

DIFC Courts Practice Direction No. 2 of 2015: Adopted at Last!

Kluwer Arbitration Blog

March 31, 2015

Gordon Blanke (Blanke Arbitration LLC)

Please refer to this post as: Gordon Blanke, 'DIFC Courts Practice Direction No. 2 of 2015: Adopted at Last!', Kluwer Arbitration Blog, March 31 2015,
<http://arbitrationblog.kluwerarbitration.com/2015/03/31/difc-courts-practice-direction-no-2-of-2015-adopted-at-last/>

The DIFC Courts Practice Direction No. 2 of 2015 on the Referral of Judgment Payment Disputes to Arbitration (available online on the official website of the DIFC Courts at <http://difccourts.ae/difc-courts-practice-direction-no-2-2015-referral-judgment-payment-disputes-arbitration/>) was finally adopted on 16 February 2015 and is now in full force. For conceptual accuracy, the more appealing title of “Practice Direction on the Conversion of DIFC Court Judgments into DIFC-LCIA Awards”, which was used in the consultation exercise (on which I previously reported in [my blog of 20 July 2014](#)), has now been watered down to “Practice Direction on the Referral of Judgment Payment Disputes to Arbitration”. This being said, the general thrust and objective of the Practice Direction remain unchanged: The Practice Direction essentially allows creditors to enforce payment judgments issued by the DIFC Courts against non-compliant debtors, i.e. debtors that have failed to comply with the terms of the judgments voluntarily, that is are unwilling to pay, through arbitration. The main benefit will be the enhanced enforceability of “judgment-converted-awards” under international enforcement instruments typically applicable to international arbitration awards, e.g. the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards. A secondary objective of the Direction is to encourage settlement of payment disputes prior to escalation to arbitration given the deterrent effect of the enhanced global enforceability of a DIFC judgment-converted-award.

No need to repeat here the concerns expressed by the local legal community in anticipation of the adoption of the draft Practice Direction over the course of the consultation exercise in the latter half of last year and the way the revised Practice Direction sought to deal with them: I have extensively reported on both in previous blogs (see my blogs of [20 July 2014](#) and of [23rd November 2014](#) respectively). Suffice it to recall that the Practice Direction is “*the first of its kind globally*” (see DIFC press release, “Another Innovative World First for DIFC Courts”, 25 February 2015, available online at <http://difccourts.ae/another-innovative-world-first-difc-courts/>) and “*an experiment without parallel in arbitration history*” (as per Chief Justice Michael Hwang, giving the DIFC Court Lecture on “The DIFC Courts Judgment-Arbitration Protocol – Referral of Judgment Payment Disputes to Arbitration” on 19 November 2014). With this in mind, the workability of the mechanism envisaged by the Practice Direction will ultimately depend on its proper implementation by arbitral tribunals and the receptiveness of international courts that are seized of the recognition and enforcement of DIFC judgment-converted-awards. As incisively put by Chief Justice Michael Hwang, the author of the Practice Direction:

[...] the success of this protocol [i.e. Practice Direction No. 2 of 2015] will obviously depend on whether the arbitrators of our Arbitration Centre [i.e. the DIFC-LCIA] will apply

the protocol in the way it is supposed to work. Accordingly, there will be briefings for potential arbitrators at the Centre (including a copy of this Lecture to enable them to understand the theoretical underpinnings of this protocol and how it is to be applied in practice). They will in due course have to exercise their own independent judgment on each case that comes before them pursuant to this protocol, but the tribunal hearing such arbitrations will have to ensure that whatever decision that it may make on the merits of the case must be based on sound arbitration principles (as indeed is this protocol).

(Chief Justice Michael Hwang, “The DIFC Courts Judgment-Arbitration Protocol – Referral of Judgment Payment Disputes to Arbitration”, The DIFC Courts Lecture, 19 November 2014, available online at <http://difccourts.ae/difc-courts-chief-justices-explanatory-lecture-notes-referral-judgment-payment-disputes-arbitration-november-2014/>, at para. 12(d))

The overall reactions from our legal community in the DIFC have been largely encouraging of our intention to give DIFC judgments more global reach. If our experiment subsequently proves successful, we will have developed an important tool to synthesize litigation and arbitration by giving concurrent remedies for enforcement and thereby resolve one of the great problems of international litigation which other jurisdictions can follow. This is because there is nothing in our protocol that changes the existing common law; indeed, our protocol builds on it. If we can develop a model for the rest of the common law world, civil law countries may also be able to adopt it, because ultimately it is a question of persuading courts to interpret, not the national laws of any country, but the meaning of an “award” under the NYC, which is a matter of international, rather than domestic, law. If our bold step proves successful, this would be the ultimate partnership between commercial courts and arbitration [...].

(Ibid., at para. 14)

Chief Justice Michael Hwang’s words are, no doubt, borne out of the best of intentions and it is to be hoped that the new DIFC Courts Practice Direction will bear out its anticipated potential in practice. Time, for sure, will tell ...