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**‘CONVERTING’ DIFC JUDGMENTS
INTO ARBITRAL AWARDS:
PRACTICE DIRECTION No. 2 OF 2015
AND ITS CONTROVERSIES**

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Abstract. *This paper examines the DIFC Practice Direction No.2 of 2015, which provides a possibility of judgment conversion into an arbitral award. In certain cases, this mechanism allows a judgment to become the basis of an arbitral award if parties agree to refer a 'judgment payment dispute' to arbitration. As a result, it would be possible to enforce an award rendered in this procedure under the New York Convention. In the beginning, a short overview is given of the organisation of the DIFC Courts and the Arbitration Center, their main features, and the enforcement of the DIFC judgments and arbitral awards abroad. Following is a detailed interpretation of Practice Direction No.2, the suggested arbitration clause and the referral criteria, their evolution, and the drafter's intention hidden in its wording. The last part deals with controversies in the use and the effect of Practice Direction No. 2, especially the negative effect of the elimination of the review of a judgment, the possibility of the arbitral tribunal to rehear the dispute, and the risk of double recovery. Notwithstanding the feasibility of the application of the New York Convention to enforce an arbitral award resulting from the use of the arbitral clause recommended in Practice Direction No. 2, the use of this mechanism would have an eliminating effect on the review of due process and public policy, which would normally be performed in a court exequatur.*

Key words: *Dubai International Financial Center (DIFC), arbitration, judgment, arbitral award, enforcement*

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1. INTRODUCTION

Arbitration and litigation, as the two main facilities for dispute resolution, have been developing in parallel but not without mutual influence. The disadvantages of litigation sparked the growth of arbitration and steered its development. Procedural flexibility, party autonomy, choice of arbitrators with needed expertise, confidentiality, and finality - these are some of the main advantages that arbitration can offer to the parties to a dispute in comparison with court litigation. On the other hand, despite its qualities, arbitration may not always be a possible or preferable way of dispute resolution. That can be due to a nonarbitrable subject matter, a multi-party dispute involving parties who have not contested to arbitration, or high costs of arbitration.

However, in this competitive game, arbitration holds one tool that gives it an undisputable comparative advantage: the 'precious Ring' of arbitration - enforceability under the New York Convention.¹ While the New York Convention offers enforceability for an arbitral award in 163 contracting states, for court judgments there is no comparable multilateral instrument. The Hague Convention² is an important step in that direction, but still with a disappointing popularity.

Winning is not enough – this simple dictum hides the main reason for the growth of popularity of arbitration over litigation in resolving international commercial disputes. However, is it possible to take the best from both worlds? To use the mechanism that would in certain cases allow court judgments to by-pass available enforcement tools for court judgments and to use the successful widespread system of the New York Convention?

This paper aims to give answers to these questions in scrutinising an 'experiment without parallel in arbitration history' (Hwang, 2014: para. 5) made by the Dubai International Financial Center (DIFC) in 2015. The DIFC created Practice Direction No.2 of 2015 (hereinafter: Practice Direction 2) that allows a judgment to become the basis of an arbitral award if the parties in the DIFC Court litigation agree to refer a 'judgment payment dispute' to arbitration under the DIFC-LCIA arbitration rules. In other words, it is the mechanism that allows 'conversion' of judgments into arbitral awards.

Before proceeding to the mechanism prescribed by Practice Direction 2, let us have a look at the short overview of the basic DIFC judicial framework.

2. THE DIFC COURTS AND THE ARBITRATION CENTRE

The Dubai International Financial Centre (DIFC) aspires to be among the top ten global financial centres and the leading financial hub for the Middle East, Africa and South Asia.³ Its creation began with the Constitutional change in the United Arab Emirates (UAE) and a set of regulatory enactments⁴, followed by the establishment of the financial free zone in

¹ UN Convention on the Recognition and Enforcement of Foreign Arbitral Award (hereinafter: The New York Convention, 1958).

² HCCH Convention on Choice of Court Agreements of 30 June 2005.

³ In 2019, the DIFC rose up the ranks to 8th position of the Global Financial Centers Index (Emirates News Agency, 14.10.2019, DIFC celebrates top ten global ranking; <https://wam.ae/en/details/1395302794629>). Since then, the position has worsened (Long Finance.net: GFCI 29 Rank, <https://www.longfinance.net/programmes/financial-centre-futures/global-financial-centres-index/gfci-29-explore-data/gfci-29-rank/>): accessed 15/06/2021.

⁴ For more, see: Carballo, 2007, and DIFC Selected documents 2007-2008.

