



Trade Centre Roundabout/Sheikh Zayed Road before 2009/2010

DIFC Courts: An Alternative for Dispute Resolution in the Construction Sector in the United Arab Emirates?

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Since the beginning of the financial crisis, the number of litigation and arbitration cases has steadily increased in the UAE as well as in other Arab countries. A majority of these cases involves property or construction cases concerning the late or non-delivery of projects or breaches in contracts. Whereas construction companies and investors traditionally have used arbitration as a means of settling their disputes, they were recently given a new option to settle their disputes as the jurisdiction of the Dubai International Finance Centre (DIFC) courts has been extended. This article shall outline the benefits of this “new” jurisdiction and compares the DIFC court proceedings with arbitration and local court proceedings in order to determine whether the DIFC courts are a serious alternative for dispute resolution in the construction sector.

In the last eight years, the DIFC court was an independent common law court system with jurisdiction reserved to civil and commercial disputes of companies located within the DIFC or related to them. But due to the recent amendment of the Dubai Law No. 12/2004 on the Judicial Authority at DIFC issued on 31 October 2011 (Dubai Law No. 16/2011), even companies not

located in the DIFC can now consensually agree on a DIFC court jurisdiction. As per Art. 5 of Dubai Law No. 16/2011, the DIFC courts may now also decide on civil or commercial claims, provided that the parties have agreed on this specific jurisdiction in writing either before or after the signing of the contract.



Skyline of Abu Dhabi

Pros and cons of the DIFC courts

However, as the DIFC courts proceedings considerably differ from arbitration or local court proceedings, their benefits have to be thoroughly reviewed in light of the level of certainty of its court decisions' outcome, the court proceedings and language, the confidentiality at court, the right to appeal, the enforcement of the judgment, and the dispute resolution costs.

Certainty of court decisions

As DIFC courts are a common law jurisdiction, their judgments are mainly based on precedents. Hence, the outcome of a dispute might be easier to predict than in local court proceedings where judgments are based on the civil law system of the UAE, which is more difficult to interpret as the law is written in Arabic and translated into English. Nevertheless, it has to be taken into account that the number of construction cases at the DIFC courts in the UAE is not that high right now. The number of cases will presumably increase and will eventually lead to a higher level of certainty regarding the predictability of the outcome of cases. However, this does not mean that construction companies are forced to wait until a sufficient number of judgments has been made, as the DIFC judiciary also has the authority to make use of English common law precedents in the meantime. In this regard, the constant publication of the DIFC court decisions will also be helpful; this is another benefit compared to the local courts.

By contrast, the outcome of the case in arbitration proceedings predominantly depends on the tribunal, the rules of arbitration and/or the applicable law chosen by the parties. Hence, the outcome of a case is more difficult to predict. This will be enhanced by the fact that arbitration awards are usually not published.

Court proceedings

DIFC court proceedings are clearly defined and well structured due to their own laws and regulations. This is particularly helpful in straightforward cases, as they can be expedited without particular delays. However, the drawback of DIFC court proceedings becomes obvious in complicated construction cases as the DIFC courts, like any other courts, are probably forced to appoint a construction expert due to their lack of technical knowledge, whereas in arbitration cases the parties can determine the arbitrator or the members of the arbitration tribunal. And as the Dubai International Arbitration Centre (DIAC) provides lists of admitted arbitrators including their specific qualifications, the parties can actually select arbitrators suited for their particular technical needs like construction or law experts. By contrast, an expert appointed by the courts is not necessarily able to cover all these technical areas.



