the Notification meant that the Treaty was not given full effect by India. As a result, if a party had applied to the Indian Courts to execute a final judgment of the courts of the UAE, the application would have been dismissed for want of the Notification. Instead, holders of UAE Court judgments had to file a fresh suit (called the Enforcement Suit) in the Indian Courts to convert the UAE Court judgment into an Indian Court judgment. This amounted to a substantive claim in the Indian Courts and was a time-consuming process resulting in inordinate delays. Such delays increased the risk that assets might be dissipated which led to UAE parties often abstaining from enforcing UAE Court judgments in India.

Following the Notification, parties with final civil/commercial judgments from the UAE Courts (including the DIFC and ADGM Courts) can directly file an execution application in the Indian Courts without having to file the Enforcement Suit first. The primary benefit of the Notification is a significant time and cost saving for UAE Court judgment creditors.

Key issues

- The Notification makes the execution process in India for UAE Court judgments quicker
- Notification also applies to ADGM and DIFC Court judgments
- Notification does not directly affect arbitral awards but opens an avenue?
- An alternative option to pursue corporate debtors in India is insolvency proceedings.

¹ The Treaty is titled 'Agreement on Juridical and Judicial Cooperation in Civil and Commercial Matters for the Service of Summons, Judicial Documents, Commissions, Execution of Judgements and Arbitral Awards'.

Arbitral awards

India is yet to notify the UAE in its official gazette under the Indian Arbitration and Conciliation Act, 1996. As a result, UAE seated arbitral awards (including DIFC and ADGM seated awards) are not directly enforceable in India either under the Treaty or the New York Convention. The Notification does not change this position. However, the Notification might now provide parties an alternate avenue to enforce UAE seated arbitral awards in India. For example, a party with a DIFC seated award could apply to the DIFC Courts to ratify the award and thereby convert the award into a DIFC Court judgment.² The party could then seek to execute the judgment in India under the Notification. This approach is untested in relation to a UAE (including DIFC or ADGM) seated arbitral award. However, such an approach has been tested in relation to English seated arbitral awards with mixed results. While, the High Court of Gujarat³ accepted this approach, the High Court of Delhi⁴ refused this approach in a different case. Therefore, a consistent trend is yet to be established by the Indian Courts in relation to this approach.

- The Notification is likely to apply to all execution applications commenced in India after 17 January 2020 irrespective of when the UAE Court judgment was obtained.

Does the Notification apply retrospectively?

The Notification does not clarify if it will apply to UAE Court judgments obtained prior to the issuance of the Notification. However, as the Notification is procedural in nature and since in the execution of a UAE Court judgment the vested right of a party accrues at the time of filing of the execution petition in India, AK Law Chambers are of the view that the Notification will apply to all execution petitions filed after 17 January 2020, irrespective of when the UAE Court judgment was issued.

Impact on dispute resolution clauses

The Notification confirms that all of the onshore UAE Courts (both Emirate and Federal level), the ADGM Courts and the DIFC Courts are superior courts of the UAE for the purposes of enforcement in India. Therefore, a final DIFC or ADGM Court judgment could be executed in the Indian Courts under the terms of the Treaty.

- ADGM or DIFC Court clauses might be an attractive option for both Indian and UAE based parties.

The DIFC and ADGM are modelled on common law principles much like Indian law and the courts in these free zones operate in English and follow the system of binding precedent which is likely to be familiar to Indian parties. Indian parties might therefore prefer to have disputes resolved by the DIFC or the ADGM Courts. UAE parties could accept this as there is now a viable option for enforcement of ADGM Court or DIFC Court judgments in India following the Notification. This could therefore result in more contracts between Indian and UAE parties providing for disputes to be resolved by the DIFC Courts or the ADGM Courts.

The execution process

Under the Treaty, the request for legal assistance for the execution of a UAE Court judgment is to be made by the Ministry of Justice, UAE to the Indian Courts (through the judgment holder). In practice, the UAE creditor would have to submit the documents listed in the Treaty to the UAE Ministry of Justice first, including relevant translations. Once the UAE creditor obtains the

² While the Treaty refers to "decrees", we have adopted the word "judgments" in this briefing as it is essentially the same.

³ *M.V. Cape Climber v. Glory Wealth Shipping Pvt. Ltd.*, (2015) 3 GLR 2375

⁴ *Marina World Shipping Corporation Ltd. v. Jindal Exports Pvt. Ltd.*, 2007(3) ARBLR 46 (Delhi)

relevant documents from the UAE Ministry of Justice, they could proceed to file an execution application in the relevant Indian Courts.

Which Indian Court?

Enforcing a foreign judgment through the High Courts of cities like Mumbai, Delhi, Chennai, Himachal Pradesh and Kolkata will likely be faster and smoother than enforcement in other district courts in India. Judgments of Indian Courts are generally enforceable across India so UAE judgment creditors should consider if an execution petition could be made to these High Courts in the first instance.