Dubai, with the UAE Federal Decree No.35 of 2004.⁵ The DIFC is an independent jurisdiction within the UAE, with its own regulatory and legal framework.⁶

The DIFC Courts can be characterized as international courts. Their jurisdiction was originally limited to civil or commercial claims which involved *nexus* with the DIFC territory. With the changes of 2011⁷, the opt-in jurisdiction is allowed for parties around the globe if the written jurisdiction agreement in that sense is provided (Alustath, 2016: 187-188). The former Chief Justice, Michael Hwang, has famously said that the DIFC is 'a common law island in a civil law ocean' (Hwang, 2015: 201). This mesmerizing statement has a grounded legal background.⁸

Arbitration is regulated by DIFC Law No.1 of 2008 which governs the arbitration proceedings and the enforcement of awards within the DIFC.⁹ New Arbitration rules were adopted in 2016,¹⁰ and the newest version entered into force on 1 January 2021.¹¹ In establishing itself as a hub for international commercial arbitration, the UAE made an important step by arranging a joint venture between the DIFC and the London Court of International Arbitration (LCIA). The DIFC-LCIA Rules are mirroring the LCIA Rules, based on the UNCITRAL Model Law.¹² All the administrative decisions under the DIFC-LCIA Rules, such as the challenge of arbitrators, are taken by the LCIA Court in London.

Looking at the organisation and law of the DIFC-LCIA Centre, it is understandable why it presents itself as a combination of the international best practices and reputation of the LCIA, with a unique understanding of the local and regional legal and business cultures in the Gulf and wider MENA region. The independence of the DIFC from the UAE legal system, the autonomy to build its own legal system, and the choice to do that in a manner of a peculiar transplantation of English common law proved to be a fortunate formula.

Although the DIFC Courts promised to investigate the possibility of the UAE to sign the Hague Convention on Choice of Courts Agreements¹³ in order to further increase the enforceability of its judgments, it has not happened yet. Consequently, they cannot benefit from it. Instead, the territory where the judgment has to be enforced importantly determines which rules are to be applied (in Dubai but outside of the DIFC, in the UAE, or outside of the UAE).

In the course of creating a more arbitration-friendly environment, the United Arab Emirates has signed the New York Convention.¹⁴ For the purposes of international enforcement under

⁵ Federal Decree No.35 of 2004.

⁶ See: the Law of Dubai International Centre, No.9 of 2004.

⁷ See: Article 5, Law No.16 of 2011.

⁸ The DIFC Courts system operates as common law bench trials. The practices and procedures of the DIFC Courts are largely based on the English Civil Procedure Rules, particularly the Rules of the English Commercial Court, which are generally accepted as being the most effective set of rules to apply in resolving complex commercial cases (Hwang, 2015: 202). Moreover, a number of DIFC laws have been based to some extent on UK statutes. Other DIFC laws codify general principles of common law, like the body of tort law that is part of the DIFC's Law of Obligations. Additionally, there is a certain American legal influence. For example, certain provisions in the DIFC's Implied Terms in Contracts and Unfair Terms Law are either identical or very similar to the corresponding text in the UK's Unfair Contract Terms Act. An example of American influence is the proposed DIFC Electronic Transactions Law which is based upon the Uniform Electronic Transactions Act of 1999, which was developed in the United States (Horigan, 2017)

⁹ Arbitration law No. 1 of 2008.

¹⁰ Arbitration Rules of 2016.

¹¹ Arbitration Rules of 2021.

¹² Different than in the LCIA Arbitration Rules, the default seat of arbitration is the DIFC and not London.

¹³ DIFC Courts Strategic Plan 2016-2021, point 9.

¹⁴ UAE signed the New York Convention on 26 August 2006, <http://www.newyorkconvention.org/countries> (15/06/2021). The Convention was adopted into UAE law by Federal Decree No. 43 of 2006. However, there

the New York Convention, an award issued from a DIFC-seated arbitration will be treated as an award made in a contracting state (the DIFC Courts being Courts of the UAE).¹⁵

3. PRACTICE DIRECTION NO. 2 OF 2015

The lack of an enforcement mechanism for judgments that would correspond to the efficiency of the New York Convention for arbitral awards motivated the DIFC to invent a novel, unique enforcement mechanism. Instead of enhancing the enforceability of judgments with the existing tools of bilateral or multilateral conventions, they have tried to merge two worlds by making a tool for enforcement of arbitral awards accessible for judgments.

The new mechanism is based on the idea that parties who fall under the jurisdiction of the DIFC Courts or choose for it, may include in their contract an agreement that any dispute arising out of or in connection with the non-payment of any money judgment given by the DIFC Courts shall be referred to and be finally resolved by arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre. This type of "mutually beneficial interaction between the courts and arbitral institutions" (Hwang, 2015: 193) would allow successful parties to convert court judgments into arbitral awards, consequently allowing them to enforce their court judgments through arbitration.

