www.singularitylegal.com October 2024

ENFORCEMENT OF RUSSIAN JUDGMENTS UNDER THE LUGOVOY LAW IN THE DIFC: A POSSIBLE SOLUTION

expert talk

SINGULARITY LEGAL

ENFORCEMENT OF RUSSIAN JUDGMENTS UNDER THE LUGOVOY LAW IN THE DIFC: A POSSIBLE SOLUTION

I. INTRODUCTION

1. International commercial dispute resolution has, throughout the years, been marred by the disruptive influence of economic sanctions.

2. The sanction related legal complexities may manifest through jurisdictional disputes between courts and arbitral tribunals in different States,[1] including challenges in recognition and enforcement of judgments or awards involving a sanctioned party.[2] Sanctions also come with practical consequences in transnational dispute resolution as they may prevent parties from instructing legal representatives of their choice qualified in a particular jurisdiction,[3] cripple parties' ability to fund legal proceedings on account of asset freeze,[4] and hinder participation in court hearings or arbitration on account of travel restrictions.[5] While dealing with sanctioned parties, arbitral institutions are required to undertake additional procedural

---

** Please note that all Russian laws and court decisions referred to in this insight are in Russian, and our views are based on a machine translation.*

[1] including these complexities stemming from various questions such as arbitrability of disputes affected by sanctions laws: [2.1.1], Eric de Brabandere and David Holloway, 'Sanctions and International Arbitration', (Research Handbook on Sanctions and International Law, 2016)

[2] Eric de Brabandere and David Holloway, 'Sanctions and International Arbitration', (Research Handbook on Sanctions and International Law, 2016), relying on *MGM Productions Group v Aeroflot Russian Airlines* (2003) 573 F Supp 2d 772 (SDNY), *Iranian Co Z v Swiss Co X* Case 4A_250/2013 (Tribunal Fédéral Suisse) (21 January 2014)

[3] US law firms are prevented from acting in arbitrations involving US-sanctioned entities under blocking sanctions unless prior authorization has been sought from the Office of Foreign Assets Control (OFAC), see Section 2 of the Executive Order of the President, 'Blocking Property with respect to Specified Harmful Foreign Activities of the Government of the Russian Federation' (15 April 2021); Law firms in the EU are also prohibited from providing legal advice to any Russian entity, *see* [2], Article 5n of Regulation 833/2014 (7 October 2022). In many cases, law firms have cut ties completely with long-standing Russian clients, *see* Matt Reynolds, 'Law firms scramble to keep pace with unprecedented Russian sanctions', (American Bar Association Journal, 2022), available here (last accessed on 23 October 2024); UK legal professionals are prohibited from providing legal advisory services for non-contentious matters, including the application or interpretation of law, The Russia (Sanctions) (EU Exit) (Amendment) (No. 3) Regulations 2023 (2023 No. 713) (30 June 2023).

[4] Removal of certain banks from the SWIFT payment system under EU Council Regulation (EU) 2022/345 of 1 March 2022, see Company Information, 'An update to our message from the Swift Community', (Swift News, 2022), available here (last accessed on 23 October 2024).

[5] Council of the European Union, 'EU sanctions against Russia explained', available here (last accessed on 23 October 2024)

compliances,[6] and in some cases, may even deny entertaining a particular reference to arbitration.[7] Such hurdles can effectively derail the arbitration proceedings, be fatal to running limitation periods, or even result in claims being deemed as withdrawn.[8]

3. Sanctions have been the subject of scholarly inquiry for many years, particularly in the context of sanctions against Iraq, Russia, Libya, and Iran. The need for understanding the consequences of sanction laws on international dispute resolution has intensified due to the recent sanctions imposed on Russia on account of its war on Ukraine in 2022[9] and the countermeasures implemented by Russia. For instance, Russia has designated a number of countries as 'unfriendly' States.[10]

4. In this insight, we deal with the Lugovoy Law (see [5] below) enacted by Russia to preserve the interests of its nationals embroiled in dispute resolution proceedings outside the Russian Federation, and explore the possibility of executing these Russian courts' decisions in the Dubai International Financial Centre ("DIFC"). Section II explains the Lugovoy Law and highlights the need for enforcing the decisions in foreign jurisdictions; Section III explains the reasons for viewing DIFC as a favourable jurisdiction; Section IV explains how Russian court decisions may be executed

---

[6] SCC Arbitration Institute, 'EU sanctions', available here (last accessed on 23 October 2024); ICC International Court of Arbitration, 'Note to the parties and arbitral tribunal on the conduct of arbitration' (29 September 2017), available here (last accessed on 23 October 2024)

[7] LCIA has the right to refuse to act on any institution and/ or make any payment if it determines (at its sole discretion and without the need to state reasons) that doing so may involve a breach of sanctions or may otherwise expose the LCIA to enforcement action from any law enforcement agency, *see* Rule 24A.10, LCIA Rules, r/w [369] - [380], Section 17 of the LCIA Guidance Note, available here (last accessed on 23 October 2024)

[8] International Association of Lawyers, 'Economic Sanctions and Arbitration: A Practical Guide for Parties, Counsel and Arbitrators', at p. 23, available here (last accessed on 23 October 2024)

[9] Russia has become the world's most sanctioned state, see Nick Wadhams, 'Russia Is Now the World's Most-Sanctioned Nation', (Bloomberg, 2022), available here (last accessed on 23 October 2024). Also, see footnotes [3] to [5] above.

[10] Government of the Russian Federation, 'Order No. 430-r' (5 March 2022), available here (last accessed on 23 October 2024); The list of "unfriendly-to-Russia countries" includes the United States of America, United Kingdom, Australia, Singapore, all members of the EU, Switzerland, Japan, and Canada.

in DIFC through insolvency proceedings or through recognition and enforcement route; and Section V proposes obtaining interim measures in aid of Russian proceedings.

II. BACKGROUND: LUGOVOY LAW

5. In June 2020, the Russian Federation introduced Article 248 to the Russian Arbitrazh (Commercial) Procedure Code ("Arbitrazh Code") to protect the interests of Russian parties from the legal and practical impediments caused due to sanctions. This introduction of Article 248, widely known as the Lugovoy Law, *inter alia,* clothed Russian courts with the power to exercise exclusive jurisdiction over disputes where the original dispute resolution clause entered into between the parties was not feasible because of anti-Russian sanctions, creating an obstacle to justice.[11] It further empowered Russian courts to grant anti-suit or anti-arbitration injunctions restraining a party from commencing or continuing a foreign litigation or foreign-seated arbitration.[12] In the event of failure to comply, the court has the power to award a sum of money to the party that has sought the injunction up to a quantum of the claim brought outside Russia in breach of the injunction.[13]

6. Since its enactment, the Lugovoy Law has been used extensively, especially in light of the Russian parties involved in disputes, under previously agreed upon dispute resolution clauses, being prevented from: (a) paying the fees required to commence arbitral proceedings;[14] (b) personally participating in arbitral

[11] Article 248.1, Arbitrazh (Commercial) Procedure Code of the Russian Federation ("Arbitrazh Code")
[12] Article 248.2, Arbitrazh Code
[13] Article 248.2, Arbitrazh Code
[14] *BM-Bank v Rizzani de Eccher* Case No. A40-50169/2022, (Arbitrazh Commercial Court of the City of Moscow) (18 August 2022) ("BM-Bank")

hearings due to travel sanctions;[15] (c) engaging qualified lawyers, including because of bank freezes imposed by the sanction laws of multiple jurisdictions including the EU, UK, USA, Switzerland, Liechtenstein, and Ukraine;[16] or (d) paying arbitration and other fees due to the ban on bank transfers through the international SWIFT system.[17]

7. However, it is widely commented that the Russian courts have adopted a broader approach since 2022.[18] The Russian Supreme Court, in *Uraltransmash v PESA* ("Uraltransmash"),[19] held that the mere fact of application of anti-Russian sanctions to a party or a party affected by it, participating in foreign dispute resolution proceedings is by itself sufficient to presume that the party's access to justice is limited. In arriving at its conclusion, the court relied upon the explanatory note to the draft law which stated that the purpose of adopting the Lugovoy law was to establish guarantees to protect the rights and legitimate interests of Russian citizens affected by restrictive measures imposed by 'unfriendly-to-Russia' States, as these measures effectively deprive Russian citizens from defending their rights in foreign states.[20] While many decisions have not assessed the merits of access of justice

[15] BM-Bank; *Russian Administration v Lithuanian Administration* Case No. A21-10428/2022, (Supreme Court of the Russian Federation) (3 July 2023) ("Lithuanian Administration"); *SC Development "VEB.RF" v Goldman Sachs International (Great Britain)* Case No. A-40-111545/23-107-846, (Ninth Arbitration Court of Appeal) (17 September 2024) ("Goldman Sachs")

[16] BM-Bank; Goldman Sachs; *Uraltransmash v PESA* Case No. A60-3697/2020, (Supreme Court of the Russian Federation) (9 December 2021) ("Uraltransmash"); C. *Thywissen GmbH v NS Bread Products* Case No. A45-19015/2023 (Supreme Court of the Russian Federation) (26 July 2024) ("Thywissen")

[17] This was argued by the affected party in BM-Bank.

