



## **COURTING CONSTRUCTION: THE NEW TECHNOLOGY & CONSTRUCTION DIVISION OF THE DIFC COURTS**

**The DIFC Courts are proposing to increase and improve their existing offering by establishing a new, specialist Technology & Construction Division (TCD).**

### **What is happening?**

On 20 March 2017, the DIFC Courts issued, in draft, a new Part 56 of the Rules of the DIFC Courts (TCD Rules) for public consultation. The TCD Rules concern the establishment of the specialist TCD, which will hear claims involving “issues or questions which are technically complex” (TCD Claims).

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What constitutes a “technically complex” issue or question is not prescribed in the TCD Rules, but a non-exhaustive list of examples of TCD Claims is provided. These include (as one might expect):

- Building, construction and engineering disputes.
- Claims by/against architects, engineers and other consultants.
- Disputes relating to computers, software and network systems.

TCD Claims may also include claims for trespass and nuisance, claims arising out of fires and challenges to arbitrators’ decisions in construction and engineering disputes so, in this respect, the remit of the TCD closely follows that of the Technology and Construction Court in England and Wales (TCC).

## Why is this important?

Currently, arbitration is overwhelmingly the forum of choice for resolving construction and technology disputes within Dubai, the UAE and the wider region. This is in large part due to the combination of certainty of process and the specialist technical expertise of the tribunal, often perceived to be lacking in the regional courts.

However, arbitration in the Middle East is not without its disadvantages. For complex disputes, the arbitral process can be lengthy and expensive. In addition, the regional courts’ inconsistency in enforcing arbitral awards remains a key concern.

The new TCD seeks to address these concerns and provide a forum for resolving disputes that offers the best of both worlds: the technical expertise and understanding found in arbitration combined with the certainty and efficiency of the existing DIFC Court regime. It is an important (and welcome) development in the UAE legal landscape, and one that is likely to make litigating complex disputes in the DIFC Courts much more attractive. In particular:

- Although not clear from the TCD Rules, it seems inevitable that the judges in charge of the TCD and hearing TCD Claims will be experienced in hearing, managing and deciding construction and technology disputes. That innate understanding of the issues in dispute not only creates efficiencies of itself, but parties may take greater comfort that the decision-maker(s) will make the “right”, or at least an informed, decision, much like a specialist arbitral tribunal.

- The TCD Rules provide for early case management conferencing, with procedures and timetables appropriate to resolve the issues in dispute laid down at the earliest stages. This certainty of process is a key attraction in institutional arbitration, affording parties a great deal of insight into the steps, timeline and costs involved in arbitration.

- Unlike the “onshore” courts, proceedings are generally in English and the DIFC Courts publish comprehensive written judgments, which form the DIFC’s own body of binding case law. This is also different from arbitration, where awards are rarely published and are not binding precedent. In time, a significant body of TCD case law is likely to develop, giving parties and their legal advisers greater guidance and certainty of outcome (which may in some instances avoid proceedings altogether).

## Will the TCD be right for your contract?

The TCD is the DIFC Courts’ version of the very successful TCC and equivalents in other common law jurisdictions. If and when established, it will offer a further choice of forum for the resolution of complex disputes. How-

ever, whether the TCD can match the pre-eminence of the TCC and, more importantly, whether it will be right for your contract, depends on a number of factors.

- **Opting-in:** While the DIFC Courts (and thus the TCD) may have exclusive jurisdiction over DIFC-related cases (in accordance with Dubai Law No. 12 of 2004), it is likely that the vast majority of cases in the wider UAE and Middle East will require the parties to “opt-in” – that is, expressly agree to submit their dispute to the jurisdiction of the DIFC Courts. Though gaining in popularity, the DIFC Courts remain a comparatively uncommon choice, particularly in construction contracts, with parties unwilling to adopt the relatively unfamiliar DIFC Courts as their dispute resolution forum. In the short-term, this may be a barrier to the TCD’s success.
- **Privacy:** As noted above, the DIFC Courts usually publish detailed judgments. In addition, as a general rule, proceedings are usually open to the public and the circumstances in which a hearing will be held in private are limited. In contrast, a key attraction of arbitration is that it is private. The willingness to opt-in to the DIFC Courts’ jurisdiction will therefore depend on the parties’ appetites for resolving their disputes in a public forum.
- **Expertise:** Key to the TCD’s success will be market confidence. The TCD’s ability to field specialist judges in sufficient numbers to manage any caseload will be an important factor in establishing its credentials. Thus far, the DIFC Courts have an excellent track record of appointing suitably experienced and qualified judges to the bench and we expect the TCD to be no different. However, in cases with complex issues across several disciplines, parties may still prefer the multi-disciplinary expertise and insight offered by a panel of arbitrators.
- **Speed and efficiency:** Rarely do parties want to be tied up in

