

MEMORANDUM OF GUIDANCE

between the

DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS



and

**THE HIGH COURT OF KENYA,
COMMERCIAL & ADMIRALTY DIVISION**



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 or to create any binding arrangements for the reciprocal enforcement of each party's money judgments.
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 High Court

4. The High Court is established under Article 165 of the Constitution of Kenya and forms part of the Kenyan court hierarchy. The High Court has unlimited original jurisdiction in criminal and civil matters (subject to certain qualifications), jurisdiction to determine questions involving the infringement of a fundamental right or freedom, jurisdiction with respect to constitutional interpretation, appellate jurisdiction in respect of decisions of specified tribunals and any other appellate or original jurisdiction conferred on the High Court by legislation. The High Court is organised under several administrative divisions. The Commercial and Admiralty Division of the High Court is the division which deals with commercial disputes which meet the prescribed pecuniary jurisdiction limits for the original jurisdiction of the High Court. The Commercial and Admiralty Division of the High Court also has appellate jurisdiction over judgments of Magistrates' Courts in commercial disputes which do not meet the pecuniary jurisdiction limits for first instance claims before the High Court. The Court of Appeal has jurisdiction to hear appeals from the High Court.

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

6. Pursuant to the Judicature Act (Cap 8, Laws of Kenya), the jurisdiction of the High Court is to be exercised in conformity with, *inter alia*, the Constitution of Kenya, all other written laws and, subject to certain qualifications, the substance of the common law of England.
7. In the High Court, a judgment of a foreign court which is a "designated court" of a reciprocating country within the meaning of the Foreign Judgements (Reciprocal Enforcement) Act, Cap 43 (the **FJRE Act**) would, subject to the provisions of the FJRE Act, be capable of registration in Kenya and be subsequently enforceable as a High Court judgment.
8. There is currently no treaty in place pursuant to which either party's judgments may be enforced by the other party's courts and the DIFC Courts are therefore not "designated courts" within the meaning of the FJRE Act.
9. In the High Court, in the absence of a relevant treaty or the foreign court being a "designated court" within the meaning of the FJRE Act, a foreign judgment may be enforced by a claim made at common law in accordance with the principles and practice described below.
10. 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.
11. The approach of the DIFC Courts to the enforcement of High Court judgments is based on the common law and a similar approach is applied.

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

12. In order to be sued upon in the High Court, a money judgment of the DIFC Courts must be final and conclusive. It may be final and conclusive even though it is subject to an appeal. Under Section 9 of the Civil Procedure Act, Cap 21, Laws of Kenya (the **CP Act**), a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating under the same title, except:
 - (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 Kenya 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; or
 - (f) where it sustains a claim founded on a breach of any law in force in Kenya.
13. Under Section 4(4) of the Limitation of Actions Act, Cap 22, Laws of Kenya, an action for enforcement of a foreign judgment must be brought in Kenya within 12 years of the date of the judgment.
 14. The High Court will not enforce certain types of DIFC Court money judgments, for example judgments ordering the payment of taxes, fines or penalties or such other money judgments as the High Court may consider unenforceable.
 15. The DIFC Courts must have had jurisdiction, according to the Kenyan 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 or must derive their title from the original parties. In addition, the enforcement proceedings in the High Court must be in respect of the money judgment issued by the DIFC Courts. The 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, habitually resident or incorporated in or having a principal place of business 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.
 16. Where the above requirements are established to the satisfaction of the High Court, the High 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 as a matter of common law, recognised by the High Court, to satisfy a judgment of the DIFC Courts.

The requirements for enforcing High Court judgments in the DIFC Courts

17. Similar principles to those set out above will be applied to determine whether a party may sue on a High Court judgment in the DIFC Courts.
18. In order to be sued upon in the DIFC Courts, a judgment of the High Court must be final and conclusive. It may be final and conclusive even though it is subject to an appeal.

19. The DIFC Courts will not enforce certain types of High Court judgments, for example judgments ordering the payment of taxes, fines or penalties.
20. The High 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 High Court; or
 - (d) agreed, before commencement, in respect of the subject matter of the proceedings, to submit to the jurisdiction of the High Court.
21. Where the above requirements are established to the satisfaction of the DIFC Courts, a High 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.
22. The DIFC Courts will not re-examine the merits of a High Court judgment. The judgment may not be challenged on the grounds that it contains an error of fact or law. A High 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 High Court.

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

23. In order to enforce a judgment of the DIFC Courts in the High Court, a party must issue a Complaint in the Commercial Division of the High Court, providing a concise statement of the nature of the claim, claiming the amount of the judgment debt, supported by a Verifying Affidavit, list of witnesses and bundle of documents intended to be relied upon. A certified copy of the judgment should be exhibited to the Complaint.
24. 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.