[18] Stepan Sultanov and Anastasiya Ryabova, 'Anti-suit Injunctions and Russian Courts' Exclusive Jurisdiction under Lugovoy Law (Articles 248.1 and 248.2 of APC)', (Review of the Judicial Practice (KIAP Law), 2024), at p.3 of annex, *see* [42], *Ziyavudin Magomedov Port-Petrovsk Limited and Others v PJSC Transneft and Others* [2024] EWHC 1176 (Comm) ("Transneft")

[19] Uraltransmash.

[20] It is notable that the decision of the Supreme Court was after the submissions of an *amicus curiae* by law firms opining that the restriction of access to justice is not an inevitable consequence of the imposition of sanctions on a party. Amicus curiae opinion available here (last accessed on 23 October 2024).

on the basis of the ruling in Uraltransmash,[21] many decisions have still made such independent assessments.[22]

8. The number of instances of application of Article 248 have steeply risen (480 cases) and the Russian courts have accepted jurisdiction in more than 68% cases submitted.[23] The fact that Russian courts have exercised their jurisdiction in a considerable number of cases, raises pertinent questions regarding the execution of such decisions in other jurisdictions where counterparties may have their assets. Judgment creditors can enforce the decisions rendered under the Lugovoy law in Russia, if available. However, many foreign entities are now divesting from the territory of the Russian Federation,[24] and so the assets of a foreign judgment debtor in Russia may be limited. This amplifies the need for exploring options for enforceability in jurisdictions outside the Russian Federation. Enforcement options in the West seem difficult, including on account of sanctions, countermeasures,[25] and anti-suit injunctions.[26] Thus, Russian parties are likely to look at enforcing decisions in States with which

[21] *Google LLC (Moscow), Google Ireland Limited and Google LLC (USA) v Tsargrad Media* No. 305-ES22-11060 (Supreme Court of the Russian Federation) (17 June 2022); Stepan Sultanov and Anastasiya Ryabova, 'Anti-suit Injunctions and Russian Courts' Exclusive Jurisdiction under Lugovoy Law (Articles 248.1 and 248.2 of APC)', (Review of the Judicial Practice (KIAP Law), 2024), available here (last accessed on 23 October 2024), relying on *Samara Metallurgical Plant JSC v Can-Pak LLC (Polland)* Case No. A55-18897/2024 (Arbitration Court of Samara Region) (19 June 2024) at p.113 of appendix, *VTB Bank PJSC v Nordea Bank (Finland)* Case No. A5b-50890/2024 (Arbitration Court of St. Petersburg and Leningrad) (10 June 2024) at p.114 of appendix

[22] Goldman Sachs; Stepan Sultanov and Anastasiya Ryabova, 'Anti-suit Injunctions and Russian Courts' Exclusive Jurisdiction under Lugovoy Law (Articles 248.1 and 248.2 of APC)', (Review of the Judicial Practice (KIAP Law), 2024), available here (last accessed on 23 October 2024), relying on Lithuanian Administration at p.12, *European Biological Technologies LLC v Cabinplant A/S (Denmark)* A55-24707/2022 (Arbitration Court of Samara Region) (24 August 2022) at p.6 of appendix, *PSJC Magnitogorsk Iron and Steel Works v CMI UVK GmBH (Germany)* Case No. 17558/2023 (Arbitration Court of the Chelyabinsk Region) (17 June 2023) at p.112 of appendix

[23] Stepan Sultanov and Anastasiya Ryabova, 'Anti-suit Injunctions and Russian Courts' Exclusive Jurisdiction under Lugovoy Law (Articles 248.1 and 248.2 of APC)', (Review of the Judicial Practice (KIAP Law), 2024), at p.3 of annex

[24] Reuters, 'Companies sell their businesses in Russia', available here (last accessed on 23 October 2024)

[25] The Council of the European Union has now introduced a new mechanism for imposing a transaction ban on entities which rely on Article 248 of the Code or any equivalent Russian legislation to obtain an injunction, judgment or similar relief, *see* Article 5ab, EU Regulation No. 833/2014 (24 June 2024).

[26] English courts have issued anti-suit injunctions preventing proceedings instituted in the Russian Arbitrazh courts under the Lugovoy Law in breach of express arbitration agreements between the parties providing for LCIA or ICC arbitration, *see* [112] & [113], *UniCredit Bank v RusChemAlliance LLC* [2024] UKSC 30 (18 September 2024); [52] & [53], *Renaissance Securities (Cyprus) Ltd v Chlodwig Enterprises Ltd & Others* [2023] EWHC 2816 (Comm) (3 November 2023); [1] & [71], *Barclays Bank Plc v Veb.Rf* [2024] EWHC 1074 (Comm) (10 May 2024)

Russia has cooperation agreements or reciprocity.[27] We propose looking at DIFC for execution as DIFC is increasingly being viewed as a pro-enforcement jurisdiction. Additionally, we propose obtaining interim measures from the DIFC in aid of the Russian proceedings to safeguard the assets for subsequent execution.

III. DIFC AS A POSSIBLE SOLUTION

9. DIFC is an advanced financial centre hosting the region's broadest and deepest range of financial activities.[28] The DIFC Courts have an international outlook and tout to be standard-bearers for business-friendly dispute resolution services contributing to certainty in business outcomes and enforcement, and reducing costs with tools that enhance court efficiency.[29] DIFC also does not have a separate sanctions regime and it follows the sanctions regime implemented by the UAE (though not widely publicised). The UAE, being a United Nations' member State, implements the United Nationals Security Council ("UNSC") Resolutions. In pursuance of the same,[30] the UAE identifies a list of individuals and legal entities subject to sanctions (primarily related to terrorist activities) and applies requisite freezing measures.[31] While Russian entities and individuals face stringent sanctions from the West, the UAE applies sanctions imposed by USA, EU, and UK through internal directives, *"based on the circumstances of the specific request from foreign authorities."*[32]

[27] For instance, while there is no bilateral treaty between Turkey and Russia for the enforcement of foreign judgments, there appears to be a *de facto* reciprocity between Russia and Turkey on account of the significant number of Turkish decisions recognising and enforcing Russian court judgments.

[28] 'DIFC at a glance: Drive the future of finance with us', accessible here (last accessed on 23 October 2024)

[29] Amna Al Owais and Mahika Hart, 'Why 'business-friendly' and 'no-nonsense' should be synonymous for commercial courts', (Corporate Disputes Magazine, 2018)

[30] UNSC Resolution 1373 (2001)

[31] Executive Office for Control and Non-proliferation, 'Targeted Financial Sanctions', accessible here (last accessed on 23 October 2024)

[32] Morgan Heavener, Roberto Maluf and Steve Molloy, 'UAE: A shifting landscape of risk and reform', (Global Investigations Review, 2024) available here (last accessed on 23 October 2024)

10. Moreover, the enforcement regime of the DIFC Courts is strong, and on account of rising enforcement with other regional and international courts, their connectivity network has matured.[33] Importantly, actions or claims for recognition and enforcement of foreign judgments do not require any geographical nexus to DIFC.[34] The DIFC Courts have assumed a unique role in facilitating enforcement both within and outside the UAE, and is a preferred mechanism for executing foreign judgments.[35] Therefore, once a judgement by the Russian Arbitrazh Courts is recognised and enforced by DIFC Courts, it will no longer be a 'recognised foreign judgment' but will simply become an independent local judgment of the DIFC Court.[36] Consequently, judgments by the Russian Arbitrazh Courts will then be enforced as domestic judgements by the DIFC Courts. This DIFC judgment would also be treated as foreign judgments for onward execution in the rest of the Middle East under the Riyadh Arab Agreement for Judicial Cooperation, 1983 ("Riyadh Convention"),[37] the 1996 Gulf Co-operation Council Convention for the Execution of Judgments, Delegations and Judicial Notifications ("GCC"),[38] and other bilateral treaties entered into by the UAE.[39]

---

[33] DIFC Courts, 'Annual Report 2023', accessible here (last accessed on 23 October 2024)

[34] *Banyan Tree Corporate Pte Ltd., v Meydan Group LLC* [2013] DIFC ARB 003 (27 May 2014); *DNB Bank ASA v (1) Gulf Eyadah Corporation (2) Gulf Navigation Holdings PJSC* [2015] DIFC CA 007 (25 February 2016) ("DNB Bank"); *(1) Lateef (2) Lukman v (1) Liyela (2) Liyani* [2020] DIFC ARB 017 (24 March 2022); *Fiske v Firuzeh* [2014] DIFC ARB 001 (5 January 2015); *Egan v Eava* [2013] DIFC ARB 002 (29 July 2015)

[35] Further discussed in detail in the chapter titled *"DIFC Courts as a Conduit for Enforcement Within and Outside The UAE"*, accessible here.

