**THE DIFC COURTS LECTURE**

NOVEMBER 19 2014

by

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**THE DIFC COURTS JUDGMENT- ARBITRATION PROTOCOL**

**REFERRAL OF JUDGMENT PAYMENT DISPUTES TO ARBITRATION**

1. One of the known limitations of state court judgments is that they are not normally enforceable outside of their home jurisdiction in the absence of either (a) some common law or international law doctrine of extra-territorial reach; or (b) a bilateral or multilateral treaty providing for reciprocal enforcement of judgments. European Union countries have the latter arrangement as have some other regional groupings. In this part of the world, we have the GCC Convention which provides for legally enforceable recognition of judgments of all GCC countries within the GCC. To a lesser degree of certainty, the Riyadh Convention also provides for reciprocal enforcement of judgments within the MENA region. . When lawyers discuss the benefits of arbitration versus litigation, the conventional wisdom is that arbitration awards have universality of enforcement under the New York Convention (“NYC”) in over 150 countries, while state judgments do not travel anywhere near as well. Today, I want to discuss an initiative that the DIFC Courts have formulated which could be the model for other countries to adopt so as to make state court judgments as enforceable as arbitration awards. Indeed, our aim is to provide a process whereby court judgments can become the basis of an arbitration award so that the monetary relief granted by the judgment can become the same relief granted by a subsequent arbitration award and be enforceable as such in all NYC countries. I am of course referring to our recent draft Practice Direction X which was released for public consultation some months ago. We have now concluded our review of the feedback received from respondents, which have been both substantial and helpful. I will share with you the feedback we have received from this consultation, but let me first set the scene by explaining the relationship between courts and arbitration in the DIFC.
2. We addressed the issue of Courts versus Arbitration when the DIFC was first established in 2006. The original concept was that the DIFC Courts would have a partnership with the proposed DIFC-LCIA Arbitration Centre (which I will just call the “Arbitration Centre”), we handling litigation, and the Arbitration Centre handling arbitration and mediation. When the Courthouse was built, the DIFC Courts shared our premises with the Arbitration Centre for some years until our expansion made it necessary for the Arbitration Centre to move out and seek alternative premises. However, we have turned full circle and, as from this year, pursuant to Dubai Law No. 7 of 2014, the Courts and the Arbitration Centre are now legally housed under an over-arching authority known as the Dispute Resolution Authority, which comprises two arms: (a) the DIFC Courts, with myself as the Chief Justice and (b) the DIFC Arbitration Institute (“DAI”)(which is the operator of the Arbitration Centre), with myself as the Head of this Institute. So we have an unusual situation of a Chief Justice who not only heads the Courts but also acts as the nominal head of the Arbitration Centre. I should point out that this is not unique because Singapore had such a situation some time ago, when the Singapore International Arbitration Centre was housed in the Supreme Court Building and was managed under the supervision of the Academy of Law, whose President was the Chief Justice.
3. Under our Arbitration Law, all arbitrations seated in the DIFC (which is an independent seat within the Emirate of Dubai) are supervised by the DIFC Courts, which therefore act as the curial or supervisory court of the Arbitration Centre as well as other arbitrations seated there. To prevent conflicts of interest under the new legal structure I have just described, I have appointed a Board of Trustees who will effectively oversee the business and caseload of the Arbitration Centre, and who will not report to me. The Arbitration Centre will therefore be fully independent of the DIFC Courts. Despite this separation of powers and responsibilities, this new authority fulfills a dream that the DIFC authorities and my predecessor, former Chief Justice Sir Anthony Evans, had of making our Courthouse a “house of justice” in its different forms.
4. But the significance of this arrangement is that neither the DIFC Courts nor the Arbitration Centre consider such co-operation to be against their own interests. Both institutions recognize that the imperative is to make DIFC the legal hub of the MENA region by offering a suite of legal options for dispute resolution, and making sure that each option is satisfactorily delivered in accordance with parties’ expectations. We in Dubai can take inspiration from London’s example in maintaining a number of vibrant legal forms of dispute resolution, thereby enlarging the pool of disputes being resolved in our legal hub, and interlinked to each other as necessary ( for example between arbitration and mediation).
5. We are now about to launch in the DIFC an experiment without parallel in arbitration history. As I mentioned earlier, we have recently circulated for public consultation a draft Practice Direction setting out an initiative in the form of a guidance note that will have the effect of “converting” court judgments into arbitration awards. (As I will explain later, I use the term “conversion” as shorthand for a more complex process). In brief, the protocol in the draft Practice Direction was in the following terms:

Any dispute arising out of or in connection with the enforcement of any judgment given by the Courts of the Dubai International Financial Centre, including any dispute as to the validity or enforceability of the said judgment, and satisfying all of the Referral Criteria set out in Practice Direction 2 of 2012 of the DIFC Courts shall be referred to and finally resolved by arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be [one/three]. The seat, or legal place of arbitration, shall be the Dubai International Financial Centre. The language to be used in the arbitration shall be English.

