

**Michael Grose**

# **Construction Law**

in the

United Arab Emirates

and the Gulf

**WILEY** Blackwell



**Construction Law  
in the  
United Arab Emirates and the Gulf**



# **Construction Law in the United Arab Emirates and the Gulf**

---

**Michael Grose**

**WILEY Blackwell**

This edition first published 2016  
© 2016 by John Wiley & Sons, Ltd

*Registered Office*

John Wiley & Sons, Ltd, The Atrium, Southern Gate, Chichester, West Sussex, PO19 8SQ,  
United Kingdom

*Editorial Offices*

9600 Garsington Road, Oxford, OX4 2DQ, United Kingdom  
The Atrium, Southern Gate, Chichester, West Sussex, PO19 8SQ, United Kingdom

For details of our global editorial offices, for customer services and for information about how to apply for permission to reuse the copyright material in this book please see our website at [www.wiley.com/wiley-blackwell](http://www.wiley.com/wiley-blackwell).

The right of the author to be identified as the author of this work has been asserted in accordance with the UK Copyright, Designs and Patents Act 1988.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, except as permitted by the UK Copyright, Designs and Patents Act 1988, without the prior permission of the publisher.

Designations used by companies to distinguish their products are often claimed as trademarks. All brand names and product names used in this book are trade names, service marks, trademarks or registered trademarks of their respective owners. The publisher is not associated with any product or vendor mentioned in this book.

**Limit of Liability/Disclaimer of Warranty:** While the publisher and author(s) have used their best efforts in preparing this book, they make no representations or warranties with respect to the accuracy or completeness of the contents of this book and specifically disclaim any implied warranties of merchantability or fitness for a particular purpose. It is sold on the understanding that the publisher is not engaged in rendering professional services and neither the publisher nor the author shall be liable for damages arising herefrom. If professional advice or other expert assistance is required, the services of a competent professional should be sought.

*Library of Congress Cataloging-in-Publication data applied for*

ISBN: 9781119085935

A catalogue record for this book is available from the British Library.

Wiley also publishes its books in a variety of electronic formats. Some content that appears in print may not be available in electronic books.

Cover image: Getty Images © Apola

Set in 10/13pt TrumpMediaeval by SPi Global, Pondicherry, India

# Contents

<i>About the Author</i>	xi
<i>Preface</i>	xiii
<b>1 Overview</b>	<b>1</b>
1.1 Basis of government	2
1.2 Division of powers in the UAE	2
1.3 Islamic Shari'ah	4
1.4 Civil law	6
1.5 Domestic courts	8
1.6 Financial free zones	10
<b>2 Construction Law</b>	<b>13</b>
2.1 Muqawala	14
2.2 Commercial and civil contracts	15
2.3 Delict (tort)	18
2.4 Public procurement	20
2.5 Administrative contracts	23
<b>3 Contract Formation</b>	<b>25</b>
3.1 Components of a valid contract	25
3.2 Offer and acceptance	26
3.3 Certainty	28
3.4 Mutual intentions	32
3.5 Capacity	33
<b>4 Interpretation</b>	<b>35</b>
4.1 Statutory maxims	35
4.2 Intentions	36
4.3 Resolution of ambiguity	39
4.4 Absence of express terms	39
<b>5 Contractual Principles</b>	<b>41</b>
5.1 Binding obligations	41
5.2 Mandatory obligations	43
5.3 Third parties	46
5.4 Subcontractors	48
5.5 Good faith	49
5.6 Related obligations	50
5.7 Abuse of rights	52
5.8 Unfair contract terms	53
5.9 Unforeseen circumstances	54

<b>6</b>	<b>Health, Safety and Welfare</b>	<b>59</b>
6.1	Construction safety	59
6.2	Design and management responsibilities	65
6.3	Welfare	66
6.4	International Labour Organisation	68
6.5	Inspection and reporting	69
6.6	Sanctions and penalties	71
<b>7</b>	<b>Design and Supervision</b>	<b>81</b>
7.1	Duty of care	82
7.2	Obligation of result	84
7.3	Standard of care	87
7.4	Defences	88
7.5	Statutory duties	89
7.6	Compensation	91
7.7	Joint liability	91
<b>8</b>	<b>Defects</b>	<b>95</b>
8.1	Materials	95
8.2	Workmanship	97
8.3	Statutory duties	98
8.4	Remedies	100
<b>9</b>	<b>Decennial Liability</b>	<b>103</b>
9.1	Statutory sources	104
9.2	Strict liability	106
9.3	Contractual status	107
9.4	Compensation	109
9.5	Mitigating decennial liability	110
9.6	Public projects	112
<b>10</b>	<b>Physical Damage and Personal Injury</b>	<b>115</b>
10.1	Delict	115
10.2	Criminal damage	116
10.3	Presumed liability for property damage	117
10.4	Inherent danger (nuisance)	118
10.5	Service lines and public utilities	120
<b>11</b>	<b>Time for Completion</b>	<b>123</b>
11.1	Agreement	123
11.2	Extension of time	125
11.3	Assessment of entitlement	125
11.4	Time at large	129
11.5	Concurrent delay	130
11.6	Prolongation costs	135



<b>12</b>	<b>Delay Damages and Other Remedies</b>	<b>137</b>
12.1	Termination for delay	137
12.2	Reducing delay damages	138
12.3	Increasing delay damages	142
12.4	Administrative contracts	143
<b>13</b>	<b>Price</b>	<b>147</b>
13.1	Formation of a contract	147
13.2	Fair remuneration: Contractor	148
13.3	Fair remuneration: Consultant	150
13.4	Supply contracts	151
13.5	Lump sum and remeasure contracts	151
13.6	Variations	152
13.7	Subcontracts	153
13.8	Public procurement in the UAE	154
<b>14</b>	<b>Payment</b>	<b>157</b>
14.1	Payment on delivery	157
14.2	Payment certificates	159
14.3	Subcontracts	159
14.4	Conditional payment clauses	160
14.5	Bank guarantee	163
14.6	Cheque	165
<b>15</b>	<b>Interest</b>	<b>167</b>
15.1	<i>Riba</i> and usury	167
15.2	Statutory right	169
15.3	Fixed or crystallised debt	170
15.4	Interest in the UAE	172
15.5	Interest under the FIDIC Conditions	172
15.6	Financing charges	173
<b>16</b>	<b>Suspension</b>	<b>175</b>
16.1	FIDIC Conditions	175
16.2	Statutory right of suspension	176
16.3	Excluding the right of suspension	177
16.4	Formalities	178
<b>17</b>	<b>Termination</b>	<b>179</b>
17.1	Termination of an innominate contract	179
17.2	Termination of a <i>muqawala</i> : Employer	183
17.3	Termination of a <i>muqawala</i> : Contractor	184
17.4	Consequences of termination	187
17.5	Impossibility and force majeure	188

<b>18</b>	<b>Self-help Remedies</b>	<b>191</b>
18.1	Retention of ownership	191
18.2	Possessory lien	193
18.3	Priority right	196
18.4	Direct payment	197
18.5	Set off	198
<b>19</b>	<b>Damages</b>	<b>201</b>
19.1	Performance by compulsion	201
19.2	Entitlement to damages	203
19.3	Assessment of damages	204
19.4	Global claims	206
19.5	Loss of profit	207
19.6	Consequential and indirect loss	209
19.7	Mitigation	211
19.8	Limitation of liability	212
<b>20</b>	<b>Evidence</b>	<b>215</b>
20.1	Burden of proof	215
20.2	Documents	216
20.3	Disclosure and production	216
20.4	Witness testimony	218
20.5	Court appointed experts	219
20.6	Conclusive findings of fact	221
<b>21</b>	<b>Prescription</b>	<b>223</b>
21.1	Islamic Shari'ah	223
21.2	Commercial obligations	224
21.3	Civil obligations	225
21.4	Restriction on amendment	226
<b>22</b>	<b>Litigation</b>	<b>229</b>
22.1	Court structure	229
22.2	International jurisdiction	233
22.3	Jurisdiction between emirates	234
22.4	Commencement of proceedings	235
22.5	Proceedings against the government	237
22.6	Summary actions	238
22.7	Mediation and adjudication	242
<b>23</b>	<b>Enforcement</b>	<b>245</b>
23.1	Procedure	245
23.2	Appeal	247
23.3	Enforcement outside the jurisdiction	248

<b>24</b>	<b>Arbitration</b>	<b>253</b>
24.1	Right to arbitrate	253
24.2	Treaty arbitration	256
24.3	Validity of an arbitration agreement	257
24.4	Capacity to agree	260
24.5	Jurisdiction and powers	264
24.6	Procedures and formalities	267
24.7	Challenging an arbitrator	272
24.8	Enforcement of domestic awards	273
24.9	Enforcement of foreign awards	278
24.10	New York Convention	280
<b>25</b>	<b>Key Features and Differences</b>	<b>285</b>
25.1	Key features of Islamic civil law	285
25.2	FIDIC Conditions	288
25.3	Gulf states contrasted	289
	<i>Commentary: FIDIC Conditions</i>	293
	<i>Glossary</i>	387
	<i>Index</i>	391



# About the Author

Michael Grose obtained a law degree in the UK before completing his legal training in 1993 in the City of London.

