

Kluwer Arbitration Blog

The DIFC and arbitration: Raising the stakes?

Gordon Blanke (Blanke Arbitration LLC) · Sunday, July 20th, 2014

In a recent, worldwide yet unprecedented move, the DIFC Courts have circulated for public consultation a draft Practice Direction (see Practice Direction No. X of 2014 amending Practice Direction No. 2 of 2012 DIFC Courts' Jurisdiction, electronically accessible on the official website of the DIFC Courts at www.difccourts.ae), which essentially aims to provide for the conversion of a DIFC Court judgment into a DIFC-LCIA arbitration award in order to avoid potential difficulties of enforcement of a DIFC judgment in jurisdictions outside the UAE. This is achieved by creating a system of optional referral to DIFC-LCIA arbitration of *“any dispute arising out of or in connection with the enforcement of any judgment given by the DIFC Courts, including any dispute as to the validity or enforcement of the said judgment”* (*ibid.*)

By way of background for the uninitiated, the DIFC – shorthand for Dubai International Financial Centre – is a six-acre common law jurisdiction carved out of the heart of the Emirate of Dubai. It is equipped with its own courts and laws, both modeled on the English legal system. The DIFC also maintains an arbitration centre, the DIFC-LCIA, a sister organization of the London Court of International Arbitration, which administers arbitration proceedings under the DIFC-LCIA Rules of Arbitration.

The draft Practice Direction follows other, equally bold initiatives by the DIFC to promote its arbitration capabilities, most recently the introduction of an Arbitration Institute (see Dubai Law No. (7) of 2014 Amending Law No. (9) of 2004 Concerning the Dubai International Financial Centre and issued by the Ruler of Dubai on 21st May 2014; for further reporting, [see my previous blog of 4 June 2014](#)). Furthermore, the DIFC Court of First Instance recently confirmed its status as “host jurisdiction” for the enforcement of both domestic and foreign arbitral awards (see Case No. ARB 002/2013 – (1) X1, (2) X2 v. (1) Y1, (2) Y2, ruling of the DIFC Court of First Instance, undated, 2014; and Case No. ARB 003/2013 – Banyan Tree Corporate PTE LTD v. Meydan Group LLC, ruling of the DIFC Court of First Instance of 27 May 2014; for further reporting, [see my previous blog of 7 June 2014](#)).

The present initiative continues the maverick approach of the DIFC as an offshore common law jurisdiction embedded within the onshore civil law system of the UAE: Who – one may ask – has heard of procedural directions of courts anywhere in the world that facilitate the conversion of a court judgment into an arbitration award? Where the converse, i.e. the conversion of an arbitral award into a court judgment is widely practiced in all leading arbitration jurisdictions and essentially forms the basis of exequatur of an arbitration award (as it is commonly known), the proposal of the draft Practice Direction provokes a radical rethinking of the natural boundaries between the powers of courts and arbitration tribunals: one cannot help feeling that the draft

Practice Direction is an practical instance of the French proverbial *monde à l'envers*, yet not entirely of the nonsensical type. It would essentially allow DIFC Court users to benefit from the scope and ease of enforcement of arbitral awards under international enforcement instruments and most importantly the New York Convention (on the recognition and enforcement of foreign arbitral awards, done in New York, 10 June 1958). This being said, however, this latter assumption – no matter how tantalizing to the international arbitration practitioner – may ultimately reveal itself as premature and as an unfortunate fallacy given that it remains to be tested to what extent an award rendered within the meaning of the draft Practice Direction would qualify as an award in the proper terms of the individual enforcement instrument: To say the least, to ensure its enforceability, an arbitral award is usually required to conclude a genuine dispute subject of the arbitration – it may be questionable in this context whether a foreign court's potential reluctance to enforce a DIFC Court judgment can qualify as a genuine dispute between the judgment creditor and the judgment debtor. There is a strong argument for saying that the enforcement of judgments – being a prerogative of the courts – should not be circumvented by recourse to arbitration. For sure and in any event, a foreign supervisory court will be tempted to look behind an arbitration award that embodies a DIFC Court judgment it may not have recognized and enforced in a direct enforcement action of the DIFC judgment itself and may be likely to refuse to enforce.

In the present instance, the proof of the pudding will, no doubt, be in the eating. To say the least, the wording of the draft Practice Direction is in the language of genuine disputes and provides a sensible opt-in for contracting parties. These may decide in favour of a referral of any enforcement disputes to DIFC-LCIA arbitration either as part of the exclusive or non-exclusive jurisdiction of the DIFC Courts *ex ante* or *ex post*. Importantly, referrals are generally confined by reference to the following referral criteria:

- (1) The [DIFC Court] judgment has taken effect [...];
- (2) The [DIFC Court] judgment is a judgment for the payment of money (whether or not the judgment also provides for remedies other than the payment of money);
- (3) There is an enforcement dispute in relation to the [DIFC Court] judgment;
- (4) The [DIFC Court] judgment is not subject to any appeal and the time permitted for a party to the judgment to apply for permission to appeal has expired; and
- (5) The judgment creditor and judgment debtor have agreed in writing that any enforcement dispute between them shall be referred to arbitration pursuant to this Practice Direction.

It will be interesting to see the outcome of the consultation process, which is open until 6 August 2014. It is anticipated that this most recent initiative of the DIFC Courts will be warmly received by the international arbitral community and hence supported without reservation. Whatever the outcome, no doubt, the DIFC is continuing to raise ever higher the stakes for arbitration in the UAE and the Middle East more generally. Watch this space for further reporting: Exciting times ahead!

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The graphic features a black background with white text and a circular icon. The icon depicts a group of five stylized human figures, with a magnifying glass positioned over the central figure. The background is accented with horizontal lines in blue and green.

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