This contract, including any provisions relating to the choice of forum, shall be governed by and construed in accordance with the laws of the Dubai International Finance Centre.

[or]

This contract shall be governed by and construed in accordance with the laws of [INSERT PLACE], save that the laws of the Dubai International Finance Centre shall apply to any provisions relating to the choice of forum."

1. The Referral Criteria referred to in this model clause are defined in the Practice Direction as follows:

“The Referral Criteria are:

1. The judgment has taken effect in accordance with Rule 36.29;
2. The 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 judgment;
4. The 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.”
6. The most important criterion was “enforcement dispute”, which was defined as:

‘enforcement dispute’ a dispute between a judgment creditor and judgment debtor with respect to money (including costs) claimed as due under a judgment, including a failure to pay on demand a sum of money due under the judgment on or after the date on which that sum becomes due under Rule 36.33;

1. Judgment was defined as:

*Consultation version defined judgment as follows:*

‘judgment’ a judgment of any of the DIFC Courts for the payment of money (including costs) in respect of which there is an enforcement dispute that the judgment creditor refers to DIFC-LCIA arbitration;

1. Rule 36.34 provides that judgments for the payment of money (including costs) must be complied with within 14 days of the judgment unless:
2. The judgment specifies a different date for compliance (including specifying payment by instalments); or
3. Any of the other Rules of Court specifies a different date for compliance; or
4. The Court has stayed the proceedings or judgment.
5. The targeted effect of this initiative was that, following a money judgment of the DIFC Courts, the judgment creditor would be able to demand payment of the judgment sum and, if payment were not made pursuant to that demand for any reason, the judgment creditor would be able to consider that an enforcement dispute (which we will now rename “payment dispute” for greater accuracy) has arisen, and could refer the dispute to arbitration at the DIFC-LCIA Arbitration Centre (or indeed any other arbitration centre). The latter might not be the wisest course to be taken by the parties, but they would be entitled to choose another centre if they wish, although this protocol might not work as well as it should if the arbitration were referred to our Arbitration Centre. The Arbitration Centre in turn would progress the arbitration, and the LCIA Court would appoint one arbitrator as to ensure relative expedition (as the parties will have chosen in their arbitration agreement), and the dispute would then be referred to the tribunal for its decision in the usual way in accordance with the Arbitration Rules of the Arbitration Centre.
6. This process is what I meant to explain by the term “conversion” of a judgment into an arbitration award. But it is not a “conversion” in the strict sense of that word. The process enables a judgment creditor to have an additional option for securing payment of his judgment without losing its rights under the judgment in any way so the judgment remains intact and fully enforceable without regard to the progress of the arbitration. The term “convert” is therefore simply a metaphor; perhaps a more accurate (if less striking) characterization of the process is “enhanced enforceability of DIFC Courts judgments”.
7. After our public consultation, we received a fair number of comments from several law firms within the DIFC. The principal worries, and my responses to those worries, were as follows
8. Whether our definition of “enforcement dispute” would work in creating a dispute on a judgment sum which could not be disputed, and whether a subsequent national court which had to enforce the award would consider that it was a mere “rubber-stamping” exercise.

* There is a long line of common law jurisprudence which clearly establishes that, for purposes of arbitration, a “dispute” exists where one party makes a claim for payment of a sum allegedly due from another party, and the respondent (i) refuses to pay (ii) or keeps silent but, in any event, does not make payment. This is so even if the issue of whether the debt is owing is beyond dispute – only a clear and unequivocal admission of liability or actual payment will mean that there is no dispute.
* In particular, there has been extensive English jurisprudence on the subject because of the legislative development of Section 4 of the English Arbitration Act 1950, which provided that:

“If any party to an arbitration agreement or any person claiming though or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay proceedings, and that court or a judge thereof… **unless satisfied that the agreement or arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred,** shall make an order staying the proceedings.”

