

The Reciprocal Enforcement of Civil Judgments Between India and the UAE

The Agreement between the United Arab Emirates and India on Juridical and Judicial Cooperation in Civil and Commercial Matters (the “Treaty”) was signed in 1999 and ratified in 2000. In January 2020, the Government of India notified the UAE as a “reciprocating territory” for the purposes of recognising UAE civil judgments in India without a re-examination of the merits of the underlying dispute. The Treaty is a reflection of the close cultural and economic ties between the two countries. The mutual recognition of civil judgments between a civil law jurisdiction and a common law jurisdiction gives rise to a number of challenges. However, overall, businesses as well as the courts of the “common law islands” in the UAE, namely the Dubai International Financial Centre and the Abu Dhabi Global Market, are likely to benefit from this development.

L'accord entre les Émirats arabes unis et l'Inde sur la coopération juridique et judiciaire en matière civile et commerciale (le « Traité ») a été signé en 1999 et ratifié en 2000. En janvier 2020, le gouvernement indien a reconnu les Émirats arabes unis en tant que « territoire de réciprocité » aux fins de la reconnaissance des jugements civils des Émirats arabes unis en Inde sans réexamen du bien-fondé du différend sous-jacent. Le Traité est le reflet des liens culturels et économiques étroits entre les deux pays. La reconnaissance mutuelle des jugements civils entre une juridiction de droit civil et une juridiction de common law soulève un certain nombre de défis. Cependant, dans l'ensemble, les entreprises ainsi que les tribunaux des « îles de common law » des Émirats arabes unis, à savoir le Dubai International Financial Centre et le Abu Dhabi Global Market, sont susceptibles de bénéficier de cette évolution.



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Introduction

The Agreement between the United Arab Emirates and India on Juridical and Judicial Cooperation in Civil and Commercial Matters (the "Treaty") was signed in 1999 and ratified in 2000. In January 2020, the Government of India notified the UAE as a "reciprocating territory" for the purposes of recognising UAE civil judgments in India without a re-examination of the merits of the underlying dispute.

The Treaty essentially lay forgotten in both countries until 2014 when the DIFC Courts published a Guide to Enforcement of DIFC Court Judgments, in which it was noted that the Treaty was signed in 1999 but was never ratified. The DIFC Courts had made efforts to clarify the position but were unsuccessful: they were advised that the Treaty was not ratified and that an Act of the Indian Parliament was required to ratify it.

The Treaty had been signed together with a Mutual Legal Assistance Treaty concerning criminal matters as well as an Extradition Treaty. The Extradition Treaty and the criminal treaty had been used several times by both countries. Also, there was a strong belief in Indian legal circles that the Treaty had been ratified.

Initial enquiries to resolve the position revealed little: the Indian Ministry of External Affairs had no record in its archives of India having ratified the Treaty. The UAE Ministry of Justice knew that the Treaty had been published in the UAE Gazette in 2000 but had little information beyond that. The research that followed was more historical rather than legal: a news wire from the Kuwait National News Agency revealed that India and the UAE had exchanged instruments of ratification in May 2000 (along with the criminal matters treaty and the extradition treaty). A November 2000 Gazette notification issued by the Government of India stated that UAE court documents could be served in India and vice versa: such a notification would not normally be issued in the absence of a bilateral treaty.

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In the meantime, Indian Courts routinely rejected applications for the enforcement of UAE civil judgments. By 2019, the arguments in the Indian Courts had developed as follows: the Treaty had been ratified, therefore the Indian Courts were required to give effect to UAE civil judgments. The Courts, on the other hand, pointed to section 44A of the Indian Code of Civil Procedure, which requires the Government of India to notify a country as a "reciprocal territory" in order for the courts to be able to recognise and enforce judgements from that country without re-examining the merits of the underlying case.

