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Converting Court Judgments into Arbitration Awards

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(1) First, let me make a confession and an apology for the inaccurate title of this talk. I am not a magician who can convert a court judgment into an arbitration award, nor may there be many takers who may wish to trade in their judgment for an arbitration award. But the process that I am going to describe today is not easily captured in a short and catchy title. So, the first point that I wish to make is that this process is to provide an arbitration award which will make a court judgment hopefully more enforceable than it would otherwise be. Under this process, the Court Judgment provides a basis for a fresh arbitration between the same parties based on a new dispute that is created when the Judgment Debtor does not pay the sum owed under a judgment. This process has been formalised into a Protocol which was conceptualised in 2014 by the Dubai International Financial Centre (DIFC) Courts, and formally issued as a court document in 2015. I will be using the terms "Protocol": and "Practice Direction" interchangeably.

(2) I served as the Chief Justice of the DIFC Courts from 2010 to 2018, but still carried on my practice in international arbitration during this period and devised this Protocol with the assistance of several arbitration practitioners in Dubai and London. The seed of this idea was first planted in my mind by Tim Taylor QC from King & Wood Mallesons at a dinner of the Dubai Arbitration Practitioners Club. After a few conversations, I began to work out the details of the Protocol, and was assisted in this task by further contributions from Tim, as well as Rupert Reed QC (then of Wilberforce Chambers), who was a regular feature in the Dubai landscape. This Protocol was crystallized in a draft Practice Direction which was circulated for public consultation in Dubai (and elsewhere) and explained in some detail in a public lecture I gave in 2014. Several members of the

local arbitration Bar contributed their feedback, which led me back to the drawing board, and eventually a final version of the Practice Direction was issued on 27 May 2015 as **Amended DIFC Courts Practice Direction No. 2 of 2015 – Referral of Judgment Payment Disputes to Arbitration**.

(3) The heart of this concept rests on the assumption that, although the issue of liability in respect of a particular dispute would have been finally settled by a Court Judgment, there could be a further dispute following the Judgment in respect of non-payment of the Judgment sum. That legal assumption is founded on well-established common law jurisprudence 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 either (i) refuses to pay or (ii) keeps silent but, in any event, does not pay. And there is still a dispute even if the issue of whether the debt is owing is beyond dispute, so only a clear and unequivocal admission of liability or actual payment will mean that there is no dispute.

(4) To save time for those of you who would like to check the relevant authorities, I need only to refer to the decision of the Singapore Court of Appeal in 2009 called ***Tjong Very Sumito v Antig Investments Pte Ltd*** **[2009] 4 SLR(R) 732** which references and discuses all the major English authorities on this point. Incidentally, I was Counsel for the successful party

(5) In this Judgment, the Singapore Court of Appeal emphasised 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 which is necessary to exclude the existence of a dispute because of an admission of that demand. As the Court said *"an open-and-shut case must be distinguished from an admission*". Against that legal background, the Practice Direction set out certain criteria for referring a dispute arising from the non-payment of a judgment sum to arbitration.

(6) The first and most important step in creating this Protocol is our definition of a dispute, which we have termed **'Judgment Payment Dispute'** which covers 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, 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 under Rule 36.34[1]; and/or

(ii) the inability or unwillingness 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.

(7) I will be using the terms "Judgment Creditor" and "Judgment Debtor" respectively to refer to the winning party and the losing party in the court action, and the winning party will usually be the claimant or plaintiff **but not always** because, if a defendant or respondent succeeds in resisting the claim and even wins its counterclaim, it can be the winning party. So please bear in mind that the Judgment Creditor can be the defendant/respondent and the Judgment Debtor can be the plaintiff/claimant. The more important point is that (as I will explain later) the "**Judgment Payment Dispute**" will be determined pursuant to the procedure set out in an Arbitration Clause in the original commercial agreement which will entitle either party to invoke the Protocol, depending on which of them is the ultimate winner of the court action that has given rise to the Judgment. Let me now explain the scope of this Protocol.

(8) First, we are talking about money judgments, not judgments for non monetary claims like declarations of ownership to property or recovery of property wrongly held by another party.

(9) Second, there must be a judgment from a court, any court anywhere, and that judgment is not fully satisfied after a demand for payment has been made. So long as there is unpaid money due under the judgment, this Protocol can apply.

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[1] [1] which explains the time for complying with a judgment or order and is, unless ordered otherwise by the Court or another Rule of Court, 14 days from the date of judgment

(10) Third, the dispute can cover the alleged inability or unwillingness of the Judgment Debtor to pay the outstanding amount of the judgment sum, so that this alleged justification for non-payment can be determined by the arbitrator

(11) With that definition, we have set out the following criteria for this Protocol to be invoked (known as "The Referral Criteria").

(12) The Referral Criteria are defined in the Protocol as follows:-

12.1 "*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, 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.*[2]

12.2 This agreement for submission to arbitration shall in all respects including (but not limited to) its existence, validity, interpretation, performance, discharge and applicable remedies be governed by and construed in accordance with the laws of the Dubai International Financial Centre.