Entrance of Dubai DIFC

Language

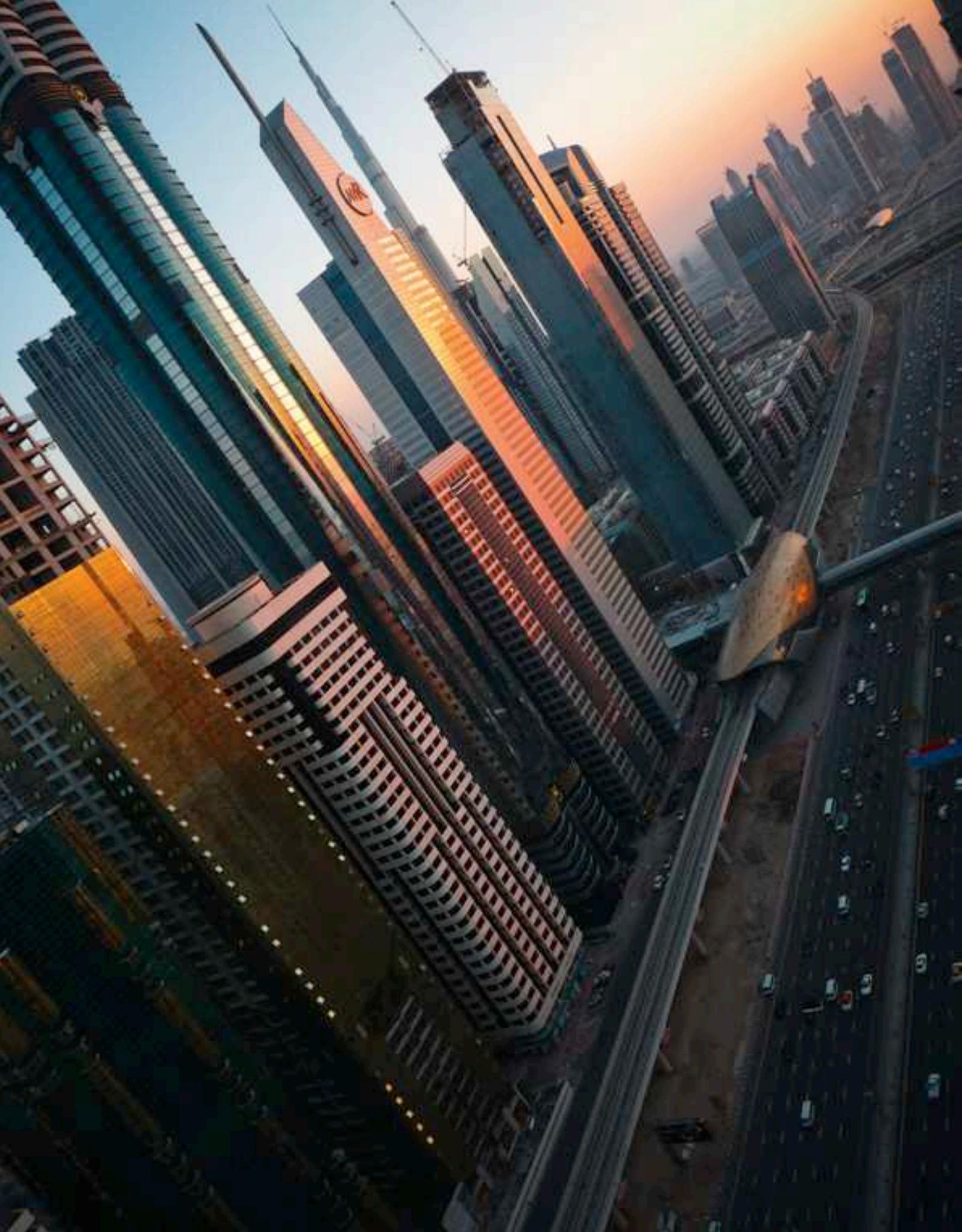
Whereas the hearings at the local courts are in Arabic, hearings in the DIFC courts will only be held in English. The latter has the significant advantage that both parties not only save translation costs but also time. Moreover, in the absence of Arabic translations, the risk of misinterpretations is lowered. Consequently, the cases will be also more transparent for the parties as the use of the English language will make it easier for the construction companies to follow their dispute resolution case. Another benefit in this regard is that parties can stay with their international lawyers as the DIFC courts allow international practitioners to register. By contrast, Emirati lawyers have to be appointed at local courts.

