

Eyeing swift dispute resolution

A dedicated construction court being established as part of the DIFC Courts has the potential to be a quicker, cheaper and more efficient route to dispute resolution, says STUART JORDAN.

IN A recent column, I discussed the new UAE criminal sanctions on arbitrators and expert witnesses, concluding that it may well have the effect of limiting the availability of high-quality arbitration as a means of resolving construction disputes in that jurisdiction. If a trend away from arbitration does start to appear in the UAE, a separate “supply side” development might reinforce it.

Earlier this year, DIFC Courts issued a consultation draft of new court rules establishing a specialist Technology and Construction Division (TCD) to handle disputes in those areas. For our purposes, I’ll ignore the technology aspects of this. The TCD is an obvious step; the evidence is that the number and value of Middle East construction disputes continues to rise and, with a long pipeline of mega-projects still in the planning stage, this trend shows no sign of reducing.

The advantages of a dedicated construction court can be summarised as: personnel and procedure. Construction, we know, is its own world: the disputes tend to be technically and contractually complex. So, it has long been concluded that efficient disposal of our disputes requires us to “grow our own” dispute referees from the ranks of construction professionals such as lawyers, engineers and others. Alongside that, we need dispute procedures that facilitate the efficient presentation and examination of the issues typically thrown up in construction.

The TCD aims to provide both personnel and procedure. It closely mirrors the Technology and Construction Court (TCC), a division of the English High Court. The proposed rules (new Part 56) state that the TCD is to take on disputes in building and other construction matters, engineering, claims involving construction professionals and – importantly – challenges to the decisions of arbitrators in construction and engineering disputes. The rules include the following:

- Parties may choose to issue their claim



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in the TCD or if not, the DIFC Courts might transfer suitable disputes to it;

- A (presumably specialist) judge will be appointed to take charge of the TCD;
- In each matter, the court will fix a case management conference early in the process;
- Specific TCD case management forms (information sheets and directions) must be exchanged, with the parties encouraged to agree directions;
- Directions may be given for the appointment of expert witnesses, inspections, sampling and the creation of Scott Schedules (itemised claim-defence-quantification-decision tables) to identify and dispose of each point in issue.

All of this is consistent with the constitution and aims of the DIFC Courts system, which was created to deal efficiently and fairly with commercial disputes – effectively to meet the needs of modern commerce. DIFC is a common law jurisdiction with court proceedings conducted in English and a procedural rules very similar to the English commercial courts. Since 2011, the business of the DIFC Courts has not been limited to contracts made within the geographical area of the DIFC: parties anywhere may now provide in their contracts for DIFC jurisdiction.

The TCD is bound to present a challenge

to arbitration, which has been the near-universal disputes resolution process in the region unless certain public contracts rules forbid it. Parties have chosen arbitration for exactly the same “personnel and procedure” reasons but arbitration can also be cumbersome, lengthy and expensive.

In reality, it is very unlikely that any success of the TCD would be at the expense of arbitration. There will be good reasons to consider the TCD although many parties will still opt for arbitration if they continue to value greater flexibility in procedure and in the ability to match arbitrators to the issues in hand. There is the added comfort of confidentiality in arbitration which, in my observation, is especially valued by parties in the Gulf. If the TCD becomes an established forum, I expect it would be similar to the TCC in England: commonly used but not dominant to the exclusion of arbitration.

The most important consideration for our industry is the availability of high-quality dispute resolution. In that regard, both specialist courts and arbitration centres can fulfil that role and they should be able to exist side by side. Indeed, if the TCD will be able to provide efficient and reliable decisions on challenges to construction arbitration awards, this can only benefit arbitration as well.

In conclusion, so long as good specialist judges are appointed to the TCD, this is an attractive combination of a modern procedure designed specifically for construction issues, together with the inbuilt advantages of being part of DIFC Courts – in terms of its supervisory law and recognition of its decisions for enforcement purposes. It could be quicker, cheaper and more efficient than arbitration.

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