The first Practice Direction draft was made available prior to its official launching in February 2015. Its content, including the suggested arbitration clause and the referral criteria, provoked many discussions (Hwang, 2015: 203). The results of a public opinion test were taken seriously and appropriate changes have been made, with the aim to clarify the manner in which it should be applied by the parties. As a result, Practice Direction No.2 was brought to light¹⁶, followed by the Amended Practice Direction No.2 several months later, in May 2015 (hereinafter: Practice Direction 2).¹⁷

“If parties who have submitted (or have agreed to submit) to (or are bound by) the jurisdiction of the DIFC Courts wish further to agree that any dispute arising out of or in connection with the non-payment of any money judgment given by the DIFC Courts may, at the option of the judgment creditor (shall be referred, in the February 16 version¹⁸) (as defined below), be referred to arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre, they may to that end adopt an arbitration clause in the terms of the recommended arbitration agreement set out below by reference to the Referral Criteria as defined.” (Amended DIFC Court Practice Direction 2, 2015).

The small changes in the text made it clear that the existence of an agreement to refer a dispute is not an obligation for the parties, but only a recommendation, a given possibility that they might use. Practice Direction 2 thus does not affect the validity of the opt-in jurisdiction of the DIFC Courts even in the absence of adoption of the recommended

were numerous problems with the application of the New York Convention in the UAE after the ratification. These problems were sufficient for the creation of a certain negative reputation of "judicial hostility" still present in reports on the arbitration in the UAE. (Birt, Omran, 2019: 3)

¹⁵ DIFC/LCIA Arbitration Center: What are the other advantages of the DIFC-LCIA? <http://www.difc-lcia.org/other-advantages-of-the-difc-lcia.aspx> (15/06/2021)

¹⁶ Practice Direction No.2 of February 2015.

¹⁷ Amended Practice Direction No.2 of May 2015.

¹⁸ Cursive added by the author.

arbitration agreement. It is possible to 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 (Hwang, 2014: 7).

Although Practice Direction 2 mentions only DIFC-LCIA Arbitration, it was clarified that following a money judgment of the DIFC Courts, the judgment creditor would be able to refer the enforcement dispute to arbitration at the DIFC-LCIA Arbitration Centre, or indeed any other arbitration centre (Hwang, 2015: 205). The Procedural Order 2 is not confined within the borders of the Dubai International Financial Centre, but stays open for the parties' autonomy and the freedom to choose the jurisdiction of another arbitration centre. The non-compulsory character of Practice Direction 2 further allows parties to choose a different set of arbitration rules.

3.1. The Recommended Arbitration Clause

Practice Direction 2 contains a recommended arbitration clause for parties who wish to refer a 'judgment payment dispute' to arbitration. The originally drafted arbitration clause differs significantly in several aspects. Most importantly, a broadly defined 'enforcement dispute', a dispute that can be referred to arbitration, has been changed into a 'judgment payment dispute'.

A comparative review of the original and the latest version of the recommended clause is provided in Table 1 below, including the changes in bold.

Table 1 Comparative review of the original and the latest version of the arbitration clause

Arbitration clause draft	Recommended arbitration clause in the Amended Practice Direction No.2, May 27 2015
Any dispute arising out of or in connection with the enforcement of any judgment given by 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... 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 the arbitration, shall be the Dubai International Financial Centre. The language to be used in the arbitration shall be English.	Any Judgment Payment Dispute (as defined in DIFC Courts Practice Direction No 2 of 2015) that satisfies all of the Referral Criteria set out in the Practice Direction may be referred to arbitration by the judgment creditor ¹⁹ , and such dispute shall be 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. There shall be a single arbitrator to be appointed by the LCIA Court pursuant to Article 5.4 of the DIFC-LCIA Arbitration Rules. 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.

Source: Hwang, 2015: 204: Amended DIFC Court Practice Direction 2, 2015

There are no strict requirements regarding the time when the parties have to reach an agreement to refer a judgment payment dispute to arbitration. They can enter into an agreement together with the selection of the forum, before the release of the judgment or

¹⁹ This is added in the Amended version of May 2015. The previous one, of February 2015, does not contain the formulation 'by the judgment creditor'.

after the judgment is rendered, and the dispute has occurred. Thus, even after the judgment on merits has been issued, the parties have an option to subsequently agree in writing to resolve the judgment payment dispute and to use the new mechanism. However, it is not very likely that the parties will reach an agreement once a judgment payment dispute has occurred because the judgment debtor would not have any interest to accept such an agreement.

3.1.1. The effects of the recommended arbitration clause

The Amended version, unlike the one of February 2015, contains an explanation of the effect of such an arbitration clause. In order to avoid any doubt, it is clarified that the existence of the arbitration clause does not affect the regular enforcement possibilities. Here, we do not have "a fork in the road" situation for a judgment creditor. The judgment creditor may ask the enforcement of the judgment and, in having done so, he is not waiving the right to use the pre-existing written agreement on the referral on payment judgment dispute to arbitration. The arbitration clause, as prescribed in the Procedural Directive 2, does not represent a limitation to the judgment creditor in any sense. It is an additional but not an alternative option.