[36] [116], *DNB Bank ASA v (1) Gulf Eyadah Corporation (2) Gulf Navigation Holdings PJSC* [2015] DIFC CA 007 (9 September 2015)

[37] The signatories to the Riyadh Convention are Algeria, Bahrain, Djibouti, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Mauritania, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, UAE, and Yemen.

[38] The signatories to the GCC Convention are UAE, Bahrain, Saudi Arabia, Oman, Qatar and Kuwait.

[39] These include The Agreement on Judicial Cooperation, Execution of Judgments and Extradition of Criminals between the UAE and the Tunisian Republic (1975); The Convention on Judicial Assistance, Recognition and Enforcement of Judgments in Civil and Commercial Matters signed between France and the UAE (1992); The Agreement on Juridical Cooperation in Civil and Commercial Matters with India (2000); The Legal and Judicial Cooperation Agreement between the UAE and the Arab Republic of Egypt (2000); The Convention on Judicial Assistance in Civil and Commercial Matters between the UAE and the PRC (2004); The Agreement between the Republic of Kazakhstan and the UAE on Judicial Assistance in Civil and Commercial Matters (2009).

11. Additionally, DIFC hosts a number of foreign companies and international banks (including Goldman Sachs International, Dukascopy Bank SA, Liechtensteinische Landesbank AG, UBS AG, Barclays Bank Plc., Euroclear Bank SA/NV, JP Morgan Chase, National Bank of Kuwait S.A.K.P),[40] who may often be the defendants before the Russian courts under the Lugovoy Law. These entities carry on business[41] in the DIFC and are registered[42] as a 'Recognised Company' in DIFC.[43] A number of foreign companies and international banks may also be designated as a 'Recognised Member' or a 'Recognised Body' by the Dubai Financial Services Authority ("DFSA")[44] and if they 'carry on business' in the DIFC, they may also be a Recognised Company.[45] Both Recognised Companies and Recognised Members/ Recognised Bodies are DIFC Establishments and/or DIFC Licensed Establishments,[46] and the DIFC Courts have jurisdiction over them in terms of Article 5(A)(1)(a) of the DIFC Judicial Authority Law, Law No. 16 of 2011 amending certain provisions of Law No. 12 of 2004 ("JAL"). Therefore, the judgment creditor or the claimant may consider winding up the defendants in, or obtain interim measures against them from the DIFC Courts (see Section [V] below).

---

[40] The public register of all companies is accessible here. The Register specifically notes if a company is a Recognised Company under the heading 'Legal Structure'. As of July 2024, DIFC had more than 6000 active registered companies, including over 370 wealth and asset management firms, and 125 insurance and re-insurance companies: DIFC Press Release (DIFC continues to drive the future of finance with outstanding H1 2024 results)

[41] Article 7.4 of DIFC Companies Regulations notes that the meaning of business for the purposes of a Recognised Company includes (a) establishing or maintaining a place of business; (b) administering, leasing to others, or managing property situated in the DIFC as principal or agent; (c) operating as a Reporting Entity; or (d) employing persons; in the DIFC.

[42] Regulation 7.3 of DIFC Companies Regulations

[43] Article 133 of DIFC Companies Law, Law No. 5 of 2018

[44] A firm located in a jurisdiction other than the DIFC can become a member of an Authorised Market Institution only if it has been granted recognition status by the DFSA. They may be given the status of Recognised Members: Article 37 of DIFC Markets Law, DIFC Law No. 1 of 2012 (also, see here). DFSA's public register is accessible here.

[45] see for instance, [2], *BGC Brokers L.P. v Mourad Abourahim* [2013] DIFC CFI 027 (31 May 2015)

[46] A DIFC Establishment is defined as any *"entity or enterprise established, licensed, registered or authorised to carry on business or conduct any activity within the DIFC pursuant to DIFC Laws, including Licensed DIFC Establishments"*. (emphasis supplied.) The "Licensed DIFC Establishment" is defined as any *"entity or enterprise licensed, registered or authorised by the Dubai Financial Services Authority to provide financial services, or conduct any other activities in accordance with the DIFC Laws"*. (See Judicial Authority Law, Law No. 16 of 2011 amending certain provisions of Law No. 12 of 2004 ("JAL"))

IV. EXECUTION

12. DIFC Courts follow English law, common law, and conflict of law principles, and regularly rely on English court decisions to interpret DIFC laws.[47] When considering a foreign judgment, English courts have executed the decision by two methods: either through insolvency proceedings or through recognition and enforcement proceedings. The methods or their application to the present subject is unique. We explore both options below and posit the possible arguments to meet the requirements.

A. Winding Up Proceedings: Recovery of Sums Awarded by the Russian Court

13. Under the DIFC Insolvency Law, Law No. 1 of 2019 ("DIFC Insolvency Law"), a Recognised Company (see [11] above) may be wound up *inter alia* if it is unable to pay its debts.[48]

14. We explore the possibility of direct execution of the foreign judgment through winding-up proceedings in DIFC (without applying for recognition and enforcement), against Recognised Companies. Notably, this form of recovery on the basis of unrecognised foreign judgment is not tested in DIFC and is only a recent jurisprudence in English law.[49]

15. The English courts, in their decisions[50] of 2024 in *Valeriy*

Also, *see* [11], [13], and [22], *(1) First Abu Dhabi Bank PJSC (2) Fab Securities LLC v Larmag Holding* B.V [2019] DIFC CA 010 (23 March 2020); [57] & [60], *Corinth Pipeworks SA v Barclays Bank Plc* [2011] DIFC CA 002 (22 January 2011); [2], [39] & [40], *Tavira Securities Limited v (1) Re Point Ventures Fzco (2) Jai Narain Gupta (3) Mayank Kumar (4) Saroj Gupta* [2017] CFI 026 (17 December 2017)

[47] Article 8(2)(e), DIFC Law No. 3 of 2004; The DIFC Courts regularly cite English court's decisions to interpret the DIFC laws. See for instance, *Lural v (1) Listran (2) Lokhan* [2021] DIFC CA 003 ("Lural v Listran"); *Rafed Abdel Mohsen Bader Al Khorafi and Ors. v Bank Sarasin-Alpen (ME) Ltd. and Ors.* CA No. 003/2011 (5 January 2012) ("Rafed I").

[48] Section 119(1)(c) of the DIFC Insolvency Law

[49] [28], In *In Re A Company* [2024] EWHC 1070 (Ch) (8 May 2024) ("In Re A"): The court held that the status of a foreign judgment which has neither been recognised nor converted by way of a Part 7 claim and any role it might play in insolvency proceedings had not been examined closely, until recently.

[50] Also, see *Sun Legend Investments v Ho* [2013] BPIR 533 (8 March 2013), cited with approval in Drelle at [47] & [48]

Ernestovich Drelle v Servis Terminal LLC ("Drelle")[51] and *In Re A Company* ("In Re A"),[52] held that a winding up or a bankruptcy petition can be entered on the basis of a foreign judgment, notwithstanding that an application for recognition of such foreign judgment had not been made. The courts confirmed that the foreign judgments (of Russian Arbitrazh court and Lebanon court respectively) resulted in 'debt'.