12.3 The Judgment Creditor may, before or after exercising its option to refer a Judgment Payment Dispute to arbitration as provided above, exercise all rights of enforcement of the judgment in a national court by way of execution on the assets of the Judgment Debtor, and the Judgment Debtor shall not be entitled to resist execution before any such national court on the grounds of this arbitration agreement, which is intended to provide a Judgment Creditor with additional, and not alternative, remedies for enforcement of its judgment.

12.4 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;

12.5 There is a Judgment Payment Dispute (as defined above); and

[2] *This should be now be more accurately modified to Article 5 of the 2016 Rules.*

12.6 The Judgment Creditor and Judgment Debtor have agreed in writing that any Judgment Payment Dispute between them may be referred to arbitration pursuant to this Practice Direction."

(13) First, you will notice that this clause is specifically drafted on the basis of referring the arbitration to a single Arbitrator to be appointed under the rules of the **DIFC-LCIA Arbitration Centre** by the LCIA Court in London, which is the appointing authority under the Centre's Rules. However, this Arbitration Protocol could easily be adapted for use in any other Centre. The single Arbitrator was chosen for this model arbitration agreement so that the arbitration could proceed more quickly than a 3-member tribunal.

(14) Next, there is provision for a governing law of the arbitration agreement, which in the model clause is stated to be DIFC Law (which is based on a common law principles and therefore very likely to recognise the validity of this Protocol), but any other law which would recognise the validity of this arbitration agreement could also be chosen.

(15) Third, and this is very important, this right to invoke the arbitration agreement is only given to the Judgment Creditor, which (on one analysis) makes this an asymmetrical arbitration clause, and I will comment on this later.

(16) Last, in order to satisfy a Judgment Creditor that it would not be losing its rights under the Judgment, we inserted a suggested paragraph within the arbitration agreement itself which provides **for the continuing validity of the Judgment itself so as to make it clear that the arbitration is intended as an additional enforcement remedy and not a substitute for a Judgment**.

(17) Accordingly, the advice we gave to the legal profession in Dubai in 2015 was that, if the arbitration clause were exercised, there would be the following choices open to the Judgment Creditor:-

(i) The Judgment Creditor would have the option either to litigate or to arbitrate.

(ii) The Judgment Creditor would opt to litigate before arbitration if the Judgment Debtor had assets in any of the following 3 places:

(a) Dubai;

(b) a common law country; and/or

(c) another country with which the UAE (of which Dubai is a part) had a multilateral treaty (notably the Gulf Cooperation Councl (GCC) Convention covering 6 important Middle Eastern states) or bilateral treaties (with major territories such as China, India, Kazakhstan and Hong Kong) providing for mutual recognition and enforcement of judgments.

(iii) If none of the above conditions favouring litigation applied, (or if execution of the judgment proved to be unsuccessful in recovering the whole of the judgment debt), the Judgment Creditor would commence arbitration.

(iv) In the last scenario, it is likely that the vast majority of New York Convention countries **which are common law countries** will uphold this arbitration clause and the arbitration award could then be enforced in such countries.

(18) Again, while the choices as described in the Practice Direction would be choices available to lawyers in Dubai and the UAE generally, my contention is that this system can work in other countries. However, let me qualify this statement. **I am reasonably confident that this system would work in any other common law country**. **First**, because of the common law doctrine that any issue which is in contention without a clear admission of liability can be considered a dispute for purposes of arbitration law. **Second**, while a clever Judgment Debtor might seek to "game the system" by saying candidly "*I admit my liability by a Judgment Debtor under the Judgment, but I am simply not in a position to pay the judgment sum*", the Practice Direction pre-empts this possible objection by defining the scope of "**Judgment Payment Dispute**" as including "***the inability or unwillingness of the Judgment Debtor to pay the outstanding portion of the judgment sum within the time demanded***".

(19) One critical element of the model arbitration clause is that **the arbitration clause can only be invoked by the Judgment Creditor but not the Judgment Debtor**. This asymmetry is to

prevent a Judgment Debtor from trying to "game the system" by halting the process of enforcement of a Judgment when: (a) the Judgment Debtor clearly has assets within a treaty state or a common law territory capable of seizure; and (b) the Judgment Debtor wishes to buy time, perhaps to move its assets out of the jurisdiction by creating an arbitration simply as a means of delay. This point was made to me when we circulated the original draft for public consultation, which at that time had a normal bilateral arbitration clause. I was then contacted by the Arbitration Committee of the American Bar Association which pointed out this apparent loophole. I did some more research, and became persuaded that an asymmetrical arbitration clause would be enforced in a common law jurisdiction in the same way as a bilateral version. Again, to save the long citation of authorities, this principle has been clearly established by the Singapore High Court in ***Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd*** **[2017] 3 SLR 267**, which has cited various English and Commonwealth authorities in support of the asymmetrical arbitration agreement. This Judgment has been upheld by the Singapore Court of Appeal [***Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd [2017] SGCA 32***].