The single arbitrator will be appointed by the LCIA Court, not by the DIFC Court, although Dubai is the seat or the legal place of the arbitration. That conforms with the LCIA-DIFC Arbitration Rules, under which the LCIA Court is marked as the competent Court for all the administrative decisions. The *LCIA-DIFC Arbitration Rules are deemed to be incorporated by reference into this clause*. That is a recommended clause, but not the only possible one. Parties are free to choose another seat and/or another set of rules (Hwang, 2015: 205). However, this autonomy is not without consequences. A differently seated tribunal could have different rules of arbitrability which can lead to the rejection of an arbitral clause prescribed in Procedural Direction 2.

3.1.2. The governing law of the arbitration agreement

The recommended clause includes a part concerning the governing law. The agreement to refer a 'judgment payment dispute' to arbitration is governed by the laws of the Dubai International Financial Centre. That applies to (but is not limited to) its existence, validity, interpretation, performance, discharge, and applicable remedies. This is, however, only a recommended option. As for the arbitration rules, parties can agree to choose a law other than the law of the DIFC. That option is not explicitly provided as an alternative one in the amended version, as it was in the draft, but nevertheless exists.

It would be against the nature of arbitration to restrain parties' autonomy. Parties' freedom to agree on another governing law could, however, jeopardise the validity of the arbitral agreement, given somewhat dissonant interpretations on the legal nature of a 'dispute' in a 'judgment payment dispute'.²⁰ In line with the *Kompetenz-Kompetenz* doctrine, the seized tribunal would, if an arbitration clause is challenged, rule itself on its validity. In the absence of designation in the clause itself, it would be necessary to identify the law that should govern the question of separability. Depending on the outcome of that determination, the governing law for the validity of the clause might be a law whose provision would endanger the clause itself. Therefore, the recommended clause from the amended Practice Direction 2, with the designation of the DIFC laws, is surely the safest option.

²⁰ That because one of the necessary requirements for arbitration agreements to fall within the scope of the New York Convention is the existence of a dispute between the parties that the court should verify. (ICC's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges, 2011: 65)

At the end of the amended Practice Direction 2, for the purpose of clarification, it is further specified that: "Nothing in this Practice Direction shall be taken to rescind, vary, curtail or suspend the effect or operation of any judgment of the DIFC Courts save as expressly provided in the Rules of the DIFC Courts as they may be amended from time to time."

3.2. Referral Criteria in the model clause

Practice Direction No.2 also stipulates which criteria have to be fulfilled in order to refer a 'judgment payment dispute' to arbitration. They are called Referral Criteria. First, the judgment must take effect following Rule 36.30,²¹ which states that "a judgment or order takes immediate effect from the time on the day when it is given or made, or such later time or date as the Court may specify". Next, the judgment should not be in respect of an employment contract or consumer contract which is subject to Article 12(2) of the Arbitration Law 2008. That article precludes arbitration in respect of such contracts. Further, it is necessary that the judgment is not subject to any appeal, and that the time permitted for a party to the judgment to apply for permission to appeal has expired.

It is also specified that Practice Direction 2 can apply only if there is a judgment payment dispute, meaning any dispute, difference, controversy, or claim between a judgment creditor and judgment debtor with respect to any money (including interest and costs) due under an unsatisfied judgment. That includes two possibilities. 1) 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 under Rule 36.34; and/or 2) the inability or unwillingness of the judgment debtor to pay the outstanding portion of the judgment sum within the time demanded. Nevertheless, any dispute about the formal validity or substantive merits of the judgment is excluded from the definition of a judgment payment dispute.

Finally, there has to be an agreement in writing between the judgment creditor and judgment debtor that any Judgment Payment Dispute between them shall be referred to arbitration under this Practice Direction.

3.3. The presumed effect of Procedural Direction No. 2

The immediate result of the use of the referral of a judgment payment dispute to arbitration would be the acquiring of an arbitral award. In other words, it would lead to the 'conversion' of the judgment into an arbitral award. The obvious envisaged benefit from it would be the enhanced enforceability of the award under the New York Convention. As a secondary objective, it is pointed out in literature that the Practice Direction can encourage settlement of payment disputes prior to the escalation to arbitration in view of the deterrent effect of the enhanced global enforceability of a DIFC judgment converted award (Blanke, 2015).

Nevertheless, although the term 'conversion' of a judgment into an arbitral award gained wide acceptance, it is a misnomer. This process enables a judgment creditor to have an additional option for securing the payment of his judgment while the judgment remains intact and fully enforceable, without regard to the progress of the arbitration. That is why the term 'convert' represents a metaphor (Hwang, 2014: 3). In realising the enforcement of his judgment he may decide not to commence the arbitration, or, if there are no available assets of the judgment debtor within the DIFC and in the Gulf countries, to use the possibility from

²¹ The Rules of the Dubai International Financial Centre Courts of 2014.

the arbitration clause (Hwang, 2015: 208).²² The judgment debtor, on the other hand, cannot use the clause to dismiss eventual enforcement proceedings in front of the national court.

