Kluwer Arbitration Blog

DIFC Court Practice Direction on the conversion of DIFC Court judgments into DIFC-LCIA awards goes full steam ahead!

Gordon Blanke (Blanke Arbitration LLC) · Sunday, November 23rd, 2014

In a recent lecture at the DIFC Courts (see Lecture Series No. 5, Practice Direction providing for the wider enforcement of Court Judgments through DIFC-LCIA Arbitration Centre, 19 November 2014), Chief Justice Michael Hwang announced that the DIFC Court Practice Direction No. X of 2014 amending Practice Direction No. 2 of 2012 DIFC Courts' Jurisdiction would likely be adopted and enter into effect in January 2015. On that occasion, the DIFC Courts circulated a revised version of the Practice Direction (the "revised Practice Direction") taking account of observations made by the legal profession on the draft Practice Direction following a consultation exercise that completed in August earlier this year (see reporting in my previous blog). The Chief Justice took the opportunity to defend the rationale of the Practice Direction and explained in further detail what it was intended to achieve. The Chief Justice confirmed that in principle, the main objective of the Practice Direction was to allow parties to "convert" a DIFC judgment into a DIFC-LCIA arbitration award, which would benefit from *pro forma* world-wide enforcement by reference to international enforcement instruments, most importantly the 1958 New York Convention and essentially *"enhance the enforceability of a DIFC Court judgment"*. Chief Justice Hwang emphasised that the new Practice Direction did not intend to curtail the finality or legal effectiveness of the original DIFC judgment, which would remain final and binding and as such enforceable on its own terms. The Practice Direction was simply intended to offer a DIFC judgment creditor an alternative (possibly more attractive) method of enforcement through arbitration.

In order to achieve this objective, the wording of the revised Practice Direction has incorporated a number of amendments, including most importantly in relation to:

• the definition of "enforcement dispute": The revised definition of "enforcement dispute" is *"a dispute between a judgment creditor and judgment debtor with respect to any money (including interest and costs) due under an unsatisfied judgment, including (i) a failure to pay on demand any sum of money remaining due under a judgment on or after the date on which that sum becomes due […]; and/or (ii) the ability or willingness of the judgment debtor to pay the outstanding portion of the judgment sum within the time demanded, but excluding any dispute about the formal validity or substantive merits of the judgment"*; this revised definition adequately reflects the desired *res iudicata* nature of the underlying DIFC judgment, which remains final and binding on the merits: in dispute between the parties will typically be the judgment debtor's failure to comply with the payment terms of the judgment; it will therefore be essentially a *payment* dispute between the parties that will be referred to DIFC-LCIA arbitration (and technically speaking not an

enforcement dispute, there being no dispute, yet paralysis of enforcement); the revised definition of "enforcement dispute" is also intended to counter concerns that had come to light from the consultation exercise to the effect that the reference to arbitration of a dispute within the meaning of the draft Practice Direction and the enforceability of a resultant award would be hampered by the deficiency of an enforcement dispute not constituting a genuine dispute within the terms required under international enforcement instruments, such as the New York Convention; in this context, Chief Justice Hwang also helpfully reminded of the prevailing position under English common law, which had given a remarkably wide meaning to the term "dispute" for purposes of referral to arbitration;

• the "Referral Criteria" (for an original list of which see my previous blog above): Even though remaining otherwise unchanged, the revised Referral Criteria now provide a sensible carve-out to the effect that the option to convert will not apply to judgments rendered in respect of an employment contract or a consumer contract, both of which types of contract are non-arbitrable pursuant to Article 12(2) of the DIFC Arbitration Law; and

• the *modus arbitrandi*: The revised Practice Direction requires the appointment of a sole arbitrator, in an obvious attempt to safe time and cost.

Even though not expressly reflected in the revised Practice Direction (which makes mandatory reference to DIFC-LCIA arbitration with seat in the DIFC only), Chief Justice Hwang insisted that in the terms of the Direction, parties remained free to choose another seat and institutional forum as a procedural framework for their arbitration. This being said, according to the Chief Justice, the conversion process would likely be facilitated if referred to arbitration under DIFC law before the DIFC-LCIA (as an institution – one may add – that will be sensitive to and promotive of the main objectives of the revised Practice Direction). This aim, no doubt, will equally be supported by submission of the arbitration agreement (or the *"agreement for submission of post-judgment disputes to arbitration"* in the terms of the revised Practice Direction) to DIFC laws.

Despite the enhanced wording of the revised Practice Direction, there remains a reasoned concern that (prospective) DIFC judgment creditors that opt into the DIFC-LCIA conversion process will forfeit their right to enforce the original DIFC Court judgment on its own terms: This realisation stems from the mandatory wording of the DIFC-LCIA arbitration agreement used in the Practice Direction and according to which *"[a]ny enforcement dispute […] shall be referred to and finally resolved by arbitration […]"*; the use of the auxiliary "shall" in the English language imposes an obligation on the DIFC judgment creditor to refer an enforcement disputes within the meaning of the revised Practice Direction to arbitration, thus overtaking the choice to proceed with enforcement before the courts. This being said, a mandatory reference to arbitration would at least contain the risk of parallel proceedings (and their potentially contradictory outcomes), where a DIFC judgment creditor may seek to increase pressure on a recalcitrant judgment debtor by proceeding with enforcement in both litigation and arbitration at the same time.

Only time will tell whether to proceed with the adoption of the revised Practice Direction will have been the result of sound judgement, the proverbial proof of the pudding on this occasion – more so than ever before – being in the eating!

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