

DRAFT
(as at 23.07.2018)

MEMORANDUM OF GUIDANCE AS TO ENFORCEMENT

BETWEEN

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS



AND

**THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
OF THE PEOPLE'S REPUBLIC OF CHINA**



1. Introduction

- 1.1 This Memorandum of Guidance (“Memorandum”) signed this 10th day of August Two Thousand and Eighteen between the Dubai International Financial Centre Courts (“**the DIFC Courts**”) and the High Court of the Hong Kong Special Administrative Region of the People’s Republic of China (“**the HK High Court**”).
- 1.2 The purpose of this Memorandum is to provide general information concerning the procedures for the enforcement of monetary judgment in their respective jurisdictions. This Memorandum is concerned only with judgments requiring a person to pay a sum of money to another person.
- 1.3 This Memorandum has no binding legal effect whatsoever under domestic law or international law. It does not constitute any agreement or arrangement or legislation or judicial precedent and it does not supersede or affect any existing laws, judicial decisions or court rules. It is not intended to be exhaustive or comprehensive and is not intended to create, alter or govern any existing legal rights or relations between the two courts or in relation to any third party.
- 1.4 The HK High Court and the DIFC Courts believe that this Memorandum and the goodwill demonstrated by entering into it will provide litigants involved in business and financial cases before the two courts with some clarity and guidance they may require regarding the processes for the enforcement of monetary judgments in the respective jurisdictions. This will also improve public perception and understanding. This Memorandum is not, however, intended to be a substitute for seeking legal advice in any specific case. Litigants wishing to enforce a HK High Court’s judgment in the DIFC Courts or *vice versa* are advised to consult local lawyers of the jurisdiction in which enforcement is sought.

2. The HK High Court

- 2.1 The HK High Court is a court of unlimited civil and criminal jurisdiction in the Hong Kong Special Administrative Region of the People’s Republic of China. It consists of the Court of First Instance (“HKCFI”) and the Court of Appeal (“HKCA”).
- 2.2 Both HKCFI and HKCA are superior courts of record. HKCFI is the court with original jurisdiction within the Hong Kong Special Administrative Region of the People’s Republic of China at which civil actions and proceedings may be commenced at first instance. The civil jurisdiction of HKCA includes appeals from any judgment or order of HKCFI in any civil cause or matter as well as appeals under section 63 of the District Court Ordinance (Cap. 336). The District Court of the Hong Kong Special Administrative Region of the People’s Republic of China is not part of the

HK High Court but also has jurisdiction, concurrent with the HK High Court, to hear and determine any action founded on contract, quasi-contract or tort where the amount of the claim does not exceed HK\$1 million. The legislative process to increase the limit to HK\$3 million is underway.

- 2.3 Under Article 82 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ("the Basic Law"), the power of final adjudication of the Hong Kong Special Administrative Region of the People's Republic of China is vested in the Court of Final Appeal of the Region which has jurisdiction to hear, *inter alia*, civil appeals from HKCA and HKCFI under sections 22 and 27B of the Hong Kong Court of Final Appeal Ordinance (Cap. 484).

3. The DIFC Courts

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. The DIFC Courts deal with civil and commercial disputes which are connected to the DIFC 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 (now amended) 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.

4. Application of the common law

- 4.1 There is currently no agreement or arrangement in place pursuant to which either court's judgments may be enforced by the other court. In the Hong Kong Special Administrative Region of the People's Republic of China, neither the Judgments (Facilities for Enforcement) Ordinance (Cap. 9) nor the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319) applies to the enforcement of judgments obtained in the DIFC Courts.
- 4.2 Article 8 of the Basic Law provides that the laws previously in force in Hong Kong, including the common law, shall be maintained (subject to exceptions that are not relevant for present purposes).
- 4.3 In the HK High Court, in the absence of a relevant agreement or arrangement, a foreign judgment (including a DIFC Courts judgment) may be enforced by a claim made at common law, in accordance with the principles and practice described below.
- 4.4 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 is imposed upon the judgment debtor to pay that sum. The judgment creditor may bring a claim to enforce that obligation as a debt.

- 4.5 The approach of the DIFC Courts to the enforcement of a judgment of the HK High Court is based upon the common law and a similar approach is applied.

5. General information on the requirements for enforcement of DIFC Courts' judgments in the HK High Court

- 5.1 In order to be the subject of an action for enforcement in the HK High 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.

- 5.2 The judgment must also be in the nature of a money award, i.e. for the payment of a debt or a definite sum of money, rather than an unliquidated sum or one that requires the judgment debtor to act in a particular way or to refrain from doing something. The HK High Court will not enforce a foreign decree for specific performance or certain types of DIFC Courts money judgments, for example, judgments ordering the payment of taxes or other charges of a like nature or in respect of a fine or other penalty.

- 5.3 The DIFC Courts must have had jurisdiction, according to Hong Kong's rules of the conflict of laws, to determine the subject matter of the dispute. The HK High 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 of the DIFC Courts; or
- (b) was a claimant, or counterclaimant, in the proceedings; or
- (c) submitted to the jurisdiction of the DIFC Courts; or
- (d) agreed, before commencement of the proceedings, in respect of the subject matter of the proceedings, to submit to the jurisdiction of the DIFC Courts.