Grounds for refusing enforcement

The Indian Courts can refuse to execute the UAE judgment, if the judgment falls foul of any of the following in Section 13 of the CPC: (a) Where it has not been pronounced by a Court of competent jurisdiction; (b) where it has not been given on the merits of the case; (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable; (d) where the proceedings in which the judgment was obtained are opposed to natural justice; (e) where it has been obtained by fraud; (f) where it sustains a claim founded on a breach of any law in force in India. Article XX of the Treaty provides additional grounds to refuse enforcement, but AK Law Chambers note that Indian Courts would, in practice, limit themselves to the grounds for refusal as provided under Section 13 of the CPC.

In relation to ground (a) above, there is a presumption under Indian law that the production of the certified copy of the UAE Court judgment means the judgment was issued by a court of competent jurisdiction. The burden of proof therefore falls on the judgment debtor to prove that the relevant UAE Court did not have jurisdiction. If a default judgment was obtained from a UAE Court after judicial consideration of the merits of the case, such a judgment would be enforceable before the Indian Courts irrespective of the fact that the decree was passed *ex parte*. However, if a default judgment was obtained from the UAE Court solely on the basis that the defendant did not appear rather than on the merits, such a judgment might not be enforceable in India.

Appeals

Depending on which Indian Court the execution petition is filed before, there could be two to three levels of appeal and a potential further appeal to the Supreme Court.

There is no automatic stay on the execution of the UAE Court judgment in the event of an appeal to the higher Courts in India. The party appealing will have to apply for a stay on the execution. Therefore, once a UAE creditor obtains a first instance execution judgment from the Indian Court, they could proceed to enforce it in India unless the Court ordered a stay on the execution.

Limitation Period

As per Article 136 of the Indian Limitation Act, 1963 (which also applies to foreign decrees of a reciprocating territory), a UAE Court judgment can be executed within 12 years from the date when such decree or judgment becomes enforceable. In this regard, a judgment that is still subject to appeal in the UAE might not be enforceable under the Treaty in the Indian Courts until the appeal has been decided.

- Execution process can be commenced in the relevant Indian courts with a track record of quicker processes. The resultant judgment is enforceable across India
- A UAE Court judgment that is subject to appeal in the UAE may not be enforced by Indian Courts
- No automatic stay on execution in India (for example on an appeal) unless the Indian Court orders.

Insolvency proceedings in India

An alternate option for UAE creditors to consider is initiating insolvency proceedings against corporate debtors in India under the recent Insolvency and Bankruptcy Code, 2016 ("**IBC**"). Under the IBC, insolvency proceedings can be initiated against a debtor if there is a default committed by the debtor in paying the debt which has become due and payable.

In practice, UAE creditors will often have to choose between commencing insolvency proceedings against a corporate debtor in India under the IBC or obtaining a final and executable judgment from a UAE Court to execute in India. This is because:

A. The Notification does not impact insolvency proceedings under the IBC. A UAE Court judgment cannot be executed directly before the Indian National Company Law Tribunal ("**NCLT**") which is the authority that hears insolvency proceedings. Instead, the UAE Court judgment only serves as additional evidence of the debt before the NCLT.⁵

B. Insolvency proceedings have to be initiated within three years from the date of default and not when the final and executable UAE Court judgment was passed – which could take some time to obtain.

C. An application to initiate insolvency under the IBC can be rejected by the NCLT where there exists a dispute between the parties which includes any ongoing court or arbitral proceedings in any jurisdiction.

D. Once the NCLT admits an application under the IBC, the NCLT will declare a moratorium period till the completion of the corporate insolvency resolution process. During the moratorium period, a UAE Court judgment holder is prohibited from commencing an execution application in the Indian Courts. Instead, the UAE Court judgment holder will have to approach the Resolution Professional of the corporate debtor, appointed by the NCLT, for final adjudication of its claim.

AK Law Chambers note that the IBC has proven to be a successful route for creditors as a number of cases get settled by the corporate debtor before the case is even admitted by the NCLT. This is usually the case where the corporate debtor has enough assets/business and is also keen to continue its business. However, where the debtor is an individual, sole proprietorship or a partnership firm, the IBC would not apply and therefore enforcement under the Notification remains the main option for UAE creditors.

Conclusion

The Notification has opened up an avenue for execution of UAE Court judgments in India (and Indian Court judgments in the UAE) that was not previously available. It remains to be seen if this leads to a significant increase in cross-border execution activity, but it is a positive development for India-UAE trade and the wider relationship between the two countries.

Content relating to India is based on our experience as international counsel representing clients in their business activities in India. We are not permitted to advise on the laws of India and should such advice be required we would work alongside a domestic law firm.

⁵ *Usha Holdings LLC v Francorp Advisors, Company Appeal (AT), (Insolvency) No. 44 of 2018 and Peter Johnson John v. M/s KEC International Limited Company Appeal (AT), (Insolvency) No. 188 of 2019.*

- Insolvency proceedings in India (or) enforcing a UAE Court judgment in India? In practice, parties may have to choose one over the other when pursuing corporate debtors in India

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