

Kluwer Arbitration Blog

DIFC Court Amends Practice Direction No. 2 of 2015 on Referral of Payment Judgment Disputes to Arbitration: Getting it Right ... Finally!

Gordon Blanke (Blanke Arbitration LLC) · Thursday, July 16th, 2015

Regular readers of this Blog will be aware of the DIFC Court's adoption of Practice Direction No. 2 of 2015 on the Referral of Payment Judgment Disputes to Arbitration ("PD 2 of 2015") earlier this year (for contemporaneous reporting see my previous [blog](#)). As the title of the Direction suggests, it essentially allows judgment creditors of DIFC money judgments that remain unsatisfied by a recalcitrant judgment debtor to refer to arbitration for enforcement of the unsatisfied debt. This, so the story goes, will be achieved through "converting" the DIFC payment judgment into a DIFC-LCIA arbitration award, which, in turn, will be globally enforceable by reference to international enforcement instruments, including in particular the 1958 New York Convention (on the recognition and enforcement of foreign arbitral awards). In other words, to the extent that a DIFC judgment creditor prefers enforcement through arbitration (taking account of the wider geographic scope of international enforcement instruments specific to arbitration) or enforcement of the original DIFC payment judgment is frustrated (e.g. for want of suitable enforcement instruments benefiting DIFC Court judgments in the targeted enforcement jurisdiction), it will be entitled to invoke a unilateral arbitration option which is binding on the recalcitrant judgment debtor for the purposes of enforcing a residual debt against it. In this sense, the judgment creditor's arbitration option operates as an arbitration obligation on the recalcitrant judgment debtor. For the avoidance of doubt, the judgment debtor will have accepted the obligation to submit to arbitration in the given circumstances by having executed a standard DIFC-LCIA arbitration agreement at the time of its original contract with its contracting counterparty, the judgment creditor.

Importantly, in the terms set out above, PD 2 of 2015 aims to offer an additional (and not an alternative) remedy of enforcement to a DIFC judgment creditor. The judgment creditor may hence exercise the arbitration option at its discretion irrespective of whether means of enforcement of the DIFC payment judgment before the competent courts for the unsatisfied debt have or have not been exhausted. This discretionary exercise of the arbitration option by the judgment creditor was not supported by the former wording of the Practice Direction, which was cast in mandatory terms ("*[a]ny enforcement dispute ... shall be referred to and finally resolved by arbitration [...]*" (my emphasis)). The Amended Practice Direction, which entered into force on 27 May

2015, (available online on the official website of the DIFC Courts at <http://difccourts.ae/amended-difc-courts-practice-direction-no-2-of-2015-referral-of-judgment-payment-disputes-to-arbitration/>) rectifies this shortfall by providing that a DIFC payment judgment dispute “**may, at the option of the judgment creditor ... , be referred to arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre**” (my emphasis). Equally, the suggested wording of the DIFC-LCIA arbitration clause contained in the Amended Practice Direction emphasises that “[a]ny Judgment Payment Dispute ... **may be referred to arbitration by the judgment creditor**” (my emphasis). The Amended Practice Direction further explains that it “*is intended to provide a judgment creditor with **additional, and not alternative, remedies for enforcement of its judgment.***” (my emphasis)

The Amended Practice Direction also contains some further “Commentary” on how the Direction is intended to operate. This commentary clearly sets out how enforcement of a DIFC payment judgment before the competent courts and through arbitration may complement each other. In the terms of the Amended Practice Direction:

1. The judgment creditor has the option either to litigate or to arbitrate (as long as the arbitration has not commenced).
2. The judgment creditor would opt to litigate before arbitration if the judgment debtor has assets in Dubai, a common law country, a GCC country and/or another country with which the UAE has a treaty providing for mutual recognition and enforcement of judgments.
3. If the judgment debtor does not have assets in Dubai, a common law country, a GCC country and/or a country with which the UAE has a bilateral or multilateral treaty on recognition and enforcement of judgments (or if the above step proved to be unsuccessful), the judgment creditor would commence arbitration.

In the last scenario, it is likely that the vast majority of New York Convention countries will uphold this arbitration clause and the arbitration award could then be enforced in almost all of the more than 150 countries that have acceded to the New York Convention.