He relocated to Dubai in 1998 where he is the head of the regional construction and projects practice of an International law firm. As a veteran of the Gulf, Michael has extensive knowledge not only of the Gulf's laws but also the application of these laws to construction contracts and disputes.

Michael frequently reviews, advises on and prepares construction contracts for major projects, bringing him into frequent contact with the FIDIC suite of contract conditions. He has drafted amendments to these conditions to adapt them for use in the Gulf and to address the most commonly arising issues.

Michael has also been involved in many of the region's largest and most high profile construction and engineering disputes. As a result, he has considerable experience of conducting arbitration in the Gulf, including as an arbitrator appointed by the Dubai International Arbitration Centre.

Working with licensed local advocates he has acted on numerous occasions for clients in the Gulf's domestic courts. This has included taking cases through all stages of the court proceedings, from obtaining freezing orders against bank guarantees, attending court appointed experts' meetings through to the execution of final judgments. He is also familiar with proceedings the Dubai International Financial Centre Courts having, amongst other things, acted for a main contractor in the first construction case to come to trial in the DIFC Courts.

Michael has also presented at numerous conferences, including the Commercial Law Conference in Bahrain (organised by the United States Department of Commerce) for members of the region's judiciary, the inaugural international conference of the Society of Construction Law held in Singapore and the inaugural conference of the Gulf branch of the Society of Construction Law.

He is recommended in the top tier of all the leading independent legal directories including Who's Who Legal, Chambers Global and Legal 500.



# Preface

This book examines the legal principles and practices applicable to construction contracts and disputes, or in other words construction law, in the United Arab Emirates and the Arab Gulf states, excluding Iraq.

As in other jurisdictions, construction law in the Gulf is not distinguished in any formal way from the law applicable to contracts and disputes in general. The scope of this book is, accordingly, dictated by the issues and disputes that arise from construction projects in the region. Further, attention has been focused on those legal issues that are raised most frequently in practice.

Some topics such as delay penalties and liability for building defects clearly merit inclusion in a text on construction law. Others, such as litigation and arbitration procedures are included due to their universal relevance to construction disputes. All are dealt with because there are relevant provisions of local law or decisions of the highest courts that provide a basis for some meaningful analysis. Particular emphasis has been placed on those areas in which these provisions of law or decisions of the courts diverge from the approach to the same issues in common law. As common law itself differs from jurisdiction to jurisdiction the main focus for this comparative element of the book is the law applicable in England and Wales.

A commentary has also been included on the Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (1999) published by the International Federation of Consulting Engineers which are used in some form almost ubiquitously on projects in the Gulf. A commentary on the issues that commonly arise from the FIDIC Conditions, against a backdrop of construction law in the United Arab Emirates, is a natural and hopefully helpful by-product of the main text.

The origins of this work lie in a series of seminars presented in 2001, the material for which became a short guide to construction contracts and disputes in the following year. The positive response to that guide gave rise to a project to produce a more detailed text. Fortuitously, the intervening years have provided a variety of significant legal developments which have been incorporated in this much expanded version of the original guide. These developments include the establishment of the Dubai International Financial Centre, with its unique legal system, a wave of judgments that flowed from the global credit crisis in 2008 that illuminated topics such as force majeure, notices of termination and precautionary attachments, as well as the first judgments of the domestic courts of the United Arab Emirates under the New York Convention. Except as otherwise indicated, the law is stated as at 1 September 2015.

Throughout this work's protracted production period I have benefited from the support and encouragement of colleagues, friends and family alike. To all these individuals I owe a substantial debt of gratitude.

Special thanks are due to the following: Laura Warren and Ben Cowling for contributing their substantial knowledge and experience of the legal regimes of Qatar and Saudi Arabia respectively; Rebecca Kelly for her helpful comments on the Abu Dhabi health and safety regime; my secretaries, Karen Turner and Claudia Vicente, for their inexhaustible patience and loyalty spanning between them a period of a decade and a half; the editorial team at Wiley-Blackwell, particularly for their constructive input on the scope and content of the early drafts; the International Federation of Consulting Engineers for kindly granting permission to reproduce parts of the FIDIC Conditions for the purpose of the commentary on them; and the partners and associates of the projects and construction group of Clyde & Co. In particular, without the considerable investment of Clyde & Co in the firm's knowledge management systems this work would not have been possible.

Last but by no means least I have had the unstinting support of my wife, Amanda, and my daughter, Emelia, both of whom have put up with the highs and lows of the drafting process with exceptional grace and humour.

Notwithstanding all of the valuable assistance that I have received, the views expressed, including all errors and omissions, are mine alone.

Without diluting such responsibility, there are some caveats that should be drawn to the reader's attention from the outset. First and foremost, as with any work in English, all quoted extracts from the region's laws and judgments have been translated from the official Arabic and should be treated with appropriate caution. The judgments reviewed are those of the United Arab Emirates' courts only.

Although these statutory provisions and judgments bring greater clarity to many issues than is often assumed, doubt remains as to the courts' likely approach to some key issues and, indeed, to many issues on any given set of facts. In the interests of producing a work that is of practical value, principles have, nevertheless, been identified as far as is practicable from the available sources. Although I have attempted to perform this process conservatively, drawing on the available sources and personal experience of the application of the law, some extrapolation has inevitably been involved. This cannot and does not introduce certainty where there is none. In particular, in the absence of a system of binding precedent care is required not to place excessive reliance on judgments, particularly those that do not form part of a line of consistent decisions.

Finally, while considerable effort has been invested in the research, collation and presentation of the material in this work it does not purport to be a comprehensive review or definitive statement of construction law as applied



in the region. It represents, instead, my understanding of the law at the time of writing. It cannot be and is not a substitute for specific legal advice.

The aim, notwithstanding these limitations, is to provide a useful guide to the legal environment in which construction businesses operate in the United Arab Emirates and the Gulf. But more than this, it is hoped that it will contribute, in however modest a way, to the success of those businesses and thus to the welfare of the construction industry, which is a vital part of the economic and social fabric of the region.

Michael Grose  
September 2015



# 1

## Overview

Construction law, for the purpose of this text, comprises the laws of the United Arab Emirates and the Arab Gulf states excluding Iraq (Bahrain, Kuwait, Oman, Qatar and Saudi Arabia) as applied to the issues commonly arising out of construction projects. As no clear separation exists between the applicable laws and the general legislative framework in these jurisdictions a review of construction law must cover, as a minimum, the key elements of this general legislative framework. An overview of the applicable legal regime of these jurisdictions is the purpose of this introductory chapter.

But the applicable legislative framework is not merely an interesting backdrop to construction law. An appreciation of the legal systems of the United Arab Emirates and the Gulf states is critical not only to an understanding of the application of construction law in these jurisdictions but also to overcoming preconceptions based on academic and judicial contributions to the topic in jurisdictions where construction law has been a recognised branch of law for many years. Although the disputes and differences that arise on projects in the Gulf are essentially the same as those that arise in other jurisdictions, the applicable laws, although in some respects similar to those elsewhere, have their own unique heritage, resulting not only in differences of emphasis and analysis but also, in some cases, a departure from what might be considered elsewhere to be orthodox principles of construction law.

## 1.1 Basis of government

Bahrain, Kuwait, Oman, Qatar and the United Arab Emirates each have a written constitution.<sup>1</sup> Although Saudi Arabia does not have a written constitution in a conventional sense, the KSA Basic Law of Government serves a similar purpose but provides that the constitution is the Qur'an and the Sunna.<sup>2</sup>

Each constitution declares the existence of an independent sovereign state and that state's part in a broader Arab nation. In the case of Saudi Arabia this is expressed as a commitment to 'the aspirations of the Arab and Muslim nation to solidarity'.<sup>3</sup>

Uniquely among the Gulf states, the UAE Constitution brought the country into existence. The UAE Constitution is, in effect, an agreement between the rulers of the emirates of Abu Dhabi, Dubai, Sharjah, Ajman, Umm Al Quwain and Fujairah. Ras Al Khaimah joined the other six emirates in adopting the UAE Constitution the following year.<sup>4</sup> The UAE Constitution, reflecting the incorporation of the seven constituent emirates, declares the United Arab Emirates a Federal state, paving the way for the creation of a Federal or Union Government.