16. The court's decision was based on Rule 48 of 15th edition of Dicey, Morris & Collins on the Conflict of Laws ("Dicey") which notes that a foreign judgment which is final and conclusive and not impeachable[53] is conclusive as to any matter adjudicated upon and cannot be impeached for any error either of fact of law. The effect of Rule 48 is when considering whether the judgment (if not impeachable) gives rise to a 'debt' for the purposes of winding up, it is to be taken as conclusive of any matter that it adjudicates. The 'debt' did not need to result from a final order or judgment of a DIFC Court only.[54] Thus, an unrecognised foreign judgment, incontrovertibly owed, is a liquidated sum not subject to a contingency, satisfies the requirement of 'debt' under the act, and it would be *"perverse for the common term "debt" to be construed differently for the purposes of winding up and bankruptcy."*[55]

17. Notably, the definition of 'inability to pay debts' under Section 82 of DIFC Insolvency Law is similar to the definition of inability to pay debts under Section 123 of UK's Insolvency Act, 1986 (basis of

[51] [2024] EWHC 521 (Ch) (11 March 2024)
[52] [2024] EWHC 1070 (Ch) (8 May 2024), relying on Drelle
[53] Under any of Rules 52 to 55 of Dicey: The foreign judgment is impeachable (a) Rule 52 – if the courts of the foreign country did not, in the circumstances of the case, have the jurisdiction to give the judgment in view of English law (b) Rule 53 – for fraud (c) Rule 54 – on the ground that its enforcement or recognition would be contrary to public policy (d) Rule 55 – if the proceedings in which the judgment was obtained were opposed to natural justice.
[54] [43] to [45], Drelle
[55] [34] & [39], In Re A

the decision in In Re A)[56] and includes that the company (whose winding up is sought) is *"deemed unable to pay its debts if… it is proved to the satisfaction of the Court that the company is unable to pay its debts as they fall due".*

18. Therefore, as DIFC Courts follow English law and rely upon English decisions to interpret its laws (see [12] above), the judgment creditors may be able to initiate winding up proceedings against the judgment debtor if it is a Recognised Company under DIFC law[57] based on an unsatisfied Russian court's decision without seeking its recognition and enforcement.[58] Notably, the DIFC Courts have confirmed that winding up a company on the basis of unpaid debt under an arbitral award is *"entirely appropriate means of execution."*[59] The judgment debtor's defence in a winding up petition would be to show a *bona fide* substantial dispute as to whether the judgment can be impeached.[60] We have explained the impeachment grounds below at Section [IV.B.2].

19. In the cases involving Lugovoy Law, the scale may tilt towards a finding that there is a *bona fide* substantial dispute as to whether the judgment can be impeached, making deploying a direct winding-up strategy difficult to succeed. But the winding-up route may be available after completing proceedings for recognition and enforcement of the Russian judgment by the DIFC

[56] [38] and [39], In Re A
[57] Part 7, DIFC Insolvency Law
[58] [97], In Re A
[59] [34], *Oger Dubai LLC v Daman Real Estate Capital Partners Limited* [2016] DIFC CFI 013 (16 June 2016): The court ordered winding up of the defendant as it was unable pay its debts as they fall due pursuant to an enforcement order for the arbitral award. However, pursuant to the Joint Judicial Committee's decision that Dubai courts would retain jurisdiction and not the DIFC Courts, the DIFC Court discharged the winding up order against the defendant [*Oger Dubai LLC v Daman Real Estate Capital Partners Limited,* CFI 013/2016 (17 October 2018)]. Therefore, though the order is vacated, it appears that the DIFC Courts will confirm winding up as an appropriate means of execution.
[60] [17], [18], & [61], Drelle

Court. A liquidator appointed by DIFC Court could then help Russian creditors to liquidated the assets of the judgment debtor globally.

B. Recognition and Enforcement of the Russian Judgment

20. The DIFC Courts do not have any independent statutory principles for recognition and enforcement of foreign judgments. However, in terms of the waterfall provisions contained in Article 8(2) of the DIFC Law No. 3 of 2004, English law, common law, and conflict of law principles apply to recognition and enforcement issues.[61] The common law requirements for enforcement of foreign judgments are set out at Rule 42 of Dicey and have been cited with approval by the DIFC Courts.[62]

B.1 Requirements For Enforcement

[i] Final and conclusive

21. For a judgment to be final and conclusive, it must be shown that the Russian judgment has conclusively established the existence of the debt.[63] A judgment is final and conclusive even if it can be appealed or is subject to a pending appeal. The test of finality is the treatment of the judgment as *res judicata* by the Russian court."[64] In terms of Article 209(1) of the Russian Civil Procedure Code, a Russian court judgment becomes enforceable upon expiration of the time within which an appeal may be filed, if no appeal is filed. If an appeal is filed and the judgment is upheld, the judgment becomes final and enforceable immediately upon

[61] [21] & [45], *Barclays Bank PLC & Ors. v Essar Global Fund Limited* [2016] DIFC CFI 036 ("Barclays v Essar"); [17], Lural v Listran. The DIFC Courts do not look at reciprocity.
[62] Lural v Listran; Rafed I
[63] Gustave *Nouvion v Freeman and another* (1889) 15 App. Cas. 1 (22 November 1889) ("Gustave v Freeman")
[64] [51], Barclays v Essar; [77], *Barclays Bank Plc v Bavaguthu Raghuram Shetty* [2022] EWHC 19 (Comm) (10 January 2022) ("Barclays v BR Shetty")
[65] [49] and [50], Barclays v Essar, relying on [9] & [10], Gustave v Freeman

the issuance of the ruling.[66]

[ii] Debt or a definite sum of money and is not a tax, fine, or penalty

22. The Russian court's judgment should be for a definite sum of money and such sum should not be a fine, tax or penalty. Such sum can also include a final order for costs.[67] Dicey notes that if the foreign judgment imposes a fine and also orders payment of compensation, the latter part of the judgment can be severed from the former and can be enforced.[68]

23. The English court's decision in *Hangzhou Jiudang Asset Management Co Ltd & Anor v Kei Kin Hung*[69] is instructive on the point of penalty. The case dealt with enforcement of final judgments made by the courts of People's Republic of China ("PRC") where the underlying dispute arose from a loan agreement. In terms of Article 253 of the PRC's Civil Procedure Law, in the event of non-payment of the sums due within the stipulated time period, the interest on the debt during the period of delay is to be doubled. One of the grounds raised by the judgment debtor was that the interest portion of the judgment was rendered unenforceable as a penalty. The English court rejected the contention and held that *"where provisions of this sort pursue a legitimate policy of deterrence, then they may be justifiable."* The court further noted that the courts should not seek to be overly astute to pass a negative judgment on such aims.

[66] Article 209(1), Russian Civil Procedure Code; *VTB Bank (PJSC) v Mavlyanov* 2018 NY Slip Op. 30166(U), at p. 6 (30 January 2018)
[67] [14-022], Rule 42 of Dicey, Morris & Colin, *The Conflict of Rules* (Sweet & Maxwell, 2012) ("Dicey"); [44], *GFH Capital Limited v David Lawrence Haigh & Ors.* [2020] EWHC 1269 (Comm) (19 May 2020) ("GFH v Haigh")
[68] [14-022], Rule 42 of Dicey, relying on *Raulin v Fischer* [1911] 2 K.B. 93
[69] *Hangzhou Jiudang Asset Management Co Ltd & Anor v Kei Kin Hung* [2022] EWHC 3265 (Comm) (19 December 2022).

24. As noted at [5] above, the Russian courts under the Lugovoy Law can impose a judicial penalty for violation of the injunction. Penalties are usually unenforceable in common law.[70] Therefore, the nature of such penalty will have to be assessed to determine its enforceability, including whether it can be treated as an award of punitive or exemplary damages.[71] This may also require expert evidence on Russian law, including to explain the plausible proposition that such imposition of penalty was a legitimate policy consideration to act as a deterrent and is justifiable.

[iii] Court of competent jurisdiction

25. Rule 43 of Dicey provides that a court is considered of competent jurisdiction if the person against whom the judgment was issued was present in the foreign country, or if he submitted to the jurisdiction of that court by either participating in the proceedings or making a claim or counterclaim, or agreed to submit to the jurisdiction of the foreign court prior to the commencement of the proceedings.[72] If the judgment debtor falls into *any* of the afore-listed categories, the foreign court would be competent to exercise its jurisdiction.[73]

26. With reference to presence in the jurisdiction, temporary presence in the foreign country will also suffice, provided it is voluntary and not induced by compulsion, fraud or duress.[74] Thus, if the judgment debtor, in a decision issued by the Russian courts under the Lugovoy law, had a presence in the territory of the Russian Federation, such presence would by itself be sufficient

[70] [14R-020], Rule 42 of Dicey
[71] [14-022], Rule 42 of Dicey, relying on *S.A Consortium General Textiles v Sun & Sand Agencies Ltd.* [1978] Q.B. 279, at p. 309, notes that an award for punitive or exemplary damages is not penal.
[72] [14R-054], Rule 43 of Dicey; [99], DNB Bank
[73] [81] - [83], Barclays v BR Shetty
[74] [49], GFH v Haigh, relying on *Adams v Cape Industries Plc,* [1990] Ch. 433, 518 (27 July 1989)

basis for the Russian courts to be considered of competent jurisdiction. However, the court would have no jurisdiction even if the defendant is present in Russia, if bringing proceedings in that court was contrary to an agreement under which the dispute in question was to be settled.[75] Such agreement should be express and not implied.[76]

27. Further, a party that makes claims or counterclaims, or objects to the jurisdiction and on that objection being denied, makes his case on merits, will be considered to have submitted to the court's jurisdiction.[77] However, joining on merits pending a renewal of a jurisdictional challenge on appeal, does not amount to submission to jurisdiction.[78] Additionally, whenever a defendant appears and pleads to the merits without contesting the jurisdiction, there is clearly a voluntary submission. Similarly, where the defendant agrees to a consent order dismissing the claims and cross claims, or where it fails to appear in proceedings at first instance but appeals on the merits, it is a voluntary submission.[79]