25. Leave is required to serve summons outside Kenya and an application for such permission may be made under Order 5 rule 21 or 22 of the Civil Procedure Rules (the CPR).
26. If, following service of summons, the defendant does not respond to the claim within the specified time period, the claimant will be entitled to obtain judgment in default under Order 10 rule 4 of the CPR. However, it remains open to the defendant to challenge the validity of the judgment under the limited grounds set out in Section 9 of the CP Act or to apply to set aside the default judgment under Order 10 rule 11 of the CPR.
27. Where a judgment debtor enters appearance, but fails to file a defence, the judgment creditor will be entitled to apply to obtain summary judgment without trial under Order 36 rule 1 sub-rule 1(a) of the CPR, 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 12 above.
28. If the claim on the DIFC Court judgment is successful, the judgment creditor will then have the benefit of a High Court judgment. The judgment creditor will be entitled, if necessary, to use the procedures of the Kenyan courts to enforce the judgment, including:
 - (a) orders for delivery of any property specifically decreed;
 - (b) orders for attachment and sale, or for sale without attachment, of any property;
 - (c) orders for attachment of debts;
 - (d) orders for arrest and detention in prison of any person (subject to prescribed qualifications);
 - (e) orders for appointment of a receiver; or
 - (f) orders for execution in such other manner as the nature of the relief granted may require.

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

29. In order to enforce a High Court judgment in the DIFC Courts, the procedure is very similar.
30. In order to enforce a High 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.

31. A party may obtain a certified copy of a High Court judgment by making an application to the Deputy Registrar of the High Court. The application may be made without notice and must exhibit a copy of the judgment, which is required to be certified. Where the High 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 the Deputy Registrar. The certified copy of the judgment will be sealed with the seal of the High Court.
32. Under Rule 9.53 of the Rules of the DIFC Courts 2014, 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.
33. 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 2014.
34. 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 High Court had jurisdiction on the grounds set out in paragraph 20 above.
35. 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 2014, 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 21 above. Applications for summary judgment are dealt with swiftly, without the need for oral evidence.
36. If the claim on the High 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; and
- (i) orders relating to insolvency procedures.

Contacting the Courts

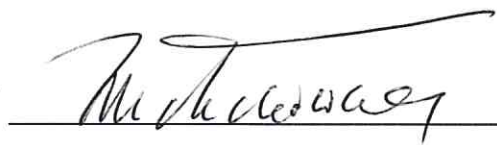
37. Further information about the Commercial and Admiralty Division of the High Court can be obtained:

- (a) by visiting the website of the Judiciary of Kenya at:
<http://www.judiciary.go.ke/portal/the-courts.html>
- (b) by contacting the Registry of the High Court, Commercial and Admiralty Division:
 - i. at Nairobi Milimani Law Courts, Milimani, P.O. BOX 30420-00100, Nairobi-Kenya
 - ii. by telephone on +00254 (020) 2221 221. or
 - iii. by email at info@judiciary.go.ke

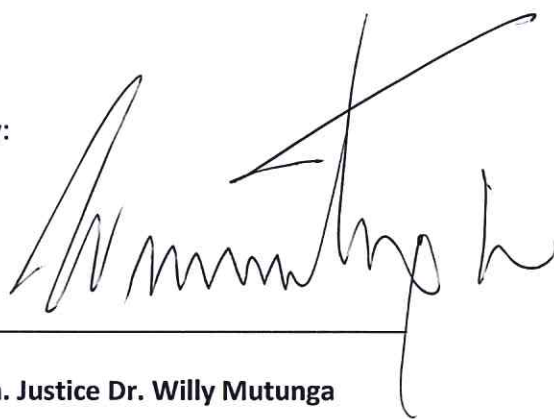
38. Further information about the DIFC Courts can be obtained:

- (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 day of November, 2014 by:



Michael Hwang SC
Chief Justice
DIFC Courts



The Hon. Justice Dr. Willy Mutunga
Chief Justice
Republic of Kenya

ACKNOWLEDGEMENT

The Honourable Attorney General of Kenya:

RECOGNISING the relationship between the Kenyan Judiciary and the DIFC Courts as an important element in promoting and facilitating legal co-operation between Kenya and the United Arab Emirates; and

CONVINCED of the value of close co-operation for mutual benefit in promoting, protecting and upholding the rule of law,

HEREBY acknowledges the entry into and the terms of this Memorandum of Guidance.



The Honourable Prof. Githu Muigai

Attorney General

Republic of Kenya

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The Chief Registrar of the Judiciary of Kenya:

RECOGNISING the relationship between the Kenyan Judiciary and the DIFC Courts as an important element in promoting and facilitating legal co-operation between Kenya and the United Arab Emirates; and

CONVINCED of the value of close co-operation between the Kenyan Judiciary and the DIFC Courts for mutual benefit in the field of administration of justice,

HEREBY acknowledges the entry into and the terms of this Memorandum of Guidance.



Anne Atieno Amadi

**The Chief Registrar of the Judiciary
Kenya**