Each of the other Gulf states is governed by a constitutional monarch, albeit with varying degrees of consultative and representative input. In Bahrain the constitutional monarch formally operates alongside a democratic form of government.<sup>5</sup>

## 1.2 Division of powers in the UAE

The powers of the UAE Federal Government are defined in and limited by the UAE Constitution which lays down guidelines for legislation required to establish the machinery of government, including the administration of justice. Except insofar as the rulers of each emirate ceded power to the Federal Government pursuant to the Constitution,<sup>6</sup> they retained for themselves and their successors power over the internal affairs of their respective emirates:

Each emirate exercises, in accordance with Article (3) of the Constitution, sovereignty over its territorial land and water in all affairs in which the

<sup>1</sup> Bahrain (2002), Kuwait (1962), Qatar (2004), Oman (1996) and the United Arab Emirates (1971). Initially the UAE Constitution was provisional, being renewed and extended at five year intervals until 1996 when the provisional designation was removed.

<sup>2</sup> KSA Basic Law of Government, Article 1.

<sup>3</sup> KSA Basic Law of Government, Article 25.

<sup>4</sup> 10 February 1972.

<sup>5</sup> Bahrain Constitution, Article 1c.

<sup>6</sup> UAE Constitution, Article 122.

Federation is not competent pursuant to the Constitution, including court jurisdiction which is an act of sovereignty. Each emirate is obliged, pursuant to Article (10) of the Constitution, to respect the independence and sovereignty of the other emirates in regards to their internal affairs within the scope of the Constitution.<sup>7</sup>

In consequence, there are two tiers of government in the United Arab Emirates: the Federal Government and each government of the seven emirates.

Both tiers of government have their own legislative authority, the Federal Government by virtue of the UAE Constitution and the governments of each emirate by virtue of their retained sovereignty. As a result, there are also two tiers of laws: Federal laws which apply in all emirates, and emirate laws which apply only in the emirate by which such laws are enacted.<sup>8</sup>

The UAE Federal Government is represented by the Supreme Council,<sup>9</sup> which is composed of the rulers of each emirate and which elects a president and vice-president, each for a five year term.<sup>10</sup> The ruler of each emirate represents that emirate and exercises both legislative and executive authority to the extent not ceded to the UAE Federal Government pursuant to the UAE Constitution.<sup>11</sup>

The UAE Federal Government's authority covers not only areas of national interest such as foreign affairs, defence and internal security but extends to domestic affairs, covering specified industries such as banking, insurance and publishing. Significantly for the construction industry, the UAE Federal Government has authority over the introduction of laws pertaining to civil and commercial transactions, in effect, submitting the law of contract to the jurisdiction of the UAE Federal Government. Construction law in the United Arab Emirates is, in consequence, predominantly a matter of Federal law.

Nevertheless, power over construction and related activities was not ceded to the Federal Government except for the construction, maintenance and improvement of union roads.<sup>12</sup> Each emirate retains power, therefore, to enact legislation covering the construction industry, provided that such

<sup>7</sup> Federal Supreme Court No. 116/13 dated 1 October 1991.

<sup>8</sup> UAE Constitution, Article 151 and Federal Supreme Court No. 4/2012 dated 19 February 2012 in which the constitutional court rejected a submission that by virtue of an emirate law the case could not be heard until it had proceeded through a preliminary notification process as required by an emirate law as this law did not bind the Federal Supreme Court.

<sup>9</sup> UAE Constitution, Article 46.

<sup>10</sup> UAE Constitution, Article 51. Since the inception of the United Arab Emirates the office of President has by convention been occupied by successive rulers of the Emirate of Abu Dhabi and the office of Vice-President has been occupied by successive rulers of the Emirate of Dubai.

<sup>11</sup> The juridical status and representation of the Federal Government and each emirate is addressed in Federal Law No. 5/1985 (the Civil Code), Article 92 and Article 93.

<sup>12</sup> UAE Constitution, Article 120(9).

legislation does not conflict with any Federal laws of general application. Given the significance of the construction sector in the development of a young country it will come as no surprise that each emirate has exercised this residual power to regulate the industry within their respective territories. The Emirates of Abu Dhabi and Dubai in particular, have taken the opportunity to introduce a large number of laws regulating the construction industry within their respective borders.

### **1.3 Islamic Shari'ah**

The Islamic Shari'ah, in essence, is the law of the Islamic religion as derived principally from the Holy Qur'an and the Sunna, the code of conduct established through example by the Prophet Mohammed.<sup>13</sup>

The Islamic Shari'ah plays a central role in the legal system of all the Gulf states. Thus, for example, the UAE Constitution records the status of the Islamic Shari'ah in the following terms:

Islam is the official religion of the Union. The Islamic Shari'ah shall be the main source of legislation in the Union.<sup>14</sup>

By virtue of the UAE Constitution and those of Bahrain, Kuwait, Qatar and Oman<sup>15</sup> it is a guiding principle in the formulation of all legislation that the main source for such legislation shall be the Islamic Shari'ah. Thus, the Islamic Shari'ah provides the inspiration for the legislation that applies within these Gulf states. However, notwithstanding its constitutional status, the Islamic Shari'ah is neither directly applicable nor the exclusive source of legislation, which may be supplemented by or draw on sources other than the Islamic Shari'ah.<sup>16</sup>

In contrast, the KSA Basic Law of Government expresses the role of the Islamic Shari'ah in the following terms:

The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion. The Constitution [of the Kingdom of Saudi Arabia] is the Quran and the Sunna of His Prophet, peace be upon him.

<sup>13</sup> A key additional source is the Hadith, comprising records of the teachings of the Prophet Mohammed compiled from indirect sources after his death.

<sup>14</sup> UAE Constitution, Article 7.

<sup>15</sup> Bahrain Constitution, Article 2, Kuwait Constitution, Article 2, Qatar Constitution, Article 1 and Oman Constitution, Article 2.

<sup>16</sup> For a review of the relevant laws and some authorities on the tension between Article 7 of the UAE Constitution and applicable laws see 'Commercial Law in the Arab Middle East', Ballantine (1986) pp. 57 – 65 and 'Arab Commercial Law: Principles and Perspectives', Ballantine and Stovall (2002), pp. 15–41.

This is more than merely a difference of emphasis, reflecting, instead, a direct application of the Islamic Shari'ah to the extent that no relevant temporal laws exist.

In practice, the laws of the Gulf states, with the exception of Saudi Arabia the history of which sets it apart from the other Gulf states, not only borrow heavily from the laws of other Arab countries, in particular those of Egypt, but also in many cases reflect the needs of an expanding and diversifying economy in which domestic and foreign businesses play a crucial part. As a result, these laws share many common features not only with those of other Gulf states but also with the laws of countries further afield. Despite these external influences there is no doubt that the primary legislation of Bahrain, Kuwait, Qatar, Oman and the United Arab Emirates draws on principles derived from the Islamic Shari'ah.<sup>17</sup>

The influence of the Islamic Shari'ah is further underpinned by legislation requiring the domestic courts to apply its provisions alongside applicable laws, customs and principles. Thus, it is provided in relation to UAE Federal Courts:

Federal courts shall enforce the provisions of the Islamic Shari'ah and the Federal Laws and other laws in force and shall enforce customary rules and general legal principles that are not in contradiction of the Islamic Shariah.<sup>18</sup>

In practice, this requirement finds expression in the reliance of judges on one of the four schools of Islamic jurisprudence: Hanbali, Hanafi, Shafi'i and Maliki. Precedence is given in the United Arab Emirates to the jurisprudence or teachings of the schools of Imam Malik and Imam Ahmad bin Hanbal and in Saudi Arabia to the latter.<sup>19</sup>

Resolution of conflicts between local laws and provisions of the Islamic Shari'ah in circumstances where these are incompatible is a matter left to the discretion of the judiciary. Although uncertainty occasioned by differences of opinion or interpretation is not unknown such controversies are few and, in most cases, now historic.<sup>20</sup>

<sup>17</sup> By way of example, see the discussion of contractual liability at Chapter 5.1 [Contractual principles: Binding obligations].