Resolution of the conundrum finally came after the DIFC Courts wrote to the International Cooperation Division (ICD) of the UAE Ministry of Justice in 2018 and encouraged them to ensure that the DIFC Courts and the ADGM Courts got notified as "superior courts" of the UAE. Coincidentally, a senior judge of the Bombay High Court

became seized of the issue in *Damas LLC v. Deepak Dhakan and Ors*,¹ a case brought by a Dubai company seeking enforcement in India of a Dubai Court judgment. The judge expressed his strong displeasure at the long delay in giving effect to the Treaty and directed that his Order be brought to the attention of the Indian Minister for Law and Justice and the Minister for External Affairs.

Once the January 2019 Order of the Bombay High Court reached Delhi, the Undersecretary in charge of the ICD in Abu Dhabi received an invitation from his Indian counterpart to a meeting in Delhi to discuss the resolution of the issue. That meeting took place in December 2019 and on 17 January 2020, the Government of India issued a notification under section 44A of the *Civil Procedure Code*, notifying the UAE as a "reciprocating territory."

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Historical and Economic Context

The Treaty is noteworthy for a number of reasons:

1. The preamble to the Treaty notes the "*bonds of friendship between the two countries*". The India-UAE relationship is a unique one and the Treaty cannot be understood without examining this historical and economic context:
 - a. The Gulf-India relationship goes back thousands of years to the very beginning of seaborne trade.
 - b. The majority of expatriates resident in the UAE are Indian citizens (estimated to be 51% of the expatriate population).
 - c. As of 2019, the annual bilateral trade between the two countries is in excess of USD 60 billion.
2. The Treaty is part of a package of bilateral treaties between India and the UAE: this is probably the most extensive set of treaties the UAE has with any country outside of the GCC or Arab League. The Treaty breaks some fundamental barriers in the legal world:
 - a. It is the only one of its kind between the UAE and a common law country.
 - b. It is the only one of its kind between India and a civil law country.

A. HISTORICAL CONTEXT

"In these and countless other ways, eastern Arabia's ports and people were as much a part of the Indian Ocean world as they were a part of the Arab world."²

Historians believe that the earliest seaborne trade networks were pioneered some 4,000 years ago between Mesopotamia (present day Iraq) and the mouths of the Indus River (present day Punjab and Gujarat on either side of the India-Pakistan border). This traffic obviously passed right through the Gulf. The Dilmun civilisation in Bahrain, dating back to around 3,000 years ago, had strong connections with the Indian subcontinent—as Bahrain continues to do to this day.

1. Comm CS No. 1742/2018.

2. James Olney, "Transnational merchants in the nineteenth-century Gulf: The Case of the Safar family" in Madawi Al-Rasheed, ed., *Transnational Connections and the Arab Gulf* (Routledge, 2004), 78.

Around 2,000 years ago, trade between the Arabian Sea and the Bay of Bengal around the Indian subcontinent became commonplace. When Islam conquered the Arabian Peninsula, it arrived in Kerala (on the West coast of India) by the next voyage. To this day, the majority of Indians resident in the GCC States are from the state of Kerala.

During the days of the British Empire, the foreign affairs of the "Trucial States", which subsequently became the UAE, were administered from Bombay. Their currency was the Indian rupee (later replaced by the "Gulf rupee" issued by the Government of India in the 1960s) until the adoption of the UAE dirham. Administration officials were routinely drawn from British territories and protectorates including India, Aden, and Palestine. Youth from the Gulf were routinely sent to be educated or apprenticed in Bombay; they returned to occupy high positions in government and commerce, and many are still around.

B. ECONOMIC CONTEXT

As of 2019, India and the UAE are among each other's largest trading partners with annual bilateral trade exceeding USD 60 billion.

As of 2019, India and the UAE are among each other's largest trading partners with annual bilateral trade exceeding USD 60 billion. More than 100 Indian businesses operate just in the DIFC alone. Most of the free zones in the UAE have large Indian client bases, in shipping, trading, and manufacturing. Almost 3 million Indian tourists visited the UAE in 2019.