The obvious advantage of the mechanism is that a judgment creditor could bypass the limitations and uncertainties that apply to the enforcement of a DIFC Court judgment outside of the UAE by relying upon the enforcement under the New York Convention. This is perceived as a step further in strengthening the DIFC enforcement regime. As stated in the DIFC Annual Review, this 'first-of-its-kind' Practice Direction could, in cases of commercial disputes, result in the judgment creditor obtaining an arbitral award that could be enforced in over 150 countries (DIFC Annual Review 2015).

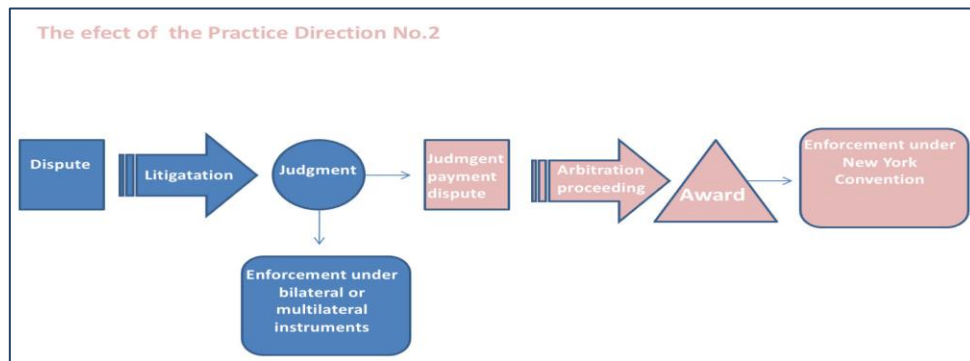


Fig. 1 The presumed effect of Practice Direction No. 2

Source: Figure created by the author (2020)

4. OVERCOMING THE HURDLES FOR ENFORCING AWARDS UNDER THE NEW YORK CONVENTION

Practice Direction 2 has prompted a great deal of discussion among scholars and legal professionals. Several issues emerged as problematic. The most important among them was the suspicion regarding the feasibility of the very purpose of a 'judgment payment dispute' referral to the arbitration, namely, of the enforceability of the succeeding DIFC-LCIA award under the New York Convention. Article V of the New York Convention defines five grounds upon which recognition and enforcement may be refused at the request of the party against whom it is invoked.²³ In this regard, a few possible obstacles can emerge to the enforcement of the DIFC-LCIA award made under Practice Direction No.2. First, there is a question if the DIFC-LCIA arbitral award can be considered as an award for the purposes of the New York Convention? Further, is the abrogation of the 'double exequatur' in the Convention not detrimental for enforcement of a DIFC-LCIA award? Finally, is a 'judgment payment dispute' arbitrable as understood under Art V (II)(a)? These questions will be examined in a separate paper.

²² Thus, judgment creditor will opt to litigate 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. If not, the judgment creditor would commence arbitration.

²³ Notably, the reasons laid out in Article V are exhaustive and have to be narrowly interpreted (Wheless, 1993: 808). It was confirmed in an often cited case *Parsons & Whittemore v. Societe Generale De L'industrie Du Papier*.

5. CONTROVERSIES IN THE USE AND THE EFFECT OF PRACTICE DIRECTION NO. 2

The use of Practice Direction 2 could have several controversial outcomes that require separate analyses. Some of the possible outcomes are: the possibility of the arbitral tribunal to rehear the dispute, the rights of third parties, the risk of double recovery, and the most important, the undesirable effect of elimination of the review of a judgment.

5.1. Possibility of the arbitral tribunal to rehear the dispute

In the creation of Procedural Direction 2, two possible solutions could have been taken regarding the possibility of the arbitral tribunal to rehear the dispute that preceded the judgment: to allow the tribunal to verify the grounds of the judgment giving rise to the 'judgment payment dispute', or to take the stand that the tribunal cannot enter into the merits of the original dispute.

The critique addressed to the first possibility was focused on the utility of the eventual power of the tribunal to conduct a hearing relating to the judgment debtor's financial circumstances. That would ask for additional costs and time, making the recommended clause a less attractive solution. Next, the hypothetical possibility to rehear a dispute would compromise the finality of the judgment if the tribunal issues an award that is inconsistent with the underlying national court judgment (Tan, 2018: 430-431). In line with the aforesaid, it was undoubtedly stated by former Chief Justice M. Hwang that it is not an intention to give the arbitral tribunal power to rehear the dispute or entertain challenges to the DIFC Courts' judgment on any ground that could have been raised in an appeal. The tribunal has to apply the doctrine of *res judicata* or issue estoppel (Hwang, 2015: 208).