<sup>18</sup> UAE Federal Law No. 6/1978, Article 8. Also, the UAE Civil Code, Articles 1, 2, 3 and 27, Federal Law No. 10/1973, Article 75 and Dubai Law No. 3/1992, Article 4. A similar provision is found in other Gulf states e.g. Qatar Law No. 16/1971, Article 4. See also the KSA Basic Law of Government, Article 48.

<sup>19</sup> UAE Civil Code, Article 1.

<sup>20</sup> Residual areas of law impacted by the Islamic Shari'ah include building defects (Federal Supreme Court No. 59/16 dated 28 June 1998), time limits (Federal Supreme Court No. 721 & 815/26 dated 22 January 2006), awards of interest (Federal Supreme Court No. 18/25 dated 19 June 2004), blood money or *diyya* and issues that are not capable of being referred to arbitration (Dubai Cassation No. 146/2008 dated 9 November 2008). Contracts and arbitration awards must be consistent with public order, which includes the Islamic Shari'ah by virtue of the UAE Civil Code, Article 3.

Despite the status accorded to the Islamic Shari'ah, instances of it having an impact on day-to-day business activities in the Gulf are, with the exception of Saudi Arabia, rare.<sup>21</sup> The conduct of business is, instead, governed by legislation, albeit that such legislation and its application are required to be consistent with the Islamic Shari'ah.

## 1.4 Civil law

The legal system of each Gulf state, with the exception of Saudi Arabia, is based predominantly on the civil law model, adapted to reflect the region's Islamic and Arab heritage. This civil law system co-exists with a broadly common law system that has been adopted within the Dubai International Financial Centre,<sup>22</sup> placing the United Arab Emirates among a limited collection of countries having civil law and common law systems operating in parallel, each having a defined but often overlapping jurisdiction.<sup>23</sup>

In a civil law jurisdiction the legislator's aim is to put in place – or codify – a comprehensive and universally applicable set of laws and regulations governing all citizens.<sup>24</sup> This is accomplished by enacting wide-ranging laws or codes that are a blend of provisions targeting specific issues, with others aimed at establishing general principles, which together guide judges to a broadly consistent and fair result. A broad residual discretion over the interpretation and application of the provisions of the civil code vests in the judiciary. In each civil law state<sup>25</sup> a civil code or equivalent piece of legislation, derived mainly from Roman law, is the cornerstone of its body of law.

With the exception of Saudi Arabia, the Gulf states have each adopted a civil code. As these are all modelled on the Egyptian Civil Code (1949), which itself is a derivative of the French Civil Code (1804), the civil codes

<sup>21</sup> Matrimonial, inheritance and other personal status cases are dealt with by the Shari'ah division of the domestic courts, further reducing the day-to-day implementation of the Islamic Shari'ah by the commercial and civil courts.

<sup>22</sup> Other financial free zones may follow suit, notably the Abu Dhabi Global Market, which was established in 2013.

<sup>23</sup> A similar duality, albeit in reverse, is found in the United States of America where Louisiana is a civil law state within a largely common law system, and in Quebec which maintains a civil law system in contrast to the rest of Canada, and in the United Kingdom, where Scotland has a mixed common law and civil law system.

<sup>24</sup> The word 'civil' derives from the Latin *civis*, which roughly translates as citizen. The origins of civil law lie in the early attempts to codify Roman law, which ultimately led to a successful codification in the form of the French Civil Code (1804).

<sup>25</sup> Notable civil law jurisdictions include France, Germany, Egypt and Japan. China has a modified civil law system.



of Bahrain, Kuwait, Qatar, Oman and the United Arab Emirates<sup>26</sup> are broadly similar. As the civil code is the backbone of any civil law jurisdiction, it follows that there is a considerable degree of similarity in the principles of law applicable to construction contracts in each of Bahrain, Kuwait, Qatar, Oman and the United Arab Emirates. In Saudi Arabia, in contrast, construction contracts are governed directly by principles of Islamic law.

Acknowledged to be greatly outdated,<sup>27</sup> the French Civil Code has, nevertheless, avoided significant revision, at least in relation to those provisions that are commonly applied to construction contracts and disputes. Notwithstanding the modernising influence of Professor Al-Sanhuri on the Egyptian Civil Code, including his introduction of some elements of Islamic jurisprudence,<sup>28</sup> the civil codes of the Gulf states consequently remain firmly rooted in the 19th century. It is axiomatic that these civil codes do not always provide a clear solution to a dispute arising from a modern construction project.

In contrast to civil law, common law is based primarily on the content of judgments which are binding on the courts in accordance with a strict hierarchy, limiting the element of discretion exercised by the judiciary.<sup>29</sup> Common law develops incrementally, as it has done from its medieval origins, by means of such judicial pronouncements or precedents with limited intervention from the legislature. Although the legislature prevails in the event of any conflict with precedents, the latter remain the cornerstone of a common law system. Laws tend to be precisely and narrowly drafted with the result that the scope for discretion when applying such laws is limited and that precedents are preserved.

There is no equivalent of a civil code in common law countries, each piece of legislation being limited to a specific topic or a relatively narrow range of topics. Thus, whereas common law courts instinctively look to resolve disputes based on principles derived from previously decided cases, courts

<sup>26</sup> 'Civil Codes of Arab Countries: The Sanhuri Codes', N. Saleh, ALQ, Vol. 8, No. 2 (1993), pp. 161–167.

<sup>27</sup> John Bell, 2008. *Principles of French Law*. 2nd Edition. Oxford University Press. p. 24.

<sup>28</sup> For a review of the origins of the UAE Civil Code and the Egyptian and Ottoman influences, particularly the Ottoman Majalla see 'The New Civil Code of the United Arab Emirates', W. M. Ballantyne, ALQ Volume 1, Issue 3, p. 245 which notes that the UAE Civil Code marks a resurgence of the Islamic Shari'ah as the main source of law, 'Application of Islamic Law in the Middle East – Interest and Islamic Banking', S. Majid, [2003] ICLR, 177 and 'Tort Law in the United Arab Emirates', a paper delivered to the Society of Construction Law (SCL) by Richard Harding QC on 9 July 2010 and available on the SCL website.

<sup>29</sup> Notable common law countries include the United States of America (in all federal courts and in state courts except for Louisiana), Australia and New Zealand. India is a common law jurisdiction in all federal courts and in most state courts. Within the United Kingdom, England and Wales have a purely common law system.

in civil law jurisdictions, including those in the Gulf, instinctively look first to the civil code and then any other relevant codes.

The result is that for a lawyer with a common law background civil law can appear imprecise and unpredictable, perhaps even intellectually inferior due to a lack of detailed legal analysis and limited reference to centuries of accumulated legal wisdom. For a lawyer with a civil law background, common law may appear to be hidebound by intricate and often outdated rules making it not only inflexible and impenetrable to the businesses and consumers that it serves but also vulnerable to a charge that it is founded on a pretence that judgments are actually derived from the dispassionate application of precedents rather than on subjective considerations of fairness and common practice.

## 1.5 Domestic courts

Domestic courts in the Gulf do not disregard their earlier judgments entirely but neither are they are compelled to follow them. It is common for previous judgments, particularly those of a final appellate court, to be deployed in support of submissions but the purpose is to lend support to a statement of principle derived from codified laws, rather than to invite rigid adherence to a binding precedent. This reflects the practice of showing deference to previous judgments of a Court of Law.<sup>30</sup>

Evidence of the application of a consistent approach can be found in the courts' practice of prefacing a judgment with a restatement of an 'established' principle, signalling the implementation of prior decisions to a common or recurring issue and in the supervisory role conferred on the highest courts in each Gulf state over important issues of legal principle.<sup>31</sup>

In a case that came before the UAE Federal Supreme Court<sup>32</sup> in 1991 the appellant relied on a number of inconsistent judgments concerning the award of interest unsuccessfully to invoke the appointment of a special panel of the Supreme Court, which can be established to deal with a departure from an established principle or to resolve conflicting decisions.<sup>33</sup> It is envisaged, therefore, that decisions of the Supreme Court establish principles and that the intention is for there to be consistency between decisions. This is consistent with the civil law doctrine of *jurisprudence constante* which,

<sup>30</sup> The Court of Merits comprises the Court of First Instance and the Court of Appeal, both of which determine issues of fact and law, in contrast to the Court of Cassation or Supreme Court which is restricted to determining issues of law only and, therefore, is referred to as a Court of Law.

<sup>31</sup> For example, Qatar Law No. 10/2003, Article 9(1).