B.2 Grounds For Impeachment

28. The circumstances in which a foreign judgment might be impeached include where the court giving the judgment did not have jurisdiction to give the judgment; where it was obtained by fraud; its enforcement would be contrary to public policy; or the proceedings in which it was obtained were contrary to the principles of natural justice.[80] Notably, a Russian judgment would

[75] [14R-097], Rule 44 of Dicey
[76] [14-079], Rule 43 of Dicey
[77] [14-069], Rule 43 of Dicey
[78] [55], GFH v Haigh, relying on *AES Ust-Kamenogorsk Hydropower Plant LLP v AES Ust-Kamenogorsk Hydropower Plant JSC* [2012] 1 WLR 920 (27 May 2011)
[79] [14-069], Rule 43 of Dicey
[80] Rule 42 of Dicey; [84] and [85], Barclays v BR Shetty. Usually, courts have held that the foreign judgment is impeachable if it is tainted by fraud, proceedings were contrary to natural justice, or against the public policy of DIFC. However, Dicey also notes that it is impeachable if the court giving the judgment lacked jurisdiction.

not be impeached on the grounds that it is manifestly wrong on merits, or the court has misapplied the Russian law or any other law, or the court admitted evidence inadmissible in the DIFC or did not admit evidence admissible in the DIFC, or otherwise followed a practice different from the DIFC law.[81]

[i] Lack of jurisdiction[82]

29. In terms of the Lugovoy Law, Russian courts may have exercised their exclusive jurisdiction over the dispute involving sanctioned parties or affected by anti-Russia sanctions in spite of an exclusive jurisdiction clause ("EJC") or a foreign-seated arbitration agreement agreed by the parties for the resolution of their disputes ("Original DR Clause"). The judgment debtor may argue that Russian court had no jurisdiction as it was contrary to parties' agreement.[83] The Russian court's decision to accept exclusive competence would be tested by reference to the DIFC rules of conflict of laws.[84] With respect to an arbitration agreement, a ruling on invalidity of the arbitration agreement is to be tested as per the law governing the arbitration agreement.[85]

30. As noted above at [25], the foreign court would have no jurisdiction if the bringing of the proceedings in that court was contrary to an agreement under which the dispute in question was to be settled.[86] However, this rule is not applicable if the Original DR Clause was illegal, void or unenforceable or was incapable of being performed for reasons, not attributable to the fault of the

[81] [112], GFH v Haigh, relying on *Pemberton v Hughes* [1899] 1 Ch. 781
[82] While determining if the court giving the judgment lacked jurisdiction, the rules to determine competent jurisdiction will be applicable (see [24] to [26]): [14-129], Rule 49 of Dicey
[83] This is unless the defendant submitted to the court's jurisdiction or filed a claim/counterclaim.
[84] [14-098], Rule 44 of Dicey; [46], GFH v Haigh. This is regardless of the fact that the Russian courts may have exercised jurisdiction in accordance with their own rules of conflict of laws: [14-098], Rule 44 of Dicey; [18], Lural v Listran
[85] This is required by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. See [82], *YYY Limited v ZZZ Limited* DIFC Arb 005/2017 (17 November 2019) ("Y v Z")
[86] [14R-097], Rule 44 of Dicey

party bringing the proceedings in which the judgment was given ("Incapability Contention"). Additionally, under the principles of conflict of law, it may be arguable that DIFC Courts may not give effect to the Original DR Clause when there are **'strong reasons'** to do so ("Strong Reasons Contention").[87]

31. **Incapability Contention:** An agreement is incapable of performance if the circumstances are such that it could no longer be performed even if both parties are ready, able and willing to perform it. It denotes impossibility or practical impossibility but not mere inconvenience or difficulty.[88] A decision by the Canadian Supreme Court is instructive in this regard. The court notes that the agreement would be incapable of being performed where the arbitral process or adjudication process cannot be effectively set in motion because of physical or legal impediment beyond the parties' control. The court elucidated that physical impediment may include *inter alia* political or other circumstances at the seat of the arbitration rendering the Original DR Clause impossible, whereas legal impediments include the subject matter of the dispute being covered by an express legislative override of the parties' right to arbitrate.[89]

32. Depending on the facts and circumstances of each case, the judgment creditor may be able to show that the Original DR Clause was incapable of being performed (see [35] below). Further, if the defendant submitted to the court's jurisdiction, it

[87] [19], Lural v Listran; [24] - [28], *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant* [2013] UKSC 35 (27 May 2011), r/w *Donohue v Armco Inc* [2001] UKHL 64 (13 December 2001) ("Donohue v Armco"); [31], *ADM Asia-Pacific Trading Pte Ltd v PT Budi Semesta Satria* [2016] EWHC 1427 (Comm); [103] - [106], *Nori Holding Limited & Ors. v Public Joint-Stock Company <<Bank Otkrite Financial Corporation>>* [2018] EWHC 1343 (Comm) (6 June 2018)

[88] *Gatoil International Incorporated v National Iranian Oil Company*, 1990 WL 10622722 (English Court of Appeal) at pp. 3 and 6 ("Gatoil")

[89] [129], [144] & [145], *Peace River Hydro Partners v Petrowest Corp* 2022 SCC 41 (Supreme Court of Canada) (10 November 2022)

can be demonstrated as waiver of the Original DR Clause. It may also be arguable that the political circumstances at the seat, like imposition of sanctions, rendered the clause impossible to perform. For instance, in *Ziyavudin Magomedov Port-Petrovsk Limited and Ors. v PJSC Transneft and Ors.*, the English court recognised the defendant's difficulties in making payment to the English lawyers to defend the proceedings.[90] Moreover, none of these impediments (including at [6] above and [35(a)] below), on account of sanctions, may be attributable to the claimant seeking the judgment (see [29] above) but still render the agreement incapable to perform.

33. Additionally, if a party were able to satisfy the court that the agreement was incapable of being fairly performed, that would suffice for the agreement to be rendered incapable of being performed.[91] We have explained the test for a fair trial at [34] to [35] below.

34. **Strong Reasons Contention:** It is arguable that the judgment creditor may be able to show,[92] that there were strong reasons not to give effect to the Original DR Clause and consequently, the Russian court exercised jurisdiction over the dispute. What constitutes a strong reason depends on the facts and circumstances of the particular case.[93] The English court's scrutiny in *Zephyrus Capital Aviation Partners 1D Ltd and Ors. v Fidelis Underwriting Ltd and Ors.*[94] may be demonstrative of the exercise

[90] [32] to [34], & [43], Transneft. However, the court continued the anti-anti-suit injunction until the determination of a jurisdictional challenge.
[91] Fairness is a necessary element of any arbitration or adjudicative process: *Gatoil International Incorporated v National Iranian Oil Company*, 1990 WL 10622722 at pp. 3 and 6
[92] The burden is on the party requesting the court to not uphold the parties' agreement, see [24] – [25], Donohue v Armco
[93] [125], *Zephyrus Capital Aviation Partners 1D Ltd and Ors. v Fidelis Underwriting Ltd and Ors.* [2024] EWHC 734 (Comm) (18 March 2024) ("Zephyrus v Fidelis"). Strong reasons cannot be established merely by demonstrating factors that place Russia as a more appropriate forum on a *forum non conveniens* analysis: [125], Zephyrus v Fidelis.
[94] Zephyrus v Fidelis

undertaken by the courts for its assessment of the strong reasons.

35. In the seminal decision of *The Eleftheria*,[95] Brandon J. listed a non-exhaustive list of matters that the courts may regard while exercising its discretion.[96] Similar to other common law jurisdictions,[97] the DIFC Courts have invalidated the Original DR Clause because of factors such as convenience and fairness.[98] However, the court may not have regard to them if they were foreseeable at the time of the contract.[99] The court will also have regard to the factor that the claimant would have been prejudiced by having to sue in the foreign court/ foreign-seated arbitration because a fair trial was unlikely for political, racial, religious or other reasons.[100] While considering if the risk of an unfair trial was foreseeable,[101] it will carry weight only to the extent that the parties could foresee a risk of an unfair trial in respect of the kind of dispute likely to arise under their contract.[102] Further, while

---

[95] *Owners of Cargo Lately Laden on Board the Ship or Vessel Eleftheria v The Eleftheria (Owners)* [1969] 2 W.L.R. 1073 ("Eleftheria")

[96] Eleftheria, at p. 5 lists the following: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts; (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects; (c) With what country either party is connected, and how closely; (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

[97] [18], Avril D. Haines, 'Choice of Court Agreements in International Litigation: Their Use and Legal Problems to Which They Give Rise in the Context of the Interim Text',relying on Australian courts in *Lewis Construction v Tichauer* [1966] VR 341; *Lep International v Atlanttrafic Express* [1987] 10 NSWLR 614; *Ramcorp v DFC Financial Services* unreported, Supreme Court of New South Wales, Waddell CJ in Eq., 30 April 1990

[98] [119], Rafed I.