Therefore, the arbitral tribunal has a very limited power regarding the judgment upon which a judgment payment dispute is based. Possible options are to refuse the judgment payment dispute in the absence of a judgment, or in the case that the identity of the parties is not the same as the ones from the judgment (Demeter, Smith, 2016: 460-461). This type of limited options motivated many to call the arbitral procedure under Practice Direction 2 a 'rubber-stamping exercise' (Hwang, 2015: 205).²⁴

Nevertheless, there is a possibility that the parties reach an agreement on their dispute after the arbitration has commenced. In the event of any final settlement of the parties' dispute, the DIFC-LCIA Arbitration Rules allow the Arbitral Tribunal to decide to make an award recording the settlement if the parties jointly request so in writing (Art. 26.9).²⁵ The judgment creditor and the judgment debtor could agree upon the manner of paying the judgment sum. For instance, they could agree upon an installment payment plan. This type of agreement would not be in breach of the principle *res judicata*; therefore, it would be theoretically possible.²⁶ Nevertheless, if the judgment debtor does not do the payment installments accordingly, the judgment creditor could still benefit from the enforcement of this 'consent award' under the New York Convention.

²⁴ Of course, a 'judgment payment dispute based on a judgment sum which could not be disputed raises a discussion about whether the award 'resolving' such a dispute qualifies for enforcement under the New York Convention.

²⁵ Article 26.9, Arbitration Rules, DIFC-LCIA, 2021.

²⁶ Judgment creditor could find this settlement more desirable if the judgment debtor is, for example, a regular business partner, if installment payments are more attainable, or if the value of the debtor's assets is not sufficient to cover the total sum rendered in the judgment.

5.2. Rights of third parties

In public discussion provoked by the Practice Direction draft, one of the raised questions has been whether third-party challenges should be provided in it. In general, the prevailing view in jurisprudence is that third parties bear no relevance to arbitration, which naturally leaves their interests unprotected (Brekoulakis, 2009: 1171). The main reason for that lies in the consensual nature of arbitration. Only parties to the arbitration agreement may participate in the arbitration proceeding. Consequently, the binding power of an arbitral award extends only over them.

However, it does not mean that third parties cannot be affected by it. On the contrary, modern business transactions often involve many parties. Regardless, this issue is not addressed in international conventions or in the UNCITRAL Model Law. Available procedural options in arbitration include a joinder, which is subject to consent of all parties.²⁷

The question of the rights of the third parties to challenge the award is, however, more complex. In principle, only a person or an entity that was a party to the original arbitration proceedings may request the annulment of the arbitral award. A third party can challenge an arbitral award only if the award undermines its rights. This is typically the case where two parties have fraudulently colluded to obtain an award that prejudices the rights of a third party.²⁸

Limited third-party protection is a general weakness of the arbitration procedure. Practice Direction 2 does not make any additional difficulties in that sense. The subject matter of the procedure in front of the DIFC-LCIA is a payment dispute based on an existing judgment. It is, thus, unlikely that a third party could be affected by it. If their financial or legal interest was affected, it had to happen regarding the judgment underlying the payment dispute. If a judgment is set aside, the basis of the demand for payment of the judgment sum will disappear (Hwang, 2015: 209).

5.3. The risk of double recovery

The existence of an agreement between the parties for a referral of a 'judgment payment dispute' to the DIFC-LCIA arbitration does not affect the judgment which is the basis for a dispute. That opens a controversy of possible double recovery.

For the sake of clarification, it should be noted that an arbitral procedure will not lead to the stay of the judgment enforcement procedure; nevertheless, once the judgment is enforced, there is no 'judgment payment dispute' to be resolved in front of the DIFC-LCIA arbitration. Thus, judgment enforcement would hinder the arbitration proceeding.

But, is there some other hidden danger? If a judgment creditor decides to use his right from a referral clause and commence an arbitration proceeding for a 'judgment payment dispute', the result will be the existence of two titles because the judgment will always remain in full force. What would happen if a judgment creditor decided to use both of them? In other words, what would happen if he decided to enforce both his court judgment and the arbitral award, in one or possibly two countries (in case the debtor has assets in both)? However, this situation is very hypothetical because the entire purpose of the

²⁷ Joining third parties in DIFC-LCIA is made available in Art. 22(x) of the Arbitration Rules of 2021.

²⁸ However, in a judgment dated 16 February 2017, the Belgian Constitutional Court decided that third parties aggrieved by an arbitral award should be able to exercise recourse against that award by way of third party opposition proceedings instituted before domestic courts. (Arrest nr. 21/2017 of 16 February 2017, https://www.const-court.be/public/n/2017/2017-021n.pdf?fbclid=IwAR1D5RQ_KTrRiITc2EFG2hmY0-KCC7WYTGH3O-fDgwuCiEPS8V1h2eAU-Q8)

additional arbitration procedure is to enhance the chances for enforcement. It is difficult to imagine a creditor who will expose himself to substantial costs of arbitration just for a theoretical possibility of a prospective double recovery from two titles.