<sup>32</sup> Federal Supreme Court No. 294/12 dated 28 May 1991.

<sup>33</sup> UAE Federal Law No. 10/1973, Article 65.

in turn, is similar to the common law doctrine of *stare decisis*, the main difference being that in the case of the latter a single judgment is sufficient to establish a precedent whereas in the former a series of consistent decisions is generally required.<sup>34</sup>

In consequence, a consistency of approach to many issues that commonly arise can be discerned from judgments of the domestic courts notwithstanding the absence of a formal system of binding precedent.

In a manner consistent with the less prescriptive approach of civil law the body of principles built up from decisions of the final appellate court or Court of Law tends to offer selective guidance on the application of the codified laws rather than establishing the type of carefully crafted rubrics, supplemented by multiple clarifications, that pervade almost every aspect of common law. The Court of Merits, which must interpret and apply the codified laws and the principles established by a Court of Law, in consequence, is less constrained in its decision-making by this civil law regime than any common law counterpart. Although reference is made, on occasion, by the Court of Merits to judgments of a Court of Law, the latter themselves do so very rarely.

Insufficient attention is generally given to these differences of approach, not merely in the context of claims or disputes but also in the preparation of construction contracts, most of which are governed by local law, whether by choice or by default. As common law precedents have no value in the domestic courts of the Gulf, principles applicable to construction contracts and disputes that are well-established by precedent under common law are not merely inapplicable but are sometimes in conflict with local law.

Furthermore, the terminology typically used in construction contracts and upon which the mechanisms of the contract rely may not have the same meaning or effect in the domestic courts as in courts in other jurisdictions. It cannot be taken for granted, for example, that commonplace concepts, such as a defects liability period, are interpreted in a manner that is consistent either with the framework of standard form contracts or with customary usage. Neither are terms of art, such as 'time is of the essence' or 'fitness for purpose', which have a well-established meaning and effect in many common law jurisdictions, necessarily understood and applied in the same way by the domestic courts of the Gulf.

<sup>34</sup> For an example of *jurisprudence constante* in operation see Dubai Court of Cassation No. 56/2004 dated 26 December 2004 in which the court stated that it was applying an established principle when declining to apply principles of delict where the parties had entered into a contract. For the same approach to different but equally well-established principles see, for example, Federal Supreme Court, Appeal No. 322/1999 dated 26 January 1999 (contract interpretation is a matter for the Court of Merits) and Dubai Cassation No. 18/2000 dated 21 May 2000 (where the wording of a contract is clear there is no scope for applying a different meaning).

## 1.6 Financial free zones

Financial free zones present an exception to the nature and hierarchy of the governing laws described above. The first such financial free zone was established in 2004 within the designated boundaries of the Dubai International Financial Centre.

By virtue of an amendment to the UAE Constitution<sup>35</sup> provision was made for the Federal legislature to disapply Federal laws within designated financial free zones.<sup>36</sup> Further enabling legislation<sup>37</sup> created an independent jurisdiction, exempt from all civil and commercial Federal laws and subject instead to the exclusive legislative authority of the Ruler of Dubai.

Business performed by construction industry participants within the DIFC, including works executed or services performed for projects located within the DIFC is, accordingly, governed by the law of the DIFC<sup>38</sup> in the absence of any contrary agreement between the parties and is subject to the jurisdiction of the DIFC Courts.<sup>39</sup>

Included within the body of laws applicable within the DIFC is the Contract Law,<sup>40</sup> the Implied Terms in Contracts and Unfair Terms Law,<sup>41</sup> the Law of Obligations<sup>42</sup> and the Arbitration Law<sup>43</sup> that are of particular application to the construction industry. These and other laws adopted within the DIFC are derived from a variety of sources, including common law:

DIFC operates on a unique legal and regulatory framework with a view to creating an optimal environment for financial sector growth. Such framework was achieved through a synthesis of Federal law and Dubai law which permitted DIFC to have its own civil and commercial laws

<sup>35</sup> UAE Constitutional Amendment No. 1/2004.

<sup>36</sup> This power is not geographically restricted. The Abu Dhabi Global Market was established as a financial free zone by UAE Federal Law No. 15/2013 and is expected to adopt a legal model similar to that of DIFC.

<sup>37</sup> UAE Federal Law No. 8/2004, UAE Federal Decree 35/2004 and UAE Cabinet Resolution No. 28/2007.

<sup>38</sup> Dubai Law No. 12/2004, Article 6 and DIFC Law No. 10/2005 (Amending and Restating DIFC Law No. 4/2004), Articles 9 and 10.

<sup>39</sup> Since October 2011, by virtue of Dubai Law No. 16/2011, amending Dubai Law No. 12/2004, Article 5(A)(2), an agreement to vest jurisdiction in the DIFC courts is permitted notwithstanding the absence of any connection between the DIFC and the parties, the subject matter or any other aspect of the transaction.

<sup>40</sup> DIFC Law No. 6/2004.

<sup>41</sup> DIFC Law No. 6/2005.

<sup>42</sup> DIFC Law No. 5/2005.

<sup>43</sup> DIFC Law No. 1/2008.

modelled closely on international standards and principles of common law and tailored to the region's unique needs.<sup>44</sup>

The DIFC Courts similarly operate in accordance with a blend of best international practice. Significantly, this includes a system of binding precedent, giving the jurisdiction a key common law characteristic.

The amendment to the UAE Constitution that facilitates the creation of a financial free zone is not geographically confined. The Abu Dhabi Global Market was, accordingly, established in 2013 on the basis of the same enabling legislation<sup>45</sup> and in 2015 the laws that will apply within its jurisdiction began to be issued.

A similar regime exists in Qatar.<sup>46</sup> The Qatar Financial Centre:

operates to international standards and provides a first class legal and business infrastructure ... the QFC's commercial and regulatory environment and systems conform to international best practices and are separate from and independent of the host Qatari systems.<sup>47</sup>

Regulations enacted within the Qatar Financial Centre cover contracts, companies, arbitration, employment, insolvency and many others.

<sup>44</sup> <http://www.difc.ae/laws-regulations>. The sources of law include, as a last resort, those of England and Wales, the birthplace of common law: DIFC Law No. 3/2004, Article 8(2).

<sup>45</sup> UAE Federal Law No. 8/2004, UAE Federal Decree No. 15/2013, UAE Cabinet Resolution No. 4/2013, and Abu Dhabi Law No. 4/2013.

<sup>46</sup> Qatar Financial Centre Law No. 7/2005.

<sup>47</sup> [www.complinet.com/qfcra](http://www.complinet.com/qfcra).



# 2

## Construction Law

Many laws directed in part or in whole at the construction industry are in force throughout the Gulf. These laws broadly fall into two categories: those that control entry to and participation in the construction industry; and those that determine the rights and liabilities of and between participants in construction projects.

In the first category are laws that, for example, apply conditions to the granting of commercial licences to construction businesses and, in particular, apply a system of classification that in principle, determines the types of projects that can be undertaken by a consultant or contractor.<sup>1</sup> Similarly, there are laws that require government departments to enter into construction contracts only with same state nationals or companies in which nationals hold a majority of the shares.<sup>2</sup> In the second category is the general body of laws that are applicable to construction contracts and that have the capacity to determine the rights and obligations of project participants, and it is these laws that are the main focus of this text.

<sup>1</sup> For example, Abu Dhabi Regulation Nos. 1/2009, 2/2009 and 3/2009 governing contractors' and consultants' classification in Abu Dhabi.

<sup>2</sup> For example, Dubai Law No. 6/2007, Article 12.

## 2.1 Muqawala

The primary source of construction law throughout the Gulf, with the exception of Saudi Arabia, is the civil code of each state, each of which includes a section governing a *muqawala* – a contract for materials and services.<sup>3</sup> A *muqawala* is defined as:

a contract whereby one of the parties thereto undertakes to make a thing or to perform work for consideration which the other party undertakes to provide.<sup>4</sup>

The *muqawala* section of each civil code also governs contracts for professional services, notwithstanding the absence of any materials component in the provision of professional services. These *muqawala* sections contain, in the civil law tradition, a mixture of both general and specific articles which provide a basis for judicial decision-making on a wide range of construction related matters. In the absence of a civil code in Saudi Arabia construction contracts are not governed by a corresponding *muqawala* regime.