[99] However, an important caveat is that grounds such as inconvenience of witnesses, location of documents, timing of the trial, and all such similar matters are precluded, if they were eminently foreseeable at the time the parties entered into the contract: [114], Zephyrus v Fidelis, relying on *British Aerospace plc v Dee Howard Co* [1993] 1 Lloyd's Rep 368.

[100] This is relevant as interestingly, the English courts, while considering whether to give effect to an agreement governed by Russian law and subject to Russian courts, regarded this condition properly while exercising its discretion against holding a trial in Russian courts: [125], Zephyrus v Fidelis.

[101] A cogent argument can be made that, having agreed to a particular forum, a party would not normally be allowed to avoid it on grounds relating to (for example) its approach to appeals, disclosure or the admission or testing of evidence: [129], Zephyrus v Fidelis.

[102] [125], [129] & [131], Zephyrus v Fidelis. At [130], Zephyrus v Fidelis, the court notes an example *i.e.,* if it was not foreseeable that a dispute under the contract in question would be likely to engage state or other interests such as to give rise to a material risk of an unfair trial, then the argument that unfairness has been "priced into the bargain" will have little force. That will remain the case even if, as matters turn out, a series of events occur whose effect is that the state does take an interest in the dispute.

considering the degree of likelihood or risk of an unfair trial, the threshold is a higher standard than the 'real risk' of denial of substantial justice[103] *i.e.*, it will generally be necessary to show that the preponderance (in terms of weight and cogency) of the evidence indicates that it is likely that the agreed forum will not provide a fair trial.[104]

36. From the above, it appears that the judgment holders may be able to argue that the Original DR Clause was not capable of being performed or alternatively, it was just, convenient, and fair to not give effect to the Original DR Clause.

(a) The parties have submitted that there were many obstacles in proceeding with or anticipating to proceed with the dispute under the Original DR Clause, including: (i) the lack of impartiality of the international arbitral tribunal due to the seat of arbitration being an 'unfriendly-to-Russia' State;(ii)[105] unequal placement of the Russian party compared to the foreign party, especially on the issue of how sanctions affect the proper performance of the claimant's obligations under the contract;[106] (iii) lack of clarity in the arbitration appeal process, especially because of not receiving the arbitral award;[107] (iv) failure to exercise its procedural rights on account of foreign banks rejecting payment;[108] and (v) those highlighted at [6] above. Moreover, for parties who entered into the contracts prior to the war and the sanctions

[103] [141] & [143], Zephyrus v Fidelis

[104] It is not sufficient to make 'broad and conclusory allegations' about the judicial system in the contractual forum, but the claimant may be able to identify specific features of the claim which give rise to a real risk of injustice. Further, the claimant is required to adduce 'positive and cogent' evidence. In its absence, the court will start with the working assumption that courts in other jurisdictions will seek to do justice and shall be free from improper interference or restriction: *see* [157] & [164], Zephyrus v Fidelis.

[105] Goldman Sachs

[106] Goldman Sachs

[107] Thywissen

[108] Thywissen

may not have foreseen this nature of inability to refer disputes as per the Original DR Clause.

(b) The Russian courts' decisions and considerations in deciding to invalidate the Original DR Clause will have to be assessed as per DIFC's conflict of laws and at the same threshold, including the incapability and these strong reasons above. Judgment creditors will firstly need to highlight the fact that Article 248.1(4) of the Arbitrazh Code is in sync with the conflict of law rules as it only gives Russian courts the power to exercise competence over the dispute if the Original DR Clause is not feasible. Courts in England have also acknowledged the fact that the Lugovoy Law was introduced on account of the effect of Western sanctions on Russian parties, in particular the effect on such parties' ability to access justice in Western countries.[109] The judgment creditor will also need to establish that the Original DR clause had become incapable of being performed for reasons not attributable to the parties, for instance, when an arbitral institution decides not to administer the dispute due to the imposition of sanctions,[110] or for reasons of political and economic sanctions, which to begin with, were beyond the control of the parties.

(c) It may also be arguable that as the Original DR Clause were foreign litigations or arbitrations seated in States designated as 'unfriendly' by Russia (see [4] above), the likelihood or risk of receiving a fair trial was low and would lead to denial of substantial justice in these States.

37. It is pertinent to note that the burden to prove that the foreign

[109] [41] & [43], Transneft
[110] See, Article 24.10A, LCIA Rules

court was competent in the sense recognised by enforcing court's law to assume jurisdiction over the dispute is on the judgment creditor seeking to enforce the foreign judgment. However, the evidentiary burden might shift during trial.[111]

38. Further, the DIFC Court's obiter in *Alucor Limited v Rohr Rein Chemie Middle East LLC ("Alucor")*[112] is also useful. In *Alucor,* the Original DR Clause was an EJC in favour of the DIFC Courts. However, the defendant-initiated proceedings before the Dubai on-shore courts and obtained a judgment. On the claimant's application before the DIFC Court, the court considered the statutory provisions of UAE and accepted that the Dubai court had jurisdiction in terms of the UAE Civil Procedure Code, noting that common law rules cannot operate to amend the UAE statute or truncate or qualify the jurisdiction of the onshore courts. The Court noted that *"exclusive jurisdiction clause in a contract does not necessarily deprive a non-contractual court of jurisdiction. If a non-contractual court declines to exercise jurisdiction because the proceeding is the subject of an exclusive jurisdiction clause in favour of the contractual court, it will not necessarily do so because the effect of the clause is to deprive it of jurisdiction within its own legal system."* [Emphasis supplied.] However, this is caveated because the DIFC Court recognised the jurisdiction of the Dubai court which is a court of the same polity. The court further noted that *"[i]t is a separate question whether, in courts covered by the exclusive jurisdiction clause, conflict of law rules require treatment of a judgment made by the non-contractual court of another polity as a judgment which that court had no jurisdiction to make."*[113] As it appears that the question is kept

[111] *Adams v Cape Industries Plc,* [1990] Ch. 433, 450 (27 July 1989)
[112] *Alucor Limited v Rohr Rein Chemie Middle East LLC* [2021] DIFC TCD 001 (7 October 2021) ("Alucor")
[113] [112], Alucor

open by the DIFC Courts for later consideration, *Alucor* may be relied upon to argue that giving effect to the Original DR Clause may have deprived the Russian courts of jurisdiction within their own legal system.

[ii] Fraud

39. The Russian judgment cannot be enforced where it has been obtained by fraud by either the parties or the court itself (for instance, where the foreign court has taken bribe to give a judgment in favour of the judgment creditor).[114] While considering the contention that the fraud is perpetrated by the judgment creditor, the DIFC Court will assess if the Russian court was misled or deceived with a dishonest intention.[115] In a case of fraud by court, the defence to fraud often merges with the challenge that the proceedings were in breach of principle of natural justice.[116]

40. It has been held that if a *prima facie* case of investigation is shown, there cannot be an order of recognition or enforcement[117] until the issue has been decided by the enforcing court. In considering the question, it is stated that it would be appropriate to bear in mind about the need for a nuanced approach, depending on the reliability of the foreign legal system (Russia), the scope for challenge in the foreign court, and the type of fraud alleged.[118] However, if the issue of fraud relating to the Russian judgment has been raised and decided in Russia (originating court) or in any third enforcing country court, it can potentially act as an issue estoppel before the DIFC Courts.[119]

[114] [14-114], Rule 47 of Dicey; [86], Barclays v BR Shetty; [53], Barclays v Essar
[115] [57] - [63], Barclays v Essar, relying on *Abouloff v Oppenheimer & Co* (1882) 10 QBD 295; *Vadala v Lawes* (1890) 25 QBD 310
[116] [14-114], Rule 47 of Dicey; see principles of natural justice as a ground for impeachment (*see* below at Section IV.B.[iii]).
[117] [14-142], Rule 50 of Dicey
[118] [68] - [76], GFH v Haigh; *Owens Bank Ltd v Bracco* [1992] 2 A.C. 443; [14-142], Rule 50 of Dicey
[119] *Owens Bank Ltd v Bracco* [1992] 2 A.C. 443

[iii] Public Policy

41. The Russian judgment will not be recognised or enforced if such recognition or enforcement would be against the public policy of the DIFC Courts.[120] The enforcement would have to *"fundamentally offend the most basic explicit principles of justice and fairness in the UAE."* [121] Some examples of such circumstances are as follows.