This provision was later repeated in section 1 of the English Arbitration Act 1975, but was significantly modified by section 9(4) of the English Arbitration Act 1996, which omitted the words "unless satisfied that…there is not in fact any dispute between the parties with regard to the matter agreed to be referred". Both before and after 1996, a body of case law has developed to ascertain what a “dispute” means and its significance for future cases, even after 1996, Courts have referred to pre-1996 cases for guidance on the meaning and scope of the word whenever it appears in an arbitration agreement. [[2]](#footnote-2)

* In one of the earliest English cases on the subject, Lord Justice Templeman held in the 1982 case of *Ellerine Brothers (Pty.) Ltd v Klinger[[3]](#footnote-3) at p.1383* that there is a dispute until the defendant admits that the sum is due and payable. Eight years later, his opinion was referred to in *Hayter v Nelson Home Insurance Co[[4]](#footnote-4)* by Justice Saville, who expressed the view that, if the parties had agreed to arbitrate their disputes, the Court should not ignore that bargain merely because the parties are seeking a quicker remedy by pursuing the case in Court. Justice Saville gave the following example in his judgment to illustrate his point, “*Two men have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately be demonstrated beyond any doubt that one is right and the other wrong does not and cannot mean that the dispute did not in fact exist. Because one man can be said to be indisputably wrong does not, in my view, entail that there was never any dispute between them*.”
* In a post-1996 case, *Halki Shipping Corporation v Sopex Oils Ltd[[5]](#footnote-5)*, the English Court of Appeal had to adjudicate on the meaning of the word “dispute” in an arbitration clause, and the effect of the amended section 9 of the English Arbitration Act 1996 on the circumstances in which a stay of proceedings would be granted by the Court. Two competing meanings of “dispute” were taken into consideration by the Court: whether it meant that a ‘real’ or ‘genuine’ dispute on the parties’ rights and obligations under the contract had to exist, or whether the term simply encompassed any disputed claim not admitted as due and payable, regardless of its merits. The Court held that the effect of the omission in the 1996 Act was that, in deciding on whether a stay should be granted, it no longer had to consider whether there was in fact any genuine dispute between the parties. Previous cases which turned on this distinction were no longer relevant. In summary. Given this new wording, English Courts now have no discretion but to grant the stay ((unless the arbitration agreement is null and void, inoperative or incapable of being performed), even in cases where it is satisfied that there is not in fact any “genuine dispute" between the parties*.*
* All these cases were examined in the Singapore Court of Appeal case of *Tjong Very Sumito v Antig Investments Pte Ltd[[6]](#footnote-6)* and cited with approval[[7]](#footnote-7).The Court emphasized that it will not assess the merits or genuineness of a “dispute” and will readily find that a dispute exists unless the defendant has clearly and unequivocally admitted that the claim is due and payable. Mere silence in the face of a demand may not be sufficient to constitute such clear and unequivocal admission necessary to exclude the existence of a dispute amounting to an admission of that demand. As the Court pithily put it: “… an open-and-shut case must be distinguished from an admission”.
* What about the enforceability of awards made under this protocol under the NYC? The word “dispute” does not appear in the NYC. It chooses to use the word “differences” (which may be considered to be synonymous with “disputes”). Article II(1) mandates recognition of “any agreement ….to submit to arbitration act or any differences…..” But the term “differences” is not defined in the NYC and I have not discovered any helpful authority elucidating the meaning of this term. But the leading authority on the NYC, Dr Albert Jan Van Den Berg, says unequivocally: “*It should not be readily assumed that a dispute does not fall under the arbitration agreement, having regard to the “pro-enforcement bias of the Convention*”[[8]](#footnote-8).

1. Is “enforcement dispute” an appropriate term when the protocol does not directly deal with enforcement of a judgment? Would “payment dispute” be more accurate?

* This is a useful observation and the term has been changed to “payment dispute”

1. What would be the governing law of the payment dispute?

* Because the enforcement dispute is a separate dispute from the dispute which the judgment will already have decided, we have added extra words to the governing law provision to make it clear that any matter to be decided in relation to the enforcement dispute (now renamed as “payment dispute”) will have one governing law, i.e. the laws of the DIFC.

1. The model arbitration agreement should only specify one arbitrator to ensure speedy processing of the arbitration

* This seems a sensible comment and we have changed the model arbitration agreement accordingly

1. Would the arbitral tribunal have power to re-hear the dispute or entertain challenges to the DIFC Courts judgment on any ground that could have been raised in an appeal?

* That is certainly not the intention, but again, “belt and braces” have persuaded us to make express provision for clarification. The tribunal would in all probability have to apply the doctrine of res judicata.