Significantly, the inclusion in the civil codes of Bahrain, Qatar, Kuwait, Oman and the United Arab Emirates of provisions governing a *muqawala* marks out a construction contract as a nominate or special contract.<sup>5</sup> The classification of a contract as either nominate or innominate is a feature of civil law, adopted from Roman law and one that has no common law equivalent.<sup>6</sup> A construction contract is generally subject not only to the civil code provisions applicable to innominate contracts but additionally to a set of more specific provisions that govern a *muqawala*.<sup>7</sup> In general, nominate contracts are more tightly regulated and less susceptible to interpretation derived from the intentions of the parties than innominate contracts.<sup>8</sup>

<sup>3</sup> Bahrain Civil Code, Articles 584–620, Kuwait Civil Code, Articles 666–697, Oman Civil Code, Articles 626–650, Qatar Civil Code 682–715 and the UAE Civil Code, Articles 872–896.

<sup>4</sup> UAE Civil Code, Article 872.

<sup>5</sup> Other nominate contracts are contracts of sale, employment, hire, partnership, loan, security, guarantee, settlement and gift.

<sup>6</sup> Coincidentally or otherwise, the same notion of nominate contracts has found its way into Islamic jurisprudence: 'Definition and Formation of Contract under Islamic and Arab Laws', N. Saleh, ALQ, Vol. 5, No. 2 (1990), pp. 101–116 at pp. 115–116.

<sup>7</sup> The Louisiana Civil Code, Articles 1915 and 1916, provide that although both nominate and innominate contracts are governed by the provisions applicable to all contracts, these are supplemented and modified to the extent that there are special provisions applicable to each nominate contract. The Oman Civil Code, Article 68 has a similar effect.

<sup>8</sup> *The French Law of Contract*, 2nd Edition, Barry Nicholas, pp. 46–47.



## 2.2 Commercial and civil contracts

Alongside a civil code, each Gulf state, with the exception of Saudi Arabia, has promulgated a commercial code or equivalent. These establish the general principles applicable to the conduct of business, including commercial contracts. Although, unlike each of the civil codes, none of the provisions are aimed exclusively at construction contracts, each commercial code does, nevertheless, contain provisions that apply incidentally to construction contracts. In consequence, these are an important secondary source of construction law.

Whether construction contracts are subject to the applicable commercial code or the corresponding civil code or both is an issue that has the potential to determine issues as fundamental as recoverability of interest<sup>9</sup> and the application of time limits for commencing legal proceedings,<sup>10</sup> among others. In Kuwait no such controversy arises as commercial contracts are governed explicitly by both the Kuwait Commerce Law and the Kuwait Civil Code in that order.<sup>11</sup>

The view that a construction contract is a civil rather than a commercial transaction and that consequently only the applicable civil code applies, is sometimes advanced on the ground that an employer under a construction contract acts as a consumer, not a business, when commissioning a building project. Although this proposition turns on the facts of a particular case and would not, for example, be available to a property developer for whom construction is part of its core business, some general guidance can be drawn from cases in which the domestic courts have had occasion to consider this issue.

In a case in 1997, Dubai's highest court, the Court of Cassation,<sup>12</sup> considered a claim for payment by a contractor that had supplied and fixed a quantity of marble for the defendants. As payment had fallen due at the latest on 1 March 1991 but proceedings were not commenced until after March 1993 the defendants submitted that the two-year prescription period applicable to a civil transaction claim for payment for goods or services<sup>13</sup> had expired, rendering the claim time barred and inadmissible. The claimant countered that as the transaction was commercial, the ten-year prescription period for a commercial transaction applied<sup>14</sup> not the two-year prescription period applicable to a civil transaction.

<sup>9</sup> Chapter 15 [Interest].

<sup>10</sup> Chapter 21 [Prescription].

<sup>11</sup> Kuwait Commerce Law, Article 96.

<sup>12</sup> Dubai Cassation No. 311/1996 dated 23 February 1997.

<sup>13</sup> UAE Civil Code, Article 476(1).

<sup>14</sup> UAE Code of Commercial Practice, Article 95.

The Court of Cassation dismissed the defendants' submission and upheld the lower court's judgment in favour of the claimant. While acknowledging that the defendants were not themselves engaged in the business of supplying and fixing marble the Court of Cassation held that because there was a close connection between the supplying and fixing of the marble and the commercial business undertaken by the defendants the transaction was a commercial one. The court relied in support on the UAE Civil Code, Article 1, which provides:

The attached Law shall operate in respect of civil transactions for the UAE. However, commercial transactions shall continue to be governed by the existing laws and regulations relating thereto until the Federal Commercial Law is enacted.

As the UAE Code of Commercial Practice had come into effect, the two-year time limit applicable to civil transactions was displaced by the ten-year time limit applicable to commercial transactions.

The same conclusion was reached by the highest UAE Federal court, the Federal Supreme Court, in a judgment delivered in 1995 on a claim brought by the supplier of a mechanical shovel to recover part of the purchase price. Although the defendant argued that the mechanical shovel was not intended for commercial use (its alternative use not being apparent from the judgment), the Federal Supreme Court, applying the provisions of the UAE Code of Commercial Practice, determined that if a transaction is personal or civil for one party and commercial for the other it is governed by the laws applicable to commercial transactions. Thus, because the transaction was commercial for the claimant (the supplier of the mechanical shovel) it was governed by provisions applicable to commercial transactions whether or not the transaction was commercial for the defendant.<sup>15</sup>

These decisions, it is submitted, indicate that if a construction contract is concluded in the course of either party's business or is closely connected to that business, it is treated by the domestic courts as a commercial transaction and thus is governed by the applicable commercial code, notwithstanding that one of the parties is not engaged primarily in the construction business or any other type of business.<sup>16</sup> The position was summarised by the Dubai Court of Cassation in a decision in 2002 as follows:

It is settled by this Court as provided by Articles 1 and 2 of the Code of Commercial Practice No. 18 of 1993 that the provisions of the said law

<sup>15</sup> The same conclusion was reached in UAE Federal Supreme Court No. 290/17 dated 28 November 1995 and UAE Federal Supreme Court No. 287/18 dated 31 March 1996.

<sup>16</sup> Also, UAE Code of Commercial Practice, Article 10.

are applicable to all commercial transactions even if the person involved is not a trader. Provisions of the Civil Code should be applied to the matters not provided for by the Code of Commercial Practice or commercial custom without being inconsistent with general principles of business activity. The rules of commercial custom are applied if there is no relevant provision in the law; however, if there is no commercial provision, the provisions of civil matters are applicable provided that they are not inconsistent with the general rules of commercial activity.<sup>17</sup>

Although, therefore, the UAE Code of Commercial Practice is the primary source of law applicable to all commercial transactions, this does not exclude the application of the relevant provisions of any other laws. In practice, the domestic courts frequently apply provisions of the applicable civil code to construction disputes, not least because these address construction related issues more specifically than the corresponding commercial code. This is not, however, done to the exclusion of the relevant provisions of the commercial code, which takes precedence in the event of a conflict.<sup>18</sup>

Ministries and departments of state and other public institutions are generally exempt from the applicable commercial code except to the extent of any commercial business in which these exempt entities are engaged.<sup>19</sup> For this purpose, commercial business explicitly includes building and real estate projects.<sup>20</sup> By virtue of the extension of the definition of commercial business to activities having similar characteristics or objectives the commercial codes typically apply well beyond this type of project only.

<sup>17</sup> Dubai Cassation No. 349/2002 dated 29 December 2002. Also, Federal Supreme Court No. 294/12 dated 28 May 1991. Cf. the Dubai Court of Cassation's conclusion in Cassation No. 290/1993 dated 27 February 1994 and Federal Supreme Court No. 278/15 dated 29 March 1994, that in accordance with the Civil Code, Article 1, the latter is inapplicable to any transaction that is commercial. The decision pre-dated the UAE Code of Commercial Practice which explicitly contemplates the application of civil laws to commercial transactions in the absence of any agreement on the issue. In Dubai Cassation No. 287/1995 dated 31 March 1996 the UAE Civil Code was applied to the rescission of a commercial transaction on the basis that the UAE Code of Commercial Practice did not contain any relevant provisions. The Dubai Court of Cassation adopted the same reasoning in Dubai Cassation No. 156/2004 dated 3 April 2005 in the context of a case involving an allegation of fraudulent misrepresentation.

<sup>18</sup> A commercial code is superior to a civil code on the principle that special laws take precedence over general laws: Dubai Cassation No. 29/1992 dated 25 October 1992 and Dubai Cassation No. 30/2007 dated 25 March 2007.

<sup>19</sup> Bahrain Commerce Law, Article 19, Kuwait Commerce Law, Article 16, Qatar Commerce Law, Article 15, Oman Commerce Law, Article 19 and UAE Code of Commercial Practice, Articles 10 and 15.