The combination of cultural ties, trade, finance and manufacturing results in a significant volume of two-way traffic in people, money, and ideas. This gives rise to a need for certainty for parties engaged in the UAE-India business. Although media attention has focused on retail lending and defaulting retail borrowers, the real impact may be on commercial contracts and financing arrangements.

Apart from commercial business, the legal developments in the DIFC, the ADGM and RAK ICC could provide a boost to the use of trust and foundation structures by high net worth Indian individuals and families. If the Singapore experience is anything to go by, DIFC and ADGM arbitration can be expected to receive a huge boost.

C. A UNIQUE TREATY THAT BRIDGES THE CIVIL LAW AND COMMON LAW GAP

When the UAE was formed, it adopted the civil law system that the rest of the Gulf States (barring Saudi Arabia) had borrowed from Egypt. When India regained independence 25 years before, it retained the English common law system that grew and evolved during the days of the British Empire. Both the common law and civil law systems display symptoms of "exceptionalism" to varying degrees, i.e., the belief that one system is better than the other. In the UAE Courts and in the Indian Courts, this sense of exceptionalism can be observed in their historical approach and suspicion towards foreign judgments and international arbitration awards. The only exceptions to this general antipathy have been bilateral or multilateral treaties providing for automatic recognition and enforcement.

In India's case, there is a statutory recognition of the principles of comity that existed during India's stint as a member of the British Empire: as the United Kingdom and her colonies largely had the same

legal system and equivalent courts, judgments were automatically recognised and enforced all across the Empire and (apart from the United Kingdom itself) a common ultimate appellate Court in the Judicial Committee of the Privy Council which shared much of its membership with the House of Lords. Those former colonies and Commonwealth States, which were all common law jurisdictions (at least from a civil procedure perspective), continued to be recognised as "reciprocating territories" after the end of the Empire. The UAE, on the other hand, has multilateral treaty arrangements with the Arab League states, the GCC States, and bilateral agreements with Jordan and (perhaps not surprisingly) France, which are all civil law States.

In this context, the India-UAE Treaty is unique because it is India's only such treaty with a civil law country and the UAE's only such treaty with a common law country. Indeed, it is one of the very few treaties of its kind in the world between a civil law jurisdiction and a common law jurisdiction outside the European Union context.

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As part of its business-friendly law reforms, the UAE has been gradually moving away from its former discomfort with common law. The country has adopted a new Arbitration Law, has introduced common law "islands" such as the DIFC and the ADGM in its civil law ocean,³ and has made numerous law reforms in the last 15 years. Similarly, India has adopted a number of business-friendly reforms including fast track courts, dedicated commercial courts, and has improved its arbitration landscape.

Since 1991, India and the UAE have entered into a bilateral investment treaty, a double taxation treaty, an extradition treaty, a mutual legal assistance treaty concerning criminal matters, and the Treaty that is the subject of this note. Outside the GCC, this is the widest package of treaties that the UAE has with any country. India has a far larger and more longstanding set of treaty arrangements, but the only comparable country from the Indian perspective is probably Singapore.

So the obvious question is, will the civil law / common law divide prove a challenge? Will the DIFC and ADGM Courts and arbitral institutions benefit more than the "onshore" courts and institutions?

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The Structure of the Treaty

The Treaty provides for three types of legal assistance in civil and commercial matters:

1. **Service of summons and other judicial documents or processes.**
2. The **taking of evidence** by means of Letters of Request or commissions.
3. **Execution of decrees, settlements and arbitral awards.**

3. Michael Hwang SC DCJ, "The Courts of the Dubai International Financial Centre – A Common Law island in a Civil Law Ocean", *LAWASIA*, Nov 1, 2008.

Article I(3) of the Treaty makes it clear that the Treaty is "*without prejudice*" to, i.e., subordinate to, other relevant treaties. For example, it does not do away with the requirements of the New York Convention in relation to arbitration awards, discussed below.