Confidentiality

The DIFC courts as well as the local court hearings in the construction sector are generally open to public. In regard to the aforementioned transparency, some people might see this as an advantage of the court system. Nevertheless, construction parties should keep in mind that their disputes might contain sensitive information that is not meant for the public. In these cases, the parties might prefer confidential hearings such as in arbitration processes.

Right to appeal

Once the DIFC courts have made their judgment, it can only be appealed on very limited grounds. Hence, as the DIFC courts solely consist of a first instance and a court of appeal, final judgments will be received faster than judgments at local courts where disputing parties have three court stages in total (first instance, court of appeal and court of cassation). It means that if a claim is disputed controversially, it might take several years until a final verdict is received. Arbitration cases, on the other hand, cannot be appealed at all. Generally the only chance to avoid the enforcement of an arbitral award is to institute proceedings against the ratification of the award at the local court as per the regulations of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) respectively Art. 216 of the UAE Federal Law No.11/1992. But even this is difficult, as the ratification of the arbitral award in the UAE can solely be prevented in limited cases, e.g., if the award cannot be arbitrated as per the UAE law or otherwise violates UAE public order.



Enforcement

Enforcement of a DIFC judgment within the DIFC is relatively straightforward but may – especially in the construction sector – not occur very often. However, the enforceability of DIFC judgments in the UAE (i.e. outside the DIFC) is still not clear, even though the situation – at least in the Emirate of Dubai – should have been clarified under the Protocol of Enforcement between Dubai Courts and DIFC Courts issued in 2010 pursuant to which DIFC judgments can be enforced in Dubai through the competent department of the Dubai Courts.

With regard to the enforcement of DIFC judgments outside the UAE, it is to be expected that the situation will be similar to the enforcement of local court judgments; this means that if DIFC judgments have to be enforced it is not clear how these judgments will be treated under reciprocal enforcement treaties. Therefore, uncertainty will remain as long as the enforcement of these judgments is not tested. Consequently, construction companies may probably be deterred from using the DIFC jurisdiction and instead prefer arbitration proceedings as they are at least theoretically enforceable in every country which has signed the New York Convention.

Costs

Although the legal costs for disputes at the DIFC and local courts are capped at high amounts, lawyer's costs are not limited as in any of the discussed three jurisdictions. Nevertheless, in contrast to the other two jurisdictions within the UAE, the benefit of the DIFC courts is that the losing party of the case is expected to pay the lion's share of the winning parties' legal costs including a reasonable amount of the lawyer's fees. This innovation will probably facilitate the parties' decision to initiate court proceedings.

By contrast, the local courts only grant small reimbursements of legal costs. And as the parties have to pay their own lawyer's fees at the local court, they might not follow up on their rightful claims as they are fearful of high legal costs. Regarding the DIFC courts, it is also worth noting that since 2008 the DIFC has been providing a Small Claims Tribunal (SCT) that can decide – as long as both parties consent – commercial claims up to AED 500,000 on a very cost-effective basis without any legal representation. Most of these cases can be settled amicably within a few weeks.

Sheikh Zayed Road in Dubai today

Conclusion

While the local courts and the arbitration bodies such as the DIAC have been the preferred dispute resolution institutions in the UAE for the last decade, contracting parties may become more and more aware of the existence of the DIFC courts. As these courts are now open to all companies who expressly agree on the DIFC as their dispute resolution jurisdiction, construction companies will also most likely benefit from the extension of law due to the aforementioned reasons. But the parties should keep in mind that the enforcement of DIFC judgments – at least outside the DIFC and the Emirate of Dubai – is still uncertain. Parties to a construction contract considering consenting to a DIFC jurisdiction clause should therefore – at least for the time being – think carefully about enforcement difficulties that still exist.



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