42. **First,** where the Russian judgment is inconsistent with a previous decision of a competent DIFC court in proceedings between the same parties or their privies, *res judicata* being capable of expression as a rule of public policy.[122]

43. **Second,** where the judgment of the Russian court has been obtained in disobedience of an injunction not to proceed with the action in a foreign court.[123] Some proceedings before the Russian courts under the Lugovoy Law have been the subject of anti-suit injunctions by other courts.[124] The review of English [125] and Singapore [126] decisions, on their facts, appear to suggest that the courts will consider it a disobedience if the injunctions have been granted by the enforcing court itself to consider it against its public policy. Therefore, as DIFC Courts have not granted anti-suit injunctions against Russian proceedings under the Lugovoy

[120] [60], *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] SGHC 104, relying on [1009], 'Halsbury's Laws of England vol 8(1)' (Butterworths, 4th Ed, Reissue); [14R-152], Rule 51of Dicey; *Ackerman v Levine* 10 F. Supp. 633 (S.D.N.Y. 1985) (20 May 1985)

[121] [21], *Lucinethlucineth v Lutinalutina Telecom Group Ltd.* [2019] DIFC ARB 005 (8 August 2019)

[122] [14-156], Rule 51 of Dicey

[123] [14-156], Rule 51 of Dicey. While Dicey further notes that it is to be also reviewed in circumstances of evidently discreditable behaviour on the part of the court concerned, it relies on the judgment in *AK Investment CJSC v Kyrgyz Mobil Tel Limited and Others*, [2011] UKPC 7 ("AK Investment") at [121]. However, the court notes that this circumstance is 'arguable'. Moreover, the decisions citing AK Investment for this contention, as reviewed, do not appear to explain the requirement of discreditable behaviour by the foreign court.

[124] [112] & [113], *UniCredit Bank v RusChemAlliance LLC* [2024] UKSC 30 (18 September 2024); [52] & [53], *Renaissance Securities (Cyprus) Ltd v Chlodwig Enterprises Ltd & Others* [2023] EWHC 2816 (Comm) (3 November 2023)

[125] *Phillip Alexander Securities & Futures Ltd. v Bamberger* [1997] ILPr 73, at p.102

[126] [60] - [65], *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] SGHC 104

Law,[127] it remains to be seen how will the DIFC Courts will interpret and if they shall grant enforcement despite an anti-suit injunction by another court.

44. **Third,** where the foreign court has acted in excess of its jurisdiction.[128] For instance, the DIFC Court in *YYY Limited v ZZZ Limited*[129] refused to recognise a judgment of the Dubai Courts that had concluded that an arbitration agreement was null and void. The court held that such recognition would be in breach of its public policy as it would put the DIFC Court itself in breach of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") for failing to uphold the arbitration agreement.[130] The DIFC Court noted that issues pertaining to the ability of the DIFC Courts to recognise and enforce foreign arbitral awards also extend to the enforcement of foreign judgments.[131] We have discussed competent court and lack of jurisdiction above.

[iv] Natural Justice

45. The Russian judgment may be impeached if it was passed in breach of natural justice.[132] The DIFC Courts will not investigate the propriety of the Russian proceedings, unless it offends DIFC Court's views on substantial justice relating to irregularity in the proceedings.[133] Such irregularities include:[134]

(a) The Russian court not giving notice to the litigant that they are about to proceed to determine the rights between him

[127] We have not yet come across a decision of the DIFC Court granting an anti-suit injunction against the Russian proceedings under the Lugovoy Law.
[128] [10] to [26], Lural v Listran
[129] [2017] DIFC ARB 005 (17 November 2019)
[130] [83], Y v Z
[131] [1], *Egan & Ors. v Eava & Ors* [2013] DIFC ARB 002 (29 July 2015)
[132] [14R-162] Rule 52 of Dicey; [65], Barclays v Essar
[133] [90], Barclays v BR Shetty
[134] [112], GFH v Haigh

and the claimant;

(b) Having given notice, it does not afford him an opportunity of substantially presenting his case before the court; or

(c) The Russian court failed to follow its own procedure.

46. A pertinent point relating to the ground of natural justice is that notice of the proceedings is a fundamental requirement and in the absence of the same, it may be considered as denying fair trial to the judgment debtor. This requires giving proper notice or 'service'. The courts have held that if the defendant is given proper notice than a technical irregularity in the mode or manner of service will be irrelevant. Similarly, if the defendant has agreed to a particular method of service, and service is effected according to the agreed method, then it is immaterial that the defendant did not receive actual notice of the proceedings. The ultimate question that is to be answered is whether there has been proof of substantial injustice caused by the proceedings.[135]

47. In *Barclays Bank PLC & Ors. v Essar Global Fund Ltd.*,[136] the defendant cited breach of natural justice to resist the recognition and enforcement of a New York judgment, as they precluded an opportunity for the defendant to be heard. The DIFC Courts rejected the argument and held that the defendants had acted *"with the assistance of lawyers of high reputation"* and agreed to provide the claimants with affidavits of confession understanding fully that they could lead to a confession judgment without any prior notice and without any hearing involving either of the parties.[137] Another instance is of the English Court where it noted that a procedural irregularity not sufficient to constitute a

[135] [96] & [97], *Cancrie Investments Limited v Mr. Zulfiqur Al Tanveer Haider* [2024] EWHC 1876 (Comm) (22 July 2024)
[136] Barclays v Essar
[137] [66] and [67], Barclays v Essar

breach of natural justice.[138]

B.3 Brief Overview of the Procedure for Enforcement in the DIFC

48. The DIFC Courts have jurisdiction to ratify a judgment of a recognised foreign Court pursuant to Article 24 of the DIFC Court Law 10 of 2004 read with Article 7(6) of the JAL. A foreign judgment constitutes a cause of action (by initiating a new claim) that will be enforced by the DIFC Courts if the requirements above are met. Proceedings in the DIFC courts are ordinarily commenced by issuing a claim form under Part 7 of the Rules of the DIFC Courts (the "RDC").[139] The judgment creditor will have to attach a certified copy of the judgment (obtainable from Russian courts) with the claim form.[140] As the recognition and enforcement of the subject Russian decisions are likely to be contested, issuing a claim form under Part 7 of the RDC may be more suitable. If following service,[141] the defendant does not respond to the claim, the claimant will be entitled to apply for a judgment in default under the RDC.[142] Similarly, if after assessing the defence if the claimant finds it suitable, he may apply for an immediate judgment under Part 24 of the RDC.

C. Other Considerations

49. While applying for recognition and enforcement of the Russian decision, there are a few additional points the judgment creditors ought to consider:

---

[138] *Emirates NBD Bank PJSC v Rashed Abdulaziz Almakhawai & Ors.* [2023] EWHC 1113 (Comm) (12 May 2023)

[139] The proceedings can theoretically be issued as a claim form under Part 8 of the RDC. Part 8 is an alternative and expedited procedure, which can be used where there is no need for a full court process because the claim is unlikely to involve a substantial dispute of fact. However, Part 7 seems a more appropriate route to initiate these proceedings.

[140] [66], Enforcement Guide, Edn. 5 of the DIFC Courts available here.

[141] In terms of Rule 9.53 and Rule 9.54 of the RDC, the claim form will then have to be served. In the event the judgment debtor has an office in the DIFC, the claim form can be served there or has to be served out of jurisdiction, except for a separate service method agreed between the parties. DIFC law does not require court's permission to be served out of jurisdiction but the service will be as per the method permitted by the law of the place where service is effected.

[142] Rule 13.5 of the RDC

50. **First,** the judgment debtor may have various challenges to the claim for recognition and enforcement of the Russian judgment. If the judgment debtor raises practical difficulties for enforcing an order for costs against the judgment creditor, it may seek an order for security for costs from the DIFC Court. The order for security *"is intended to remove the risk of irrecoverability of costs under a future order because of the difficulty of enforcing such an order in the foreign jurisdiction."*[143] In the event the judgment creditor is sanctioned or from Russia with assets mainly in Russia or the party's assets are subject to a freezing order on account of sanctions, the judgment debtor might argue that these pose a risk of enforcing a costs order.

51. **Second**, it may be possible that there are parallel arbitration or foreign court proceedings relating to the same dispute (probably referred to as per the Original DR Clause) as before the Russian courts. This includes proceedings for interim remedies or anti-suit injunctions against the Russian proceedings. The defendant may obtain the judgment or the award prior to the decision of the Russian court and proceed for recognition and enforcement. The court may then determine the viability of the recognition as per the principles set out above.