At the Indian end, all three types of legal assistance require administrative notifications by the Government of India:

1. The service of foreign summons and other judicial documents in India—and the taking of evidence by means of Letters of Request or commissions—requires a Gazette notification pursuant to Section 29 of the *Civil Procedure Code*. This notification was issued in November 2000 and advised to the Indian judiciary in 2005.
2. The recognition and enforcement of foreign judgments without a re-examination of the merits of the matter requires a notification under section 44A of the *Civil Procedure Code*. This is the notification that was issued on 17 January 2020.
3. The recognition and enforcement of foreign arbitral awards in India requires a Gazette notification pursuant to section 44 of the Arbitration and Conciliation Act 1996. This notification has not yet been issued but that is somewhat less problematic now as awards can be converted into judgments and then enforced.

At the UAE end, the following developments and issues are relevant:

1. The new Civil Procedure Regulations issued pursuant to Cabinet Resolution No. 57/2018 make it clear that service through diplomatic channels is only necessary in exceptional circumstances where service through other means has failed.
2. The taking of evidence through Letters of Request or commissions is essentially unknown in the "onshore" civil law system, which favours Court-appointed experts and investigative judges. An onshore UAE Court would have difficulty outsourcing the appointment of an "expert" to an Indian court, and would find that the role of a commissioner in the common law is very different from that of an "expert" appointed by the UAE courts.
3. The UAE Courts are generally mindful of treaty obligations in the judgment recognition space.

route, there is no responsibility placed on the Central Authorities to make any efforts.

The Requests and all supporting documents need to be translated into the official language of the other State (i.e., English or Arabic as the case may be) and provided in duplicate. This obviously involves coordination between Indian and UAE lawyers before a Request is filed.

B. THE TAKING OF EVIDENCE

Requests for the taking of evidence need to satisfy additional requirements: they need to identify the authority requesting the evidence, the nature of the proceedings for which the evidence is required, the names and addresses of the parties to the proceedings, the evidence to be obtained, and the names and addresses of the persons to be examined. The Letter of Request may also include a list of questions to be put to the witnesses or other persons. The Letter of Request should also specify if the evidence is to be taken on oath or affirmation.

Articles X and XI are interesting as they deal with domestic law: they bring the civil law vs common law debate into sharp contrast. This is not very different from the issues faced when putting together the DIFC Courts–Dubai Courts MOU. From an Indian perspective, therefore, a DIFC or ADGM sourced Request would be significantly easier to comply with than a UAE one. Similarly, for the "onshore" courts, an Indian request would essentially need to be treated as similar to a DIFC or ADGM Courts' request.

Article XIV contains an interesting provision permitting a commissioner appointed by the Courts of one contracting State to take evidence in the territory of the other.

C. RECOGNITION AND EXECUTION OF DECREES AND ARBITRAL AWARDS

When the Treaty was signed and ratified, the UAE had not ratified the New York Convention. India had adopted the new UNCITRAL Model Law only a few years before. So it is understandable that judgments and arbitral awards got lumped together into one section of the Treaty.

The Treaty sets out some **mandatory** rules as to which Courts will have jurisdiction in specific circumstances: questions of / capacity or status⁴ / immovable property⁵ are to be determined in accordance with the mandatory treaty provisions. In other matters, too, the Treaty sets out the rules that will determine questions of jurisdiction.⁶ Of particular importance, given the jurisdiction of both the ADGM and DIFC Courts based on the registration of the Claimant,⁷ is the Treaty requirement of domicile, residence or place of business in the jurisdiction in which enforcement is sought.⁸

The court in the requested State will be bound by the facts stated in the judgment *unless the decree is passed in absentia*.⁹ This may raise questions in respect of enforceability of default UAE Court judgments relating to retail personal loans and credit cards in India. A common shortcut employed by UAE banks is to show the court that they have served the summons through a newspaper notification in

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Requirements for a Request under the Treaty

As with other bilateral treaties of this nature, the Treaty provides specific guidance as to how a Request for legal assistance is to be made.