1. Would the protocol apply to summary and default judgments?

* It is certainly intended to do so, and we have amended the wording of the Practice Direction to remove any ambiguity

1. Would the referral to arbitration affect the rights of the judgment creditor to enforce the judgment as such during the pendency of the arbitration? Would enforcement of the judgment be stayed, either automatically or upon application?

* We intend that the judgment will remain in full force and effect whatever the progress or outcome of the arbitration. As mentioned earlier, the term “conversion” is a misnomer because the judgment creditor is not supposed to lose any of its rights under the judgment. Appropriate amendments have been made to the Practice Direction for clarity. A judgment creditor will have control of when it wishes to exercise its alternative options for realizing the fruits of its judgment – to levy execution on the judgment, in which case it might wish to defer commencing the arbitration, or, if it sees no assets of the judgment debtor within the DIFC or elsewhere in the GCC, it might then proceed to take the arbitration route.

1. Should we provide for potential third party challenges, such as applications under RDC 36.33, by non-parties who are directly affected by judgments to apply for setting aside?
   * My thought is that these applications will simply take their course in the usual way. In the unlikely event that such applications are filed after the referral to the Arbitration Centre has been filed, there may be cause for an application being made to the tribunal for a stay, which may or may not be granted depending on the circumstances. Ultimately, if a judgment is set aside, the basis of the demand for payment of the judgment sum will have disappeared.
2. Should the model arbitration agreement be amended to refer to a “judgment (or any part thereof)” to address the possibility that some parts of the judgment may not relate to money (assuming that the intent is to permit the enforcement of the “money (including costs)” part of any judgment?

* In the revised version of this Practice Direction, we have consolidated the definition of “judgment” in Referral Criteria 2 within the main definition, which has been amended to clarify the point.

1. If there are multiple judgment creditors and/or debtors, will all of them need to be made parties to the arbitration?

* That will ultimately be a matter for the tribunal to decide. However, if the matter is governed by DIFC law, then that decision will probably depend on whether (in the case of multiple debtors) the judgment debtors are jointly or severally liable. If the judgment debtors are jointly liable, the tribunal is likely to rule that all of them need to be made parties, following the common law rule that all joint debtors need be joined for an enforcement of a joint liability. The interesting question will be if a demand for satisfaction of a judgment against joint judgment debtors is only made on one of them; can the judgment creditor then commence an arbitration only against the one debtor on whom he has made a demand? This may have to be decided under English common law as there seems to be no provision in the DIFC Contract Law expressly dealing with this issue.

1. Is the reference in the model arbitration clause providing for referral of any dispute to the DIFC-LCIA Arbitration Centre intended to be fixed?

* No. Parties may choose to refer their disputes to arbitration to any institution or any seat of their choice. But common sense would inform them that there could be a greater likelihood of a tribunal seated in the DIFC accepting the validity of this clause than in any other seat, and, unless there is an overwhelming desire to use DIAC as the institution of choice (with a DIFC seat), the DIFC-LCIA Arbitration Centre would seem an obvious choice.

1. Will the restrictions on the use of arbitration in employment and consumer matters (as provided for in Article 12(2) of the DIFC Arbitration Law 2008) apply to matters covered by the Draft Practice Direction? What is intended where only part of a judgment (or only some but not all of the parties to it) have employment/consumer related content?

* As stated in the DIFC Arbitration Law 2008, disputes covering employment and consumer matters may not be enforced against the employee or consumer except under specific situations. It is therefore unlikely that judgments encompassing such matters will be enforced. This is simply a matter of arbitrability. The draft Practice Direction has been amended in the revised version to reflect this point

1. Should the suggested arbitration clauses include reference to Referral Criterion 5 – i.e. referral pursuant to this Practice Direction?

* Since the model arbitration agreement expressly refers to the satisfaction of all the Referral Criteria, it will not be necessary to make any further amendment.

1. What if a clever judgment debtor responds to the demand for payment by saying: “I acknowledge my liability for the judgment debt, but I simply have no liquid assets to satisfy the judgment and I seek time for payment.” Will there still remain a “dispute” for purposes of a valid arbitration?

* This problem is now pre-empted by our amendment to the definition of “enforcement dispute” (now renamed a “payment dispute”) to add the words “including any dispute about the ability or willingness of judgment debtor to pay the outstanding portion of the judgment sum.”

1. Wouldn’t the effectiveness of this initiative be dependent on the number of parties who are willing to sign up for it since it is an optional submission? Why should Party A agree in advance to help Party B to enforce a judgment against Party A?