52. **Third**, the costs involved for recognition, enforcement, and execution could be substantial especially as execution may be against assets in several jurisdictions. The judgment creditor may consider seeking assistance from a litigation financier to fund these costs for a share in the recovery. Alternatively, the litigation financier can acquire the judgment at a discount from the

[143] [46] - [49], *Mr Rafed Abdel Mohsen Bader Al Khorafi v Bank Sarasin-Alpen (ME) Limited*, [2010] DIFC CA 001 (23 January 2011)

judgment creditor. This assists the judgment debtor to have a dollar today than speculative five dollars tomorrow.[144]

53. On receiving the enforcement order for the foreign judgment, if the judgment debtor has assets in DIFC, the creditor can execute the DIFC judgment in DIFC. Parts 46 to 50 of the RDC provide assistance for execution of the enforcement orders. Additionally, though winding up appears to be a plausible solution for the judgment creditor; the judgment creditor may also consider seeking a recognition and enforcement of the Russian decision and then seek execution by way of winding up of the judgment debtor (see [19] above).[145]

V. INTERIM MEASURES

54. DIFC has a broad jurisdiction to grant interim measures, including worldwide freezing orders ("WFOs")." The concern is that the defendant may dissipate the assets or put it beyond reach of the claimant to frustrate any eventual decision in favour of the claimant. To safeguard this concern, the claimant can seek WFOs from the DIFC Courts in aid of the Russian proceedings ("Freestanding WFOs"). The claimant may also seek WFOs in aid of enforcement before the DIFC courts. We discuss the requirements of WFOs in our paper here.

55. There has been development in the DIFC regarding the Freestanding WFOs where the broad jurisdiction is narrowed down. This narrow scope is being reconsidered by the DIFC Court

[144] Singularity specialises in advising clients in raising post project finance for legal claims and debt collection. Our profile on litigation finance can be accessed here.

[145] Section 82(b) of the DIFC Insolvency Law notes that the debtor is deemed to be unable to pay debts if execution or other process issued on a judgment, decree, or order of any DIFC Court in favour of the creditor is returned unsatisfied in whole or in part.

of Appeal.[146] The law of DIFC, as held in *Sandra Holding Ltd v Fawzi Musaed Al Saleh* ("Sandra Holding"), is that the court will not grant a Freestanding WFO if none of the jurisdictional gateways outlined in Article 5(A)(1)(a) to (d) and 5(A)(2) of JAL are fulfilled. The claimant cannot rely only upon Article 5(A)(1)(e) for the WFOs:[147]

56. The effect for the purposes of this paper is that the DIFC Courts can grant a Freestanding WFO in aid of Russian proceedings only if it has *in personam* jurisdiction over the defendant. Consequently, if all conditions are satisfied, the claimant may obtain a WFO from the DIFC Courts if the defendant is a DIFC Establishment (see [11] above). That is a wide pool of defendants with foot in the DIFC (see [11] above). Moreover, in the event Sandra Holding is overturned, DIFC courts will be able to grant Freestanding WFOs against all defendants in aid of the proceedings even though they have no nexus (presence or assets) in the DIFC. Moreover, the claimant will also have remedies in the event of non-compliance with such orders. We discuss the remedies for non-compliance with non-money judgments in our paper here.

[146] Further discussed in detail at Section VI in the chapter titled, *"Obtaining Worldwide Freezing Orders in the DIFC: Freestanding and in Aid of Enforcement"*, accessible here.

[147] [51] - [54], *(1) Sandra Holding Ltd (2) Nuri Musaed Al Saleh v (1) Fawzi Musaed Al Saleh (2) Ahmed Fawzi Al Saleh (3) Yasmine Fawzi Al Saleh (4) Farah El Merabi* [2023] DIFCCA 003 (6 September 2023)

VI. CONCLUSION

57. The prospect of enforcing Russian court judgments made under the Lugovoy law remains a significant challenge in most jurisdictions. In contrast to this, DIFC has emerged as a potential solution for enforcing such judgments. The DIFC's strong enforcement regime, coupled with its absence of a separate sanctions regime, makes it an attractive jurisdiction for recognition and enforcement of Russian decisions under the Lugovoy Law. Under the DIFC Insolvency Law, insolvency proceedings can be instituted against judgment debtors who are registered in DIFC by using the decisions of the Russian courts as evidence of existing debts.

58. While the DIFC Courts have been pro-enforcement, the enforceability of Russian judgments under the Lugovoy Law presents unique challenges. Therefore, despite the challenges, DIFC may offer a viable avenue for enforcing Russian judgments under the Lugovoy Law. Moreover, there has been no adverse decision by the DIFC Court against such enforcement as yet. By carefully navigating the legal requirements and potential obstacles, judgment creditors may be able to obtain recognition and enforcement of their Russian judgments in the DIFC Courts, and use the resulting judgment for execution in other jurisdictions.

ABOUT US

Singularity is an Asia and Africa focused international disputes boutique, established in August 2017. Since then, we have handled over US$ 8 billion in cross-border disputes in various sectors, including energy and resources, construction and infrastructure, shipping and maritime, sports and entertainment, international trade and business, and private equity and finance. These disputes have arisen out of business relations and projects in various parts of the world including the Bahamas, British Virgin Islands, Cayman Islands, Canada, Egypt, Hong Kong, India, Israel, Italy, Indonesia, Kazakhstan, Nigeria, Malaysia, Oman, Philippines, Russia, Turkey, UAE, UK, USA, Saudi Arabia, Sierra Leone Singapore and Somalia.

We are recognised as market leaders.

a. Ranked as "Most Active in the Enforcement & Annulment of Commercial Arbitration Awards" - Jus Connect's 2023 Rankings

b. Chambers Global - Dispute Resolution: Arbitration (2023)

c. Legal 500 - Tier 2 Dispute Resolution: Arbitration (2023)

d. Asian Legal Business - Fast 30: Fastest & Fierce Growing Law Firms (2022)

e. AsiaLaw Profiles - Notable Firm (2022)

f. Benchmark Litigation (India) - Recognised for Commercials & Transactions; Construction; International Arbitration; White Collar Crime practice areas (2023); Top 6 Boutique Firms in Asia-Pacific for Dispute Resolution; Tier 3 in India for International Arbitration (2021)

g. Leaders' League - Best Law Firm in India for Intl' Arbitration & White-Collar Crime (2021)

LAWYERS OF TOMORROW

h. Financial Times - Recognised for moving the Litigation Finance market forward (2021); Top 5 in Asia-Pacific for Innovation in Dispute Resolution (2020)

i. Forbes India - Top Law Firm in India for White-Collar Crime and Arbitration practice (2021)

j. BusinessWorld - Oil & Gas Law Firm of the Year (2021)

OUR MIDDLE EAST PRACTICE

Singularity Legal is licensed to practice as legal consultants in the UAE, including as solicitors before the courts at Dubai International Financial Centre (DIFC) and Abu Dhabi Global Markets (ADGM).

Our partner, Prateek Bagaria, has also been registered as a Part II lawyer with full rights of audience before the DIFC Courts and will be heading the firm's Middle East practice.

On the firm's entry into the UAE, he said:
"DIFC is an upcoming business and trade hub and has been a priority center for Indian financial institutions, funds, family businesses, multinational corporations, and trading houses, among others, operating in the Asia-Africa corridor. Moreover, in light of the new India-UAE Comprehensive Economic Partnership Agreement (CEPA), business dealings in the DIFC are slated to grow exponentially. We are thrilled to expand our practice to the Middle East, where our clients increasingly require our assistance with their disputes. This expansion will also give the clients more immediate access to the firm's specialists and wider network in the MENA region."

Singularity now has the end-to-end ability to service clients across the UAE, including DIFC and ADGM Courts, covering disputes relating to:

(a) construction and infrastructure projects
(b) shipping and maritime
(c) bank guarantees and insurance
(d) debt recovery, enforcement, and insolvency
(e) intellectual property
(f) digital assets
(g) pro bono representation

In view of our remarkable achievements in the Middle East, we have also been ranked as one of the "most active law firms in the enforcement and annulment of commercial awards in the United Arab Emirates".

ABOUT EXPERT TALK

The Expert Talk initiative seeks to provide quality continued digital education to professionals, through freely accessible webinars, and a digital library of blogs, alerts, insights and talks, on dispute resolution and litigation finance.

LAWYERS OF TOMORROW

DISCLAIMER

The contents of this insight should not be construed as a legal opinion. This insight provides general information existing at the time of preparation. Singularity Legal neither assumes nor accepts any responsibility for any loss arising to any person acting or refraining from acting as a result of any material contained in this insight. It is recommended that professional advice be taken based on the specific facts and circumstances. This insight does not substitute the need to refer to the original pronouncements.

South Asia Office

1809-1810, One Lodha Place,
Senapati Bapat Marg,
Lower Parel,
Mumbai - 400013

United Arab Emirates

Level 41, Emirates Towers,
Sheikh Zayed Road,
Dubai, UAE
PO Box 31303

Singapore Office

138 Market Street,
#24-01 CapitaGreen,
Singapore 048946

e: singularity@singularitylegal.com
w: www.singularitylegal.com

LAWYERS OF TOMORROW