A. SUMMONS AND OTHER JUDICIAL DOCUMENTS

In respect of summons and other judicial documents, the Treaty provides for a formal route and a "direct" route. The formal route involves the making of a Request through the Central Authorities in each State, namely the respective law ministries. The "direct route" is essentially service through private means, which is recognised in both jurisdictions as valid: the only difference is that, with the direct

4. Treaty, art. XVI.

5. *Ibid.*, art. XVII.

6. *Ibid.*, art. XVIII.

7. Abu Dhabi Law No. 4/2014 concerning the Abu Dhabi Global Market, arts. (13) 6 and 7, Dubai Law No. 12/2004 Promulgating the Judicial Authority Law, art. 5A(1)(a).

8. Treaty, arts XVIIIa and b.

9. *Ibid.*, art. XIX.

the UAE. If they then obtain a judgment in the UAE Courts and seek to enforce in India, the borrower's defence could be that the bank knew the borrower was already in India and did not take steps to serve summons there. Further, if the Indian Court takes the view that the borrower's opportunity to present a defence is hindered by potential imprisonment or travel prohibition, the Court might consider it a violation of the principles of natural justice.¹⁰

Article XX contains a long list of exceptions to execution. These include jurisdictional factors, whether or not the judgment has been given "on the merits of the case"¹¹ (this can cause difficulties with "onshore" UAE court judgments that merely adopt the findings of the court-appointed expert), fraud,¹² breach of principles of natural justice (*can a defaulting borrower be said to have a fair opportunity to present his case if he could be imprisoned / prohibited from leaving the country?*), failure to effect summons in accordance with the rules applicable in the country of the defendant¹³ (*will the service of summons through a newspaper ad in the UAE suffice?*), etc.

Moreover Article XV provides that the parties will recognise such decrees "in accordance with its laws" which in the Indian context includes section 44A of the Indian Civil Procedure Code and its counterparts in the UAE, DIFC and ADGM. Subsection 44A(3) adds an additional requirement that section 13 of the Civil Procedure Code will not apply to the foreign judgment, but that section adds little if anything to the terms of the Treaty.

Within the UAE enforcement is also not without its complications. The jurisdiction of the ADGM Courts in relation to foreign judgments is *prima facie* limited to enforcement within the ADGM.¹⁴ The jurisdiction of the DIFC Courts is not¹⁵ but the capacity for application of Dubai Decree No. 19/2016 where the civil law Dubai Courts have jurisdiction should not be overlooked.¹⁶

D. REQUIREMENTS SPECIFIC TO ARBITRATION AWARDS

The Treaty requirements in respect of arbitration awards are simpler: the party seeking enforcement only needs to show that the award is based on a written arbitration agreement and is made on matters that are arbitrable in the country in which recognition and enforcement is sought. Of course, there is also a public policy exception, but the Indian courts have become much more sophisticated about what this means in the last 15 years.

The difficulty is that India has a "Gazette notification" requirement for foreign arbitral awards as well! No such notification has been issued under the Arbitration and Conciliation Act 1996. The UAE has no such requirement (and indeed no reciprocity requirement under the New York Convention). But the Indian Courts are restricted in their ability to recognise and enforce foreign arbitration awards unless the country in which they were issued has been notified as a "reciprocating territory" by the Indian Government. An alternative would be to have a UAE award converted into a judgment and then enforced in India. The DIFC Courts ought not to care about reciprocity when faced with an Indian award but the "onshore" Courts might: there is an ongoing debate in the Abu Dhabi Courts about whether

the "double exequatur" requirement applies following the adoption of the new *Arbitration Law*.