- 5.4 Moreover, the proceedings must not be brought in contravention of an agreement under which the dispute in question was to be settled otherwise than by proceedings in the DIFC Courts, unless the person against whom the judgment was given in such circumstances either agreed to the bringing of the proceedings or otherwise submitted to the jurisdiction of the DIFC Courts.

5.5 Where the above requirements are established to the satisfaction of the HK High Court, a judgment of the DIFC Courts may be challenged in the HK High Court only on limited grounds. Those grounds include but are not limited to where:

- (a) the judgment was obtained by fraud; or
- (b) the judgment is contrary to the public policy of the Hong Kong Special Administrative Region of the People's Republic of China in the sense that giving effect to the judgment would violate the most basic notions of morality and justice; or
- (c) the proceedings were conducted in a manner which the HK High Court regards as contrary to the principles of natural justice.

5.6 The HK High Court will not re-examine the merits of a DIFC Courts judgment. The judgment may not be challenged on the grounds that it contains an error of fact or law. A DIFC Courts judgment will be enforced on the basis that the judgment debtor has a legal obligation, recognised by the HK High Court, to satisfy that judgment.

6. General information on the requirements for enforcing the HK High Court judgments in the DIFC Courts

6.1 Similar principles to those set out above will be applied to determine whether a party may sue on a HK High Court judgment in the DIFC Courts.

6.2 In order to be sued upon in the DIFC Courts, a judgment of the HK High Court must be final and conclusive. It may be final and conclusive even though it is subject to an appeal.

6.3 The DIFC Courts will not enforce certain types of HK High Court judgments, for example judgments ordering the payment of taxes or other charges of a like nature or in respect of a fine or other penalty.

6.4 The HK High Court must have had jurisdiction, according to the rules on conflict of laws applied by the DIFC Courts to determine the subject matter of the dispute. The DIFC Courts will generally consider the HK High 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 of the HK High Court; or
- (b) was the claimant, or counterclaimant, in the proceedings; or

- (c) submitted to the jurisdiction of the HK High Court; or
- (d) agreed, before commencement of the proceedings, in respect of the subject matter of the proceedings, to submit to the jurisdiction of the HK High Court.

6.5 Where the above requirements are established to the satisfaction of the DIFC Courts, and a judgment of the HK High Court has been duly registered in the DIFC Courts, a HK High Court judgment may be challenged in the DIFC Courts only on limited grounds. Those grounds include but are not limited to where:

- (a) the judgment was obtained by fraud; or
- (b) the judgment is contrary to public policy of the United Arab Emirates; or
- (c) the proceedings were conducted in a manner which the DIFC Courts regard as contrary to the principles of natural justice.

6.6 The DIFC Courts will not re-examine the merits of a HK High Court judgment. The judgment may not be challenged on the grounds that it contains an error of fact or law. A HK High Court judgment will be enforced on the basis that the judgment debtor has a legal obligation, recognised by the DIFC Courts, to satisfy a judgment of the HK High Court.

7. General information on the procedure for enforcement of the DIFC Courts' judgments in the HK High Court

7.1 In order to enforce a judgment of the DIFC Courts in the HK High Court, a party must commence an action in the HK High Court on the basis of the judgment. An action is generally commenced by a Writ of Summons which must be served on the judgment debtor in accordance with the relevant provisions of the Rules of the High Court (Cap. 4A) ("RHC").

7.2 Where the judgment debtor is outside the Hong Kong Special Administrative Region of the People's Republic of China, the judgment creditor, as plaintiff, must apply for leave to serve the Writ of Summons out of the jurisdiction in accordance with Order 11 of RHC. The application for leave is generally made without notice (ex parte) to a Master of the HK High Court and must be supported by an affidavit. The affidavit should include all relevant facts and exhibit a certified copy of the DIFC Courts judgment. The affidavit must state:

- (a) that Order 11, rule 1(1)(m) of RHC applies, that is, that the claim is made to enforce a DIFC Courts judgment, and any other grounds on which the application is made;

(b) that in the deponent's belief, the plaintiff has a good cause of action; and

(c) in what place the defendant is, or probably may be, found.

7.3 A judgment creditor may obtain a certified copy of a DIFC Courts 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 Courts judgment, they 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 a Registrar of the DIFC Courts. The certified copy of the judgment will be sealed with the seal of the DIFC Courts.

7.4 If, following service of the Writ of Summons, the judgment debtor does not respond to the claim, the judgment creditor will be entitled to obtain judgment in default under Order 13 of RHC. However, it remains open to the judgment debtor to dispute the jurisdiction of the HK High Court under Order 12, rule 8 of RHC.

7.5 If the judgment debtor acknowledges service of the Writ of Summons, the judgment creditor must file and serve a Statement of Claim (if he has not done so already), setting out in a summary form the material facts relied on in support of the claim. The Statement of Claim should contain a statement that the DIFC Courts had jurisdiction on the grounds set out in clause 5.3 above.