(20) I can therefore say with some confidence that this clause should work as an arbitration clause in all common law countries. There might be some doubt about the position in civil law countries. I have done some preliminary research into the French position, where the strict position under **Article 1174 of the French Civil Code** appears to hold that such an asymmetrical clause would be void as a **potestative condition**. However, the modern French jurisprudence apparently disapproves of this interpretation for arbitration agreements, and would hold an asymmetrical arbitration clause to be valid provided that the choice offered to the beneficiary of the option for arbitration is "foreseeable". In that situation, the asymmetrical clause would then not violate Article 1174 (See the 2015 case involving Apple (*eBizcuss v Apple Sales International* Cass. 1st civ. 7 October 2015, No. 14-16.898); *Mme X v. Rothschild* Cour de Cassation, Civil Division 1, 26 September 2012, 11-26022 and *Danne v. Credit Suisse* Cour de Cassation, Civil Division 1, 25 March 2015, 13-27.264). (Since this talk was delivered, I have received a helpful note from Dr Peter Heink form Germany who has opined that such an asymmetrical arbitration clause could work under German law). However, i cannot yet speak for the rest of the civil law universe.

(21) For those faint hearts, perhaps they could settle for a normal bilateral arbitration clause and choose an arbitration centre which is known for its emphasis on efficient and speedy process by the Tribunal. The worst that could happen if the Judgment Debtor invoked the Arbitration Agreement is that there may be a short delay while the arbitration is heard, but execution of the Judgment could still be possible. In any event, a Judgment Creditor could refer to the arbitration agreement itself, which explicitly saves all rights of execution under the Judgment even if the option for arbitration is chosen. However, I have to say that, at the moment, this Protocol remains as a theoretical construct. as I have not heard of any party adopting this procedure in Dubai or elsewhere.

(22) This is probably partly due to the reluctance of arbitration practitioners to adopt any new procedure. From a practical level, it might also be that lawyers in Dubai are perhaps less in need of this alternative method of enforcement since Dubai Court Judgments have a comparatively wide geographical reach. This is due to:-

(a) The fact that the common law world accepts the basic principle that all foreign judgments will be enforced as of right if the basic conditions for jurisdiction are satisfied, which automatically gives you at least 50 countries and territories (present and past members of the British Commonwealth plus the USA) where any court judgment will automatically be recognised and enforced upon satisfaction of not very onerous requirements.

(b) Furthermore, UAE has entered into several significant multilateral and bilateral treaties for mutual recognition of their Court Judgments (including those of the DIFC Courts). These include the GCC Convention (which covers 6 important Middle East countries including the UAE, Saudi Arabia, and Qatar) , the Riyadh Convention (which covers 18 Middle Eastern and North African Arab nations) and bilateral treaties with the PRC, Kazakhstan, India and (lately) Hong Kong.

(23) Some viewers may ask: why should the defendant / respondent agree in advance to help the plaintiff / claimant to enforce a judgment against the defendant / respondent?

(24) We have to realise that the ideal time to incorporate such an arbitration clause is at the time of negotiating the commercial deal

between the parties and, **at that stage there is no plaintiff/claimant or defendant/respondent, because that will only be determined when a dispute arises**. So where both parties consider that, they wish their primary dispute to be decided in a mutually agreed court (and this will be reflected in a choice of court clause), but each of them would also like a more effective means of international enforcement of any judgment which it might obtain in its favour, then this is where the asymmetrical arbitration clause will be useful to allow a more effective means of enforcement of that Judgment. Therefore, since the asymmetrical arbitration clause would be of benefit to whomever was the plaintiff/claimant at that time, then there is a practical reason why both parties should agree to incorporate that additional arbitration clause with its asymmetry. And this is also why I think that the clause will not fall foul of French law, because the asymmetry is clearly foreseeable and accepted by both parties. Indeed, it is capable of being used by either party if it were to be the winner in the court case. **So, in reality, to describe this an asymmetrical arbitration clause is not really accurate. When the arbitration clause was signed, it gave both parties the opportunity to have this option for arbitration if it won the court case settling their dispute on liability**.

(25) In any event, parties could also be advised that there is no downside from adopting this Protocol as it would take nothing away from their existing rights under a judgment, and this Protocol may well have the effect of making enforcement of that judgment more effective. So what is there to lose by adopting a process that would still be optional if the asymmetrical model were adopted (other than a few months' delay to actually deal with the arbitration)?

(26) In conclusion, I suggest that arbitration and corporate practitioners from all jurisdictions should give serious consideration to adopting (or adapting) this concept in their future drafting of commercial agreements. And if we can have more contributions from civil law practitioners as to how this concept can work in their respective countries, we may yet arrive at a universal solution to benefit the development of dispute resolution generally.