A new division within the DIFC Courts, the Technology and Construction Division

24 September 2017

The DIFC Courts, last week, published Part 56 (Technology and Construction Division) of the Court Rules ("Part 56") marking the launch of the Court's new division - the Technology and Construction Division ("TCD"). This follows a consultation period with the region's legal community on the proposals in which Hogan Lovells participated.

1. What is the TCD?

The TCD offers a further choice of forum for the resolution of “issues or questions which are technically complex” ("TCD Claims") and draws on specialist judges steeped in construction and engineering disputes experience. In addition, a new set of specific rules to fast-track the resolution of such disputes have been introduced.

The services provided by the TCD are broadly equivalent to those offered by the Technology & Construction Courts of England & Wales ("TCC"), which have been used to hear complex cases in these sectors since the late 1990s.

A non-exhaustive list of potential TCD Claims is provided in Rule 56.3 of Part 56. As such, provided parties opt in, the TCD will have jurisdiction to hear inter alia:

- building, construction and engineering disputes;
- claims by and against architects, engineers, surveyors, accountants and other specialised advisers relating to the services they provide;
- claims by and against DIFC or any DIFC body relating to the development of land or construction of buildings;
- claims relating to the design, supply and/or installation of computers, computer software and related network and IT systems and services; and
- challenges to decisions of arbitrators in construction and engineering disputes.

2. Who can use the TCD?
The TCD will not only have jurisdiction to hear DIFC-related cases but parties outside of the DIFC (and indeed the UAE) will also be able to submit their dispute to the jurisdiction of the TCD by either including a dispute resolution clause to that effect in their contract or by electing by mutual consent to use the TCD to resolve a dispute which has already arisen.

3. How does it differ from the English TCC?

Generally, Part 56 follows the English law Practice Direction 60 (Technology and Construction Court Claims) ("PD 60") except for the following main divergences which we summarise below:

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<th>Part 56</th>
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<td><strong>Rule 56.3:</strong> The non-exhaustive list of disputes that would be appropriate to be heard by the TCD mirrors the list provided for under PD 60, save for the following two examples which have not been included in Part 56:</td>
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<td>• Claims relating to the <strong>quality</strong> of goods sold or hired, and work done, materials supplied or services rendered; and</td>
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<td>• Claims relating to the <strong>environment</strong> (for example, pollution cases).</td>
<td>While the TCD’s scope of the disputes is seemingly more limited than PD 60, this is not necessarily a deficiency as:</td>
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<td>• the list is non-exhaustive; and</td>
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<td>• the types of disputes that have not been included are probably less likely to be heard in the DIFC in any case.</td>
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Rule 56.19: The Rule expressly lists topics that the Court will consider at a Case Management Conference ("CMC"). This list is non-exhaustive and includes:

- whether any issues can be conveniently dealt with by a **Court-appointed expert** and whether **ancillary orders** may be necessary for the carrying out of inspections, the obtaining of samples, the conducting of experiments, or the performance of calculations;
- whether it would be appropriate and proportionate to make any **interim orders for the preservation of evidence**; and
- whether it would be appropriate to set out the elements of a claim / counter-claim in a **Scott Schedule**.

Again, this is an indicative list of matters the judge will consider at the CMC. It is a non-exhaustive list and the Court will therefore have the discretion to consider other matters not listed in Rule 56.19.

Rule 56.20: The fixing of Pre-Trial Review by the Court seems to be optional as the Rule sets out: *"If the Court fixes a date for a Pre-Trial Review [...] (emphasis added)"*. This differs from PD 60 as in the latter the Pre-Trial Review is compulsory.

4. Why choose the TCD?

Until now, arbitration has been the preferred forum for the resolution of complex disputes within the construction industry in Dubai and the wider region, not least because it allows the parties to choose the decision-makers and ensure that the tribunal has the appropriate expertise and will be able to grasp the key issues and make decisions accordingly. Arbitration can, however, be challenging in this region, especially towards the end of the process as enforcement of
arbitral awards can be complicated and time consuming.

Hogan Lovells partner Nabeel Ikram, who conducted the first ever construction case which went to trial in the DIFC Courts (and where his client succeeded with all its claims) and who has also advised on a number of other projects within the DIFC, comments:

“This is an exciting development. From my first-hand experience, I can confirm the DIFC Court was extremely adept at handling a complex, technical construction case as far back as 2008. The addition of a specialist division will only bolster the DIFC Court’s credibility and vision as a world-class centre for dispute resolution.”

Factors to take into account when drafting the dispute resolution clause which should comprise the parties’ choice of forum - whether arbitration or the court system - include speed, cost, reliability, ease of enforcement/execution, and confidentiality of proceedings. We are, of course, very happy to advise on these issues.

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