<sup>20</sup> For example, Oman Commerce Law, Article 9(20) and UAE Code of Commercial Practice, Article 6(8).

Numerous other laws are directed at regulating the construction industry. For example, these lay down standard specifications for construction materials and products, establish committees for assessment of tenders and resolution of disputes arising from government construction projects, impose penalties for damage caused to the environment and establish fire regulations applicable to public and private premises, to name a few. In the case of the United Arab Emirates most such laws are emirate laws as the UAE Federal Government does not have a specific legislative mandate over the construction industry.<sup>21</sup>

### 2.3 Delict (tort)

Aside from the impact of any of these laws the application of a construction contract is also potentially affected by the doctrine of liability for acts causing harm, referred to in a civil law context as delict and sometimes compared to liability in tort at common law.

Any person, even if not in a contractual relationship, is subject to the following:

Any harm done to another shall render the actor, even though not a person of discretion, liable to make good the harm.<sup>22</sup>

The absence of any requirement for a contractual relationship allows for concurrent liability for an act causing harm to arise, in principle, independently of an agreement.

While qualified and clarified in subsequent provisions of each applicable civil code and in judgments, liability for delict is far reaching and, as with torts in common law jurisdictions, overlaps with contractual liability. Delict is commonly enlisted, in practice, in support of contractual claims, not least because liability for damage caused directly does not require fault.<sup>23</sup>

<sup>21</sup> An exception is the construction, maintenance and improvement of union roads by virtue of the UAE Constitution, Article 7.

<sup>22</sup> Bahrain Civil Code, Article 158, Kuwait Civil Code, Article 227, Oman Civil Code, Article 176, Qatar Civil Code, Article 199 and the UAE Civil Code, Article 282. For further commentary see Chapter 10 [Physical damage and personal injury]. Physical loss or damage is not a prerequisite for liability in delict.

<sup>23</sup> 'The Concept of Fault in the Arab Law of Contract', Adnan Amkhan, *Arab Law Quarterly*, Vol.9, No. 2 (1994), p. 171. Amkhan notes that Islamic law traditionally bases liability on damage, so long as it is direct, rather than on fault. Liability for damage caused indirectly, in contrast, requires an element of wrongdoing: UAE Civil Code, Article 283 and Dubai Cassation No. 243/1994 dated 27 May 1995. Cf. Dubai Court of Cassation No. 243/1994 dated 27 May 1995. Also, Dubai Cassation No. 334/1995 dated 13 April 1996. It is possible that these are examples liability for damage caused indirectly.

Liability must, instead, be rebutted on one of the prescribed grounds as follows:

If a person proves that the loss arose out of an extraneous cause in which he played no part such as a natural disaster, unavoidable accident, force majeure, act of a third party, or act of the person suffering the loss, he shall not be bound to make it good in the absence of a legal provision or agreement to the contrary.<sup>24</sup>

The extent to which the parties' bargain can be supplanted or supplemented by general principles of delict has, in consequence, often fallen to be considered by the domestic courts.

In a shipping case in 1997,<sup>25</sup> the claimant entered into a contract, as evidenced by the bill of lading, with the defendant to ship certain goods from the United States to Dubai. The goods were destroyed in transit as a result of a fire caused by a collision at sea. Under the terms of the bill of lading the carrier was not liable for the destruction of the cargo. Dismissing the claimant's appeal, in which it was alleged that the collision occurred due to the negligence of the crew, the court stated that it was not acceptable to advance a case based on delict where the parties have entered into a contractual agreement, unless there is evidence of a crime,<sup>26</sup> deception or gross negligence.<sup>27</sup>

In a claim against a vehicle manufacturer the Dubai Court of Cassation reached the same conclusion stating:

It is established by the precedents of this Court that the legislator has laid down different provisions for contractual and delictual liabilities in distinct provisions. By doing so the legislator is declaring its intention to have a separate scope for each one of the two liability grounds. Therefore, if there is a specific contractual relationship ... and the damage sustained by one of the contracting parties was as a result of the other party's breach of his contractual obligation, then what should be applied are the provisions of the contract ... The rules pertaining to delictual liability may not be invoked as this amounts to a neglect of the contractual provisions relating to breach of contract.<sup>28</sup>

<sup>24</sup> UAE Civil Code, Article 287. Dubai Cassation No. 290/1990 dated 3 August 1991.

<sup>25</sup> Dubai Court of Cassation No. 198/1997 dated 20 December 1997.

<sup>26</sup> UAE Federal Supreme Court Law, Article 54 and 55, establishes a civil right to damages suffered as a result of a crime. For a construction case in which the court upheld a claim for acts causing harm due to the commission of a crime: Abu Dhabi Cassations Nos. 43, 78 and 161/4 dated 31 March 2010.

<sup>27</sup> Dubai Cassation No. 334/1995, Federal Supreme Court No. 43/2010 dated 31 March 2010 and Dubai Cassation Nos. 113 and 142/2004 dated 20 February 2005.

<sup>28</sup> Dubai Cassation No. 56/2004 dated 26 December 2004.

Restricting delict in this way finds support elsewhere<sup>29</sup> but notwithstanding the prevailing view that delict is subordinate to the parties' agreement except in cases of a crime,<sup>30</sup> fraud or gross negligence, it is likely to continue to arise as an area of controversy.

## 2.4 Public procurement

Throughout the Gulf a class of laws and regulations exists specifically and exclusively to regulate the procurement of public sector projects. The interplay between these laws and any contractual rights of the parties is an area of uncertainty. Specifically, their effect may be limited to serving as internal departmental regulations, controlling procurement methods and ensuring some consistency in conditions applicable to government contracts or, more significantly, they may have direct effect as laws of specific application.<sup>31</sup>

Each of the Gulf states has adopted public procurement laws and regulations.<sup>32</sup> By way of illustration, in Bahrain public procurement regulations apply as follows:

Without prejudice to the provisions of treaties and agreements applicable in the Kingdom of Bahrain, the provisions of this Law shall be enforced with respect to purchasing operations of goods, construction and services. Its provisions shall apply to all ministries, organisations, public institutions, municipalities and government authorities that have an independent or supplementary budget and the companies that are fully owned by the government, Consultative Council and House of Representatives.<sup>33</sup>

<sup>29</sup> Omer Eltom (2009). *The Emirates Law in Practice*. Dubai. pp. 11–14 and Dubai Cassation No. 28/2005 dated 22 May 2005.

<sup>30</sup> In Abu Dhabi Cassation No. 43, 78 and 161/4 dated 31 March 2010 the court, upholding a judgment against an engineering consultant, applied this exception based on a conviction arising from defective works.

<sup>31</sup> Saudi Arabia Royal Decree No. M/58/4 Ramadan 1427H/27 September 2006 Government Tenders and Procurement Law provides that its provisions override an agreement to the extent that the latter is inconsistent with the former.

<sup>32</sup> For example, Bahrain Law No. 36 /2002 Regulating Government Tenders and Purchases and Bahrain Law No. 37/2002 Issuing the Implementing Regulations for the Tenders and Purchase Law, Qatar Law No. 26/2005 Issuing the Tenders and Bids Regulations Law and Kuwait Law No. 37/1964 pertaining to Public Tenders.

<sup>33</sup> Bahrain Decree 36/2002 Regulating Government Tenders and Purchases and Bahrain Decree 37/2002 Issuing the Implementing Regulations of the Law Regulating Government Tenders and Purchases.

Similar regulations are found in Qatar,<sup>34</sup> Kuwait,<sup>35</sup> Oman<sup>36</sup> and Saudi Arabia.<sup>37</sup>

### *Saudi Arabia*

In Saudi Arabia, government departments and ministries are required by the Government Tenders and Procurement Law to use standard form contracts approved by the Ministry of Finance. Such approved standard form contracts include the construct-only standard form known as the Public Works Contract, which is loosely modelled on the Conditions of Contract for Works of Civil Engineering Construction, published by FIDIC, 3rd edition, 1977. Notwithstanding the appearance recently of amended discussion drafts the Public Works Contract has not been updated or replaced. Only the King may grant an exemption from the requirement to use an approved standard form.

### *United Arab Emirates*

Projects carried out for UAE Federal ministries are subject to a ministerial decision setting down 'rules and procedures for purchase contracts and works contracts'.<sup>38</sup> The following wording that has in the past appeared in standard conditions used by the Federal Government increases the potential for conflict between the ministerial decision and the contract conditions:

General Civil, Administrative and Commercial Regulations, the General Conditions of Contracting, the laws presently in force in the United Arab Emirates and any laws, statutes and decisions issued by the concerned authorities will apply whether or not they are expressly referred to in the contract.