* That is a fair observation and this protocol would probably be most likely to be adopted where:-

1. both parties believe that they have a fighting chance of winning, especially if a counterclaim is added; or
2. one party is in a stronger bargaining position than the other to be able to insist on this protocol being adopted.
3. Let me sum up the main features of this new protocol.
4. First, this Practice Direction does not change the law in any way. It works on the basis of the law as we understand it. Nor does it in any way affect the validity of the opt-in jurisdiction of our DIFC Courts even in the absence of an adoption of the recommended arbitration agreement. In other words, you can have opt-in jurisdiction for the primary dispute to be referred to the DIFC Courts without the add-on submission to arbitration for post-judgment disputes. But the arbitration agreement is postulated on there being a DIFC Courts judgment to enforce, so it would normally follow an opt-in clause choosing the DIFC Courts as the forum, except where parties elect to enter into an agreement to arbitrate under our protocol in respect of cases where DIFC Courts have jurisdiction over the dispute in any event under other applicable laws like Article V(A) of the Dubai Law 12 of 2004 (the Law of the Judicial Authority at the DIFC).
5. Second, the recommended arbitration agreement is only a recommendation, and parties are allowed to deviate from it if they want to choose a different seat, a different arbitration institute, and/or a different set of arbitration rules. But any changes may have a consequence because going before a differently seated tribunal may mean subjecting the arbitration to different rules of arbitrability than we in the DIFC are used to. Choosing a different arbitration institution may have less consequences, as most arbitration institutions will accept any Request for Arbitration for purposes of commencing an arbitration by the appointment of a tribunal, and questions of jurisdiction (including arbitrability) will be left to the tribunal. So the arbitration will get under way even outside of the DIFC. However, in that scenario, if the seat is not DIFC, we are back to the problem of arbitrability under the law of that particular seat. While I have confidence in common law seats which will pay regard to the legal authorities I have just discussed, I cannot with equal confidence predict how civil law seats will view our arbitration agreement. And bear in mind that, even if the tribunal were to agree with my view of the legal validity of our model arbitration agreement, an award eventually rendered which gives the same relief to the claimant/judgment creditor as was granted by our DIFC Courts would still have to be enforced under the NYC. In that case, the courts of the enforcing country will have to look afresh at the validity of our arbitration agreement because non-arbitrability is a ground for denial of recognition and enforcement under Article V of the NYC.
6. This is not a universal panacea to the problem of cross-border enforceability of judgments but what have you got to lose by adopting such an arbitration agreement in your submission to the jurisdiction of the DIFC Courts? Your judgment will always remain in force, whatever happens to your post-judgment arbitration, so all that would be at risk would be the costs of starting the arbitration and (if there is still a refusal to pay the judgment sum) the costs of actually taking the arbitration to its conclusion which, given the fact that it is based on a binding court judgment, will likely not be significant.
7. Finally, the success of this protocol will obviously depend on whether the arbitrators of the DIFC-LCIA Arbitration Centre will apply the protocol in the way it 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 Centre will try to ensure that whatever decision they may make on the merits of the case will be based on sound arbitration principles (as is indeed this protocol)
8. Accordingly, with appropriate amendments to meet the concerns of our users, we hope to launch the actual initiative early next year in terms of the final version of the Practice Direction which is attached as “Annex A” 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 but 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, so I hope that all of you will wish us good luck in this venture.

1. \* I must acknowledge with gratitude the contributions of Tim Taylor QC, Rupert Reed QC (and other international arbitration practitioners too numerous to list) for their conceptualization of this protocol. I also wish to express grateful thanks to our Assistant Registrar, Natasha Bakirci, for translating this concept into the original Practice Direction X and assimilating all the feedback received from the public consultation. Special mention needs to be made of Leo Zhi-Wei, an intern in my office whose research on the case law and other legal authorities has proved invaluable. [↑](#footnote-ref-1)
2. [↑](#footnote-ref-2)
3. [1982] 1 W.L.R. 1375 [↑](#footnote-ref-3)
4. [1990] 2 LLR 265 [↑](#footnote-ref-4)
5. [1998] 1 LLR 465 [↑](#footnote-ref-5)
6. [2009] 4 SLR(R) [↑](#footnote-ref-6)
7. See the case of *Larkden Pty Limited v. Lloyd Energy Systems Pty Limited*, [2011] NSWSC 268, decision of 1 April 2011 [↑](#footnote-ref-7)
8. *The New York Convention of 1958* (1981) at p150 [↑](#footnote-ref-8)