7.6 If, following service of the Statement of Claim, the judgment debtor fails to file its Defence within the time prescribed by RHC, the judgment creditor may apply for judgment in default under Order 19, rule 2 of RHC. It should be noted that judgments obtained under Order 13 or 19 of RHC are liable to be set aside by the HK High Court.

7.7 In some cases, a judgment creditor may be entitled to apply to obtain summary judgment without trial under Order 14 of RHC, unless the judgment debtor can satisfy the HK High Court that there are issues to be tried in relation to one or more of the grounds set out in clauses 5.4 and 5.5 above or that there ought for some other reason to be a trial. The application for summary judgment must be made by summons supported by an affidavit verifying the facts on which the claim is based and stating that in the deponent's belief there is no defence to that claim. A certified copy of the DIFC Courts judgment should be exhibited. Applications for summary judgment are dealt with swiftly, without the need for oral evidence. It should be noted that any judgment given against a party who does not appear at the hearing of an application for summary judgment

may be set aside or varied by the HK High Court on such terms as it thinks just.

7.8 If the claim on the DIFC Courts judgment is successful, the judgment creditor will then have the benefit of a HK High Court judgment. The judgment creditor will be entitled, if necessary, to use the procedures of the Hong Kong Courts to enforce the judgment in the Hong Kong Special Administrative Region of the People's Republic of China, including seeking:

- (a) garnishee 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 land and certain types of property in favour of the judgment creditor;
- (c) orders:
 - (i) for sale of land over which the judgment creditor has the benefit of a charging order;
 - (ii) requiring the judgment debtor to provide information about his assets;
 - (iii) appointing enforcement officers to seize and sell the judgment debtor's goods ("writs of fieri facias");
 - (iv) appointing receivers;
 - (v) for committal for contempt of court; or
 - (vi) relating to insolvency procedures.

The availability of any of the above modes of enforcement depends on the circumstances of each case and is subject to the relevant provisions in the RHC and other applicable laws of the Hong Kong Special Administrative Region of the People's Republic of China.

8. General information on the procedure for enforcement of the HK High Court judgments in the DIFC Courts

8.1 In order to enforce a judgment of the HK High Court in the DIFC Courts, a judgment creditor 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.

- 8.2 A judgment creditor may obtain a sealed copy of a HK High Court judgment from the Registry of the HK High Court.
- 8.3 Under Rule 9.53 of the Rules of the DIFC Courts 2017, there is no requirement to obtain the permission of the DIFC Courts before serving proceedings outside the DIFC. However, it remains open to the judgment debtor to challenge the jurisdiction of the DIFC Courts.
- 8.4 If, following service, the judgment debtor does not respond to the claim, the judgment creditor will be entitled to obtain judgment in default under Part 13 of the Rules of the DIFC Courts 2017.
- 8.5 If the judgment debtor acknowledges service, the judgment creditor 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 HK High Court had jurisdiction on the grounds set out in clause 6.4 above.
- 8.6 In most cases, a judgment creditor will be entitled to apply to obtain immediate judgment without trial under Part 24 of the Rules of the DIFC Courts 2017, unless the judgment debtor can satisfy the DIFC Courts that it has a real prospect of establishing at trial one of the grounds set out in clause 6.5 above. Applications for immediate judgment are dealt with swiftly, without the need for oral evidence.
- 8.7 If the claim on the HK High Court judgment is successful, the judgment creditor will then have the benefit of a DIFC Courts 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:
 - (i) for possession of land;
 - (ii) for sale of land or other property over which the judgment creditor has the benefit of a charge;
 - (iii) requiring judgment debtors to provide information about their assets;

- (iv) appointing enforcement officers to seize and sell the judgment debtor's goods;
- (v) appointing receivers;
- (vi) for committal for contempt of court; or
- (vii) relating to insolvency procedures.

9. Contacting the Courts

9.1 Further information about the HK High Court can be obtained:

9.1.1 by visiting the website of the Hong Kong Judiciary at: <http://www.judiciary.hk>

9.1.2 by contacting the Registry of the HK High Court at:

Address: Lower Ground 1st Floor, High Court Building, 38
Queensway, Hong Kong;

Telephone: +852 2523 2212;

Email: enquiry@judiciary.hk

9.2 Further information about the DIFC Courts can be obtained:

9.2.1 by visiting the website of the DIFC Courts at: <http://difccourts.ae/>

9.2.2 by contacting the DIFC Courts Registry at:

Address: Ground Floor, Building 4, The Gate District, PO
Box 211724, Dubai, United Arab Emirates;

Telephone: +971 4 427 3333;

Email: registry@difccourts.ae

Signed this 10th day of August, 2018 by:

Dr. Michael Hwang SC

Chief Justice

**Dubai International Financial
Centre Courts**

The Hon Mr Justice Andrew Cheung

Chief Judge of the High Court

**High Court of the Hong Kong
Special Administrative Region of the
People's Republic of China**