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Opportunities and Potential Pitfalls for the UAE / DIFC Practitioner

As noted above, there is an obvious alignment of concepts and procedures between the common law Courts of the UAE (DIFC and ADGM) and the Indian Courts. There is a great opportunity to apply the learnings from the DIFC Courts-Dubai Courts MOU to the application of the India-UAE Treaty. However, there is no equivalent of the Joint Judicial Committee to weigh in, and any abuse of the Treaty provisions could well lead to a diplomatic crisis.

Civil law practitioners need to exercise caution if they expect tried and tested procedures under UAE law to be upheld in the Indian Courts.

Civil law practitioners need to exercise caution if they expect tried and tested procedures under UAE law to be upheld in the Indian Courts. These include the use of court-appointed experts, the service of summons through domestic newspaper notifications, the issuance of "in absentia" judgments, and the threat of imprisonment and travel bans in the context of civil litigation.

It follows from this that if enforcement of a judgment in India is the objective of UAE proceedings, care should be taken to ensure that the peculiarities of local jurisdictions such as those discussed above, or the claimant-based jurisdictions of the DIFC and ADGM Courts, do not result in challenges to enforceability in India. The starting point should where possible be an agreed submission to jurisdiction.¹⁷

Just based on the potential volume of work and the greater "interoperability", there is a huge opportunity to benefit from the speed and convenience of the UAE-based common law forums for India-related disputes. When drafting new contracts with an Indian element, consideration should be given to using DIFC / ADGM dispute resolution clauses. This includes arbitration clauses given the relative ease with which an arbitration award can be converted into a court judgment.

Given the relative speed with which this notification was issued once the right people got involved, it is perfectly reasonable to expect that the final Indian Gazette notification in respect of arbitration awards will be issued with a bit of effort. When that happens, the intermediate step of converting an award into a judgment will go away.

17. Treaty, art. XIIIe, Abu Dhabi Law No. 4/2014 concerning the Abu Dhabi Global Market, arts. 13(6) and (7), Dubai Law No. 12/2004 (Judicial Authority Law), art. 5A(1)(a).

10. *Ibid.*, art. XXe.

11. *Ibid.*, art. XXc.

12. *Ibid.*, art. XXf.

13. *Ibid.*, art. XXI.

14. Abu Dhabi Law No. 4/2014 concerning the Abu Dhabi Global Market, art. 13(12).

15. Dubai Law No. 12/2004 Promulgating the Judicial Authority Law, art. 5A(1)€ and DIFC Courts Law, art. 24.

16. See, e.g., *Akhmedova v. Akhmedov and Straight Establishment* [2018] CA-003-2018 at [24].

وقعت الهند ودولة الإمارات العربية المتحدة اتفاقية حول القضاء والتعاون القضائي في المسائل المدنية والتجارية عام 1999 وتمت المصادقة عليها عام 2000. في يناير 2000 أبلغت الحكومة الهندية دولة الإمارات العربية المتحدة أنها تعتبر "أرضاً متبادلة" لغرض الاعتراف بالأحكام المدنية الإماراتية في الهند دون إعادة النظر في وقائع النزاع الأساسي. تعكس هذه الاتفاقية الروابط الثقافية والاقتصادية الوطيدة بين البلدين. يتسبب الاعتراف المتبادل بالأحكام المدنية بين ولاية قضائية مدنية وأخرى مبنية على القانون العام بعدد من التحديات. لكن، بشكل عام، ستستفيد من هذا التطور الشركات وكذلك المحاكم التابعة لـ "جزر القانون العام" في الإمارات المتحدة وهي مركز دبي المالي العالمي وسوق أبوظبي العالمي.

BIOGRAPHY

DAVID RUSSELL AM RFD QC is an Australian barrister specialising in international tax law. He is admitted to practise in England and Wales, Australia, Papua New Guinea, New Zealand and the Courts of the Dubai International Financial Centre. He was first appointed Queen's Counsel in 1986.

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UAE – Treaties – Enforcement of Judgments – Reciprocity

ÉAU – Conventions – Exécution des jugements – Réciprocité