litigation for months on end. A common problem with multi-arbitrator arbitrations is that it can be difficult to find mutually convenient hearing dates within compressed timetables. As a result, small slippages in the timetable can result in hearing dates being postponed for several months, delaying any final resolution. Currently, the DIFC Courts have a well-deserved reputation for good case management, while the lack of an appellate court beyond the Court of Appeal (in contrast to the onshore courts’ Court of Cassation) helps to minimise the overall duration of litigation compared to the onshore courts. However, in addition to the number of TCD judges appointed (at least in the longer-term), a key factor will be their availability – many of the DIFC’s judges are not permanently based in the UAE. In the English TCC, caseloads have been managed through the use of pre-litigation adjudication, often avoiding litigation altogether. In the absence (for now) of any similar regime in the DIFC, the TCD will have to be properly resourced to avoid leaving too few judges hearing too many cases, with little timetabling flexibility.

- **Enforcement:** Enforcement remains a key concern for most parties. Taking arbitration as a reference, arbitral awards benefit from wide-ranging portability and enforceability under international treaties such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a significant attraction for international parties. In contrast, enforcement of DIFC Court judgments outside the DIFC is still largely untested. However, in addition to the UAE’s various treaties for the mutual enforcement of court judgments, the DIFC Courts have made remarkable progress in implementing a growing framework for the enforceability of their judgments onshore in the UAE, across the wider region and globally through a series of agreements and memoranda

of understanding. This means, in principle, that DIFC Court judgments can be widely enforced in the region and may be afforded greater weight – or fewer opportunities for challenge – than an arbitral award. Critical to the TCD’s success as a forum for disputes will be increasing confidence and certainty by demonstrating a growing and consistent pattern of enforcement of its judgments outside the DIFC itself.

- **Cost:** Parties are increasingly focussed on managing their legal spend. This is particularly the case in the Middle East, where recent market fluctuations mean companies are acutely aware of the costs of litigation and arbitration. Though comparatively more expensive than the local, onshore courts and, potentially, ad hoc arbitration, the DIFC Courts fare better in comparison to institutional arbitration, where parties are generally charged an administrative fee based on the sums in dispute, in addition to paying the fees of the tribunal. Of course, though an important consideration, in many instances the cost of proceedings will be secondary to the ability to enforce a final decision. However, provided the DIFC Courts can continue to build confidence amongst their users, the lower cost of litigating may be a further incentive for parties to choose the DIFC Courts over arbitration.

### What’s next?

Given the DIFC Courts’ increasing popularity and the prevalence of building and construction disputes in the UAE and the wider region, the TCD is in many ways an inevitable and logical progression of the DIFC Courts’ services.

It is also timely. There is usually a delay between parties choosing a forum for dispute resolution in their contracts and formal proceedings commencing. With the number and scale of projects currently underway and planned in the region – for example, the World Expo in Dubai in 2020 and the FIFA World Cup in

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Qatar in 2022 – we expect the volume of regional, technically-complex disputes to increase significantly in the next five to 10 years. Proposing this initiative now allows time for the TCD to mature and establish itself as a viable alternative to arbitration, poised to be the dispute resolution forum of choice for many of those projects if and when disputes arise in the years to come.

Until the TCD is established, we expect most parties to continue to specify arbitration as their chosen method for resolving disputes in technically complex matters. However, that is not to say the TCD will have no role to play in those disputes. Parties are increasingly choosing to seat their arbitrations in the DIFC to take advantage of the pro-arbitration stance of the

DIFC Courts and DIFC Arbitration Law (something we have discussed previously here (<http://www.hfw.com/DIAC-to-change-its-default-seat-of-arbitration-March-2017>)). Under the TCD Rules, it is proposed that the TCD hear challenges to arbitrators’ decisions in construction and engineering disputes and we anticipate that the TCD will follow and confirm the DIFC Courts’ historical approach. We also expect to see existing cases in the DIFC Courts that are “technically complex” transferred to the TCD – something specifically provided for in the TCD Rules. However, as the TCD grows in reputation and familiarity, this may become less common as parties commence their cases in the TCD directly.

The draft TCD Rules will be open for public consultation until 22 April 2017 with the final rules expected in the second quarter of this year. We will write further on this topic once more information on the TCD is available.

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