For the sake of intellectual curiosity, these hypothetical scenarios may be developed to the end. In a situation where a judgment is already enforced and the debt paid, but a creditor nevertheless commences an enforcement procedure for the arbitral award, the debtor could use the possibility of Art. V(1)(e), V(2)(b) and Art. VI of the New York Convention. Hence, he would be able to ask a court to stay an enforcement procedure while having a set-aside procedure in the country of a seat of arbitration. The enforcement of such an award would amount to a double recovery, which conflicts with public policy. On the other hand, if the arbitral award is enforced first and the debtor subsequently asks for enforcement of a court decision, the debtor could use procedural tools of the civil procedure law of the country where the judgment enforcement is sought, and thus prevent a situation where he would pay twice while the creditor would benefit from unjust enrichment.

Therefore, the existence of two titles is not likely to prompt a situation where a double recovery could occur. If that happened, it would mean that a debtor did not take reasonable measures to use available legal instruments.

This hypothetical situation should not amplify the already existing alarms against the solution provided in Practice Direction 2. While commenting on the famous *Hilmarton* case²⁹, Jan Paulsson lucidly compared it with a "two-headed white rhinoceros which might give us a thrill in the cinema but does not really endanger our daily walk to work" (Paulsson, 1998: 15). Similarly, we are discussing the situation that is not likely to occur and, if it does, it will not raise greater concerns than those already existing in the contemporary world of international commercial arbitration.

5.4. The undesirable effect: Elimination of the review of a judgment

In a number of contracting states, the lack of the international enforcement mechanism for court judgments that would be comparable with the New York Convention is not a coincidence. A lack of trust in the competence and rightfulness of foreign courts is still a prevailing feeling, although the EU has shown readiness to overcome traditional distrust and abolish exequatur within its borders under the Brussels I recast³⁰. The necessity for the recognizing court to review whether the rendering court observed the principles of procedural due process and to guard against violations of the forum's public policy is a consequence of such distrust.

The enforcement of a DIFC-LCIA award on a 'judgment payment dispute' creates the same undesirable situation, aimed to be avoided with the procedure of exequatur of court judgments. If such an award would be enforced under the New York Convention, the DIFC judgment of the original dispute (which served as a basis for a judgment payment dispute) would circumvent the inspection otherwise necessary to perform judgment exequatur.

The arbitral award itself has to possess all the qualities necessary to avoid refusal of the recognition and enforcement prescribed in Article V of the New York Convention. However, the preceding judgment stays completely under the radar. The award deals only with the judgment payment dispute but does not review the judgment. That was confirmed by the former Chief Justice, M. Hwang, in his answer to the question whether the arbitral tribunal would have

²⁹ Case 92-15.137 *Société Hilmarton Ltd v. Société Omnium de traitement et de valorisation* (OTV).

³⁰ Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

the power to entertain challenges to the DIFC Courts' judgment on any ground that could have been raised in an appeal. He said that it is certainly not the intention to do so, and the tribunal would in all probability have to apply the doctrine of *res judicata* (Hwang, 2014: 5).

Consequently, if there has been, for instance, a violation of the procedural due process in the court procedure that preceded a DIFC judgment, rendering an award on judgment payment dispute consequent to that judgment and the subsequent enforcement of the award would cut off any possibility for the review of that violation.