Taking account of the wording above, the Amended Practice Direction leaves no doubt that the option of enforcement through arbitration adds to a judgment creditor’s toolkit to assist in the enforcement of residual debts of a DIFC payment judgment against a recalcitrant judgment debtor. In deciding whether to litigate or arbitrate the enforcement issue, a judgment creditor will consider the enforceability of a DIFC Court judgment under prevailing bi-lateral or multi-lateral enforcement instruments, including in particular the GCC and Riyadh Conventions (see the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications and the Riyadh Convention on Judicial Cooperation between States of the Arab League), to which the UAE are a party. Enforcement in the Emirate of Dubai will, of course, be assisted by reference to the regime of mutual recognition in place between the Dubai and DIFC

Courts (see DIFC Law No. 12 of 2004 as amended by DIFC Law No. 16 of 2011, the Judicial Authority Law, and in particular Article 7(2) thereof). Enforcement in a number of common law jurisdictions will benefit from memoranda of guidance or understanding which the DIFC Courts have entered with the top judicial bodies in those jurisdictions (see, e.g., Memorandum of Guidance as to Enforcement between the DIFC Courts and the Commercial Court, Queen's Bench Division, England and Wales, dated 23rd January 2013; Memorandum of Understanding between Supreme Court of New South Wales, dated 9 September 2013; Memorandum of Guidance between the Federal Court of Australia and the Dubai International Financial Centre Courts; Memorandum of Guidance between the Dubai International Financial Centre Courts and The High Court of Kenya, Commercial & Admiralty Division, dated 27 November 2014; and Memorandum of Guidance between the DIFC Courts & United States District Court for the Southern District of New York (SDNY), dated 29 March 2015). With this in mind, enforcement may or may not be - entirely at the discretion of the judgment creditor - only the very last resort after having exhausted all available litigious avenues.

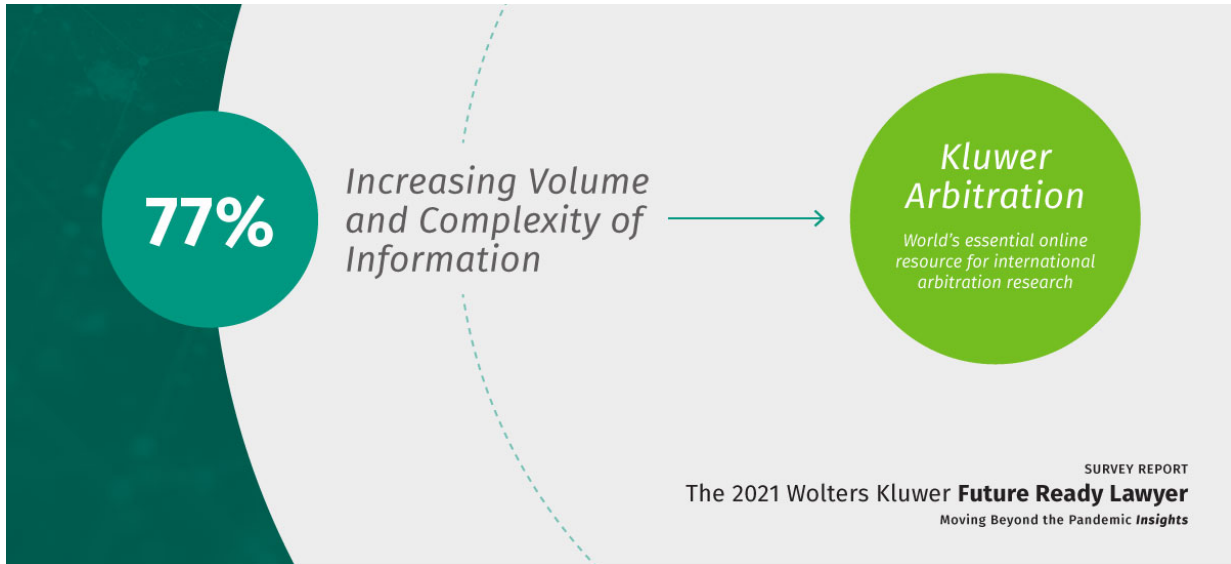
Irrespective of the foregoing, only time will tell whether and if so, to what extent foreign courts will enforce DIFC-judgment-converted arbitration awards without raising objections to their provenance.

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