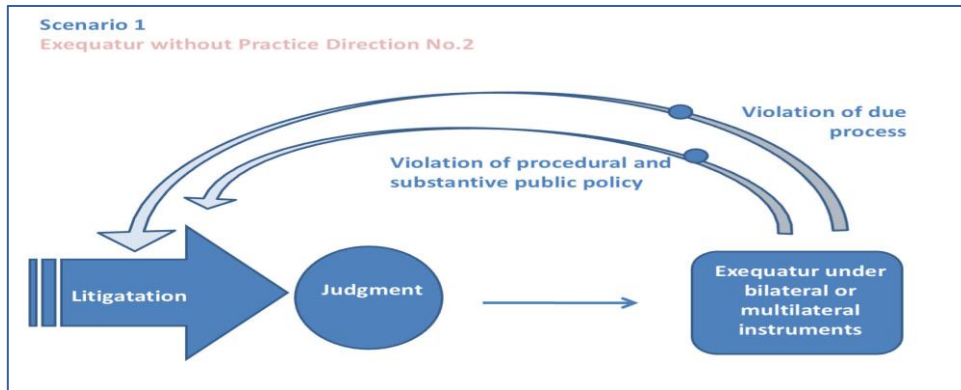


Fig. 2 Exequatur without Practice Direction No.2

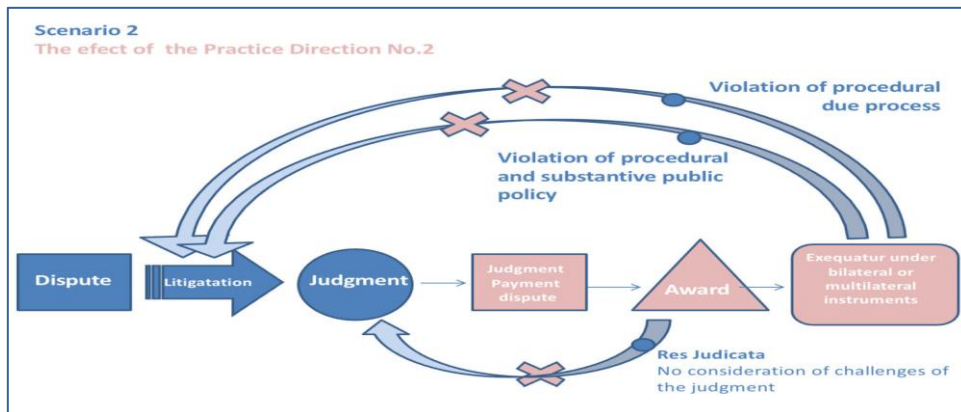


Fig. 3 The Effect of Practice Direction No. 2

Source: Figures created by the author (2020)

6. CONCLUSION

Practice Direction 2 is designed to create a possibility to overcome the deficiencies of the enforcement mechanism available for court judgments. It allows a judgment payment dispute that satisfies all of the provided Referral Criteria to be referred to arbitration by a judgment creditor, provided that an arbitration agreement in that regard exists between the

parties. This type of agreement would not affect the regular enforcement possibilities. It gives an additional option for a judgment creditor, not an alternative one. With the appropriate use of Practice Direction 2, a judgment creditor could benefit from the worldwide enforcement under the New York Convention. Such an unprecedented mechanism provoked a 'knee-jerk' opposition.

Setting aside the potential obstacles such an award would face regarding its enforceability under the New York Convention, several controversies emerged in the possible use and the effect of Practice Direction 2. Some of them, the risk of double recovery and the alleged right of an arbitral tribunal to rehear a dispute have shown to be ungrounded. However, the enforcement of a 'converted-judgment-award' under the New York Convention opens the door for an undesirable effect. The mechanism provided in Practice Direction 2 allows a judgment that precedes the 'judgment payment dispute' to evade the review of the due process or public policy that would normally be performed in a court *exequatur*. This could have a detrimental effect on the reliability of arbitral awards.

Conclusively, the success of this 'conversion' of a DIFC judgment into an arbitral award will depend on the receptiveness of the courts seized for enforcement of the DIFC-LCIA award resulting from the referral of a judgment payment dispute to arbitration. The famous proverb says: "The proof of the pudding is in the eating". The existence of Practice Direction 2 generated a necessity to revisit some of the basic concepts of arbitration and the *exequatur*, but only the practice will show its success.

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KONVERZIJA PRESUDE MEĐUNARODNOG FINANSIJSKOG CENTRA DUBAI U ARBITRAŽNU ODLUKU: KONTROVERZE U PRIMENI PROTOKOLA O POSTUPANJU BR. 2

U članku se razmatra Protokol o postupanju br.2 Međunarodnog finansijskog centra Dubai (DIFC), koji otvara mogućnost za svojevrsnu konverziju presude u arbitražnu odluku. Ovaj mehanizam, u određenim slučajevima, omogućava da sudska odluka postane osnova za arbitražnu odluku, ukoliko ugovorne strane, ili stranke u postupku, arbitražnim sporazumom predvide da će spor povodom novčane obaveze biti upućen na arbitražno rešavanje. Arbitražna odluka doneta u takvom postupku bi mogla biti izvršena u inostranstvu primenom Njujorške konvencije.

Najpre je dat pregled organizacije sudova i arbitražnog centra Međunarodnog finansijskog centra Dubai, njihovih osnovnih karakteristika i pravila o izvršenju njihovih odluka u inostranstvu. Sledi detaljna analiza Protokola o postupanju br.2, predložene arbitražne klauzule i kriterijuma za upućivanje na arbitražu, njihovih prvobitnih verzija, kao i analiza namera donosioca ovih rešenja. Poslednji deo posvećen je mogućim posledicama primene ovog Protokola, koje su izazvale polemiku u literaturi. Neke od njih su: nepoželjni efekat eliminacije kontrole sudske odluke, mogućnost arbitražnog tribunala da ponovi odlučivanje o sporu koji je već okončan sudskom odlukom, kao i rizik da bi ovakav mehanizam doveo do dvostrukog izvršenja.

Ostvajajući po strani mogućnost primene Njujorške konvencije za izvršenje arbitražne odluke do koje bi došlo korišćenjem mehanizma iz Protokola o postupanju br.2, zaključak je da bi njegova primena rezultirala u eliminaciji kontrole sudske odluke (koja je osnov spora povodom novčane obaveze koji je upućen na arbitražno rešavanje), u pogledu eventualne povrede procesnih prava i javnog poretka, a koja bi predstavljala razlog za odbijanje priznanja i izvršenja te odluke.

Ključne reči: *Međunarodni finansijski centar Dubai, sudska presuda, arbitražna odluka, izvršenje*