Contracts and purchases made by the armed forces are governed by a separate Federal decree.<sup>39</sup>

<sup>34</sup> Qatar Law No. 26/2005 Regulating Government Tenders, as amended.

<sup>35</sup> Kuwait Decree No. 37/1964 Governing Public Tenders. In addition, Kuwait has enacted laws governing private sector investment in public sector projects, notably Kuwait Law No. 7/2008 and the accompanying Executive Regulations.

<sup>36</sup> Oman Tenders Law No. 36/2008 and Oman Decree No. 29/2010 the Implementing Regulations for the Tenders Law.

<sup>37</sup> Saudi Arabia Royal Decree No. M/58/4 Ramadan 1427H/27 September 2006 Government Tenders and Procurement Law.

<sup>38</sup> Ministerial Decision No. 20/2000, Article 1 and Financial Circular 16/75.

<sup>39</sup> UAE Federal Law No. 12/1986.

### *Abu Dhabi*

The Government of Abu Dhabi overhauled its procurement regime in 2008 in an effort to improve delivery of development and infrastructure projects.<sup>40</sup> Responsibility for procurement together with control over budgets has been delegated to government departments in a move away from an emphasis on a centralised tender committee. Each government department should have a tender and bid committee<sup>41</sup> which operates within the guidance set out in two manuals.<sup>42</sup>

The primary legislation and the accompanying manuals do not expressly address its status but some assistance is provided by the Purchases, Tenders, Bids and Warehouses manual which provides:

This manual contains the policies or guidelines and procedures applicable to the purchases, import of materials, service contracts and works contracts regardless of their type. The concerned department shall fully abide by its provisions, failing which the officers in charge shall be subject to disciplinary action.<sup>43</sup>

The reference to policies and guidelines accompanied by sanctions in the form of disciplinary action for any failure to comply is consistent with preserving the primacy of the contract.

Regulations applicable in Abu Dhabi further prescribe the forms of contract for procurement of certain public work.<sup>44</sup> The prescribed forms comprise, in dual English and Arabic, the FIDIC Conditions and the Conditions of Contract for Plant and Design – Build (1999), published by FIDIC, incorporating amendments.<sup>45</sup> These prescribed conditions are not, however, widely used in practice.

<sup>40</sup> Abu Dhabi Law No. 6/2008, Article 3(6). Abu Dhabi Law No. 4/1977, which previously governed public procurement in the Emirate of Abu Dhabi, was repealed by Article 14. The law and the manual do not cover contracts and purchases made by the Abu Dhabi police.

<sup>41</sup> Abu Dhabi Law No. 6/2008, Article 9.

<sup>42</sup> The Warehouse and Inventory manual and the Purchases, Tenders, Bids and Warehouses manual. The latter provides guidance for the relevant ministries and departments on, for example, maintaining registers of contractors, bonds, levying delay damages, variations and the procedures for tender committees.

<sup>43</sup> Purchases, Tenders, Bids and Warehouses manual, Article 3.

<sup>44</sup> The enabling law is Abu Dhabi Law No. 21/2006, repealing Executive Council decision 23/20/81. The latter took effect on 1 January 1982 and introduced a standardised set of contract conditions in Arabic. The implementing regulation of the former is Abu Dhabi Executive Chairman's Decision No. 1/2007.

<sup>45</sup> Among other things these previous conditions provided for disputes to be resolved by the competent Courts of the Emirate of Abu Dhabi, a requirement that has been replaced in the latest prescribed forms by arbitration in Abu Dhabi pursuant to the Rules of Conciliation and Arbitration of the Abu Dhabi Chamber of Commerce's Commercial Conciliation and Arbitration Centre.



## Dubai

Projects for the Government of Dubai are subject to similar procurement rules.<sup>46</sup> Notable provisions include:

- a requirement for contracts to be awarded only to citizens of the United Arab Emirates or companies in which citizens of the United Arab Emirates hold a majority of the shares,<sup>47</sup> except where there is no alternative source of supply<sup>48</sup>
- a prohibition on the adoption of unamended Conditions of Contract published by FIDIC<sup>49</sup>
- a requirement for an on-demand bond of 10% of the contract value, except in the case of an agreement with a foreign entity where there is no alternative source of supply
- a prohibition on any provision for arbitration to take place outside Dubai or any provision applying laws other than those prevailing in Dubai<sup>50</sup>
- a requirement for delay damages to be imposed up to a maximum of 10% of the contract value<sup>51</sup>
- an entitlement to fair compensation for executing works that result in a grave loss due to unforeseen circumstances of an exceptional nature<sup>52</sup>
- jurisdiction conferred on the Courts of Dubai over disputes arising from contracts made in accordance with the applicable law.<sup>53</sup>

The public procurement regime in Dubai also incorporates specific provisions regulating public–private partnerships,<sup>54</sup> signalling a desire to encourage greater participation by the private sector in the development and operation of Dubai’s physical infrastructure.

## 2.5 Administrative contracts

In addition to the uncertainty surrounding the status of public procurement laws a contract to which government procurement rules apply is most likely classed as an administrative contract, a classification unique to civil law.

<sup>46</sup> Dubai Law No. 6/1997, as amended by Dubai Law No. 2/2009.

<sup>47</sup> Article 12.

<sup>48</sup> Article 13, as amended by Dubai Law No. 2/2009.

<sup>49</sup> Article 32, as amended by Dubai Law No. 2/2009.

<sup>50</sup> Article 36. Exemptions have been granted to Emirates Airline, Dubai Aviation Corporation and the Department of Tourism and Marketing.

<sup>51</sup> Article 65.

<sup>52</sup> Article 66.

<sup>53</sup> Article 83.

<sup>54</sup> Dubai Law No. 22/2015, which came into effect on 18 November 2015. ‘How will Dubai’s New PPP Law Impact Construction?’, Adrian Creed, Construction Week, 30 September 2015.

Although the principal characteristic of an administrative contract is generally considered to be that the contract is subordinate to the attainment of the underlying objective, namely service of the public interest, neither the applicable civil codes nor the commercial codes draw this or any other distinction between private and administrative contracts. In consequence, although a distinction has been recognised by the courts,<sup>55</sup> it is difficult to discern any consistent principles of law that govern administrative contracts.<sup>56</sup>

In France, from where the classification originates,<sup>57</sup> there is a separate branch of the courts having jurisdiction over disputes arising from an administrative contract. These administrative courts were created by the new government following the end of the French revolution in 1799 as a bulwark against the reactionary tendencies of the established judiciary and the regional royal courts. Notwithstanding the different political conditions of the Gulf, administrative courts have been established in Kuwait<sup>58</sup> and Oman.<sup>59</sup> The existence of these administrative courts suggests that the civil codes of the region have imported some recognition of administrative law, even if the extent and effect of this is unclear.

<sup>55</sup> Federal Supreme Court No. 462/18 dated 17 February 1998 in which it was held that for the purpose of an administrative contract evidence that the works are delayed beyond the time for completion is sufficient to trigger delay damages whereas other considerations will be relevant to a private transaction.

<sup>56</sup> 'The Challenge of Defining an Administrative Contract', Rana El Husseini, <http://www.hadefpartners.com>, 6 September 2011.

<sup>57</sup> For further commentary on the origins and development of civil and administrative procedure in France see 'Introduction to French Civil Justice System and Civil Procedure Law', L. Cadiet, RLR No. 28 (2011), 331. Also, Lionel Neville Brown, 1998. *French Administrative Law*: L. Neville Brown, John S. Bell With the Assistance of Jean-Michel Galabert. 5 Edition. Oxford University Press.

<sup>58</sup> Amiri Decree No. 20/1981 Creating a Division of the Al Kulliya Court to hear Administrative Disputes.

<sup>59</sup> Sultan Decree No. 91/1999 Establishing Administrative Courts. Cases in Qatar and Abu Dhabi are also designated as 'administrative' in dockets maintained by the courts.

# 3

## Contract Formation

Construction projects typically involve multiple participants, employ a one-off design and span a period of months or years, during which some element of change or unforeseen circumstance if not inevitable is at least likely. In consequence, the construction industry relies, among other things, on lengthy and detailed contracts to manage this volatility on each project.

Yet despite the effort invested in drafting construction contracts, including standard form conditions such as those published by FIDIC, the operation of local law and its impact on such contracts is often considered only as an afterthought or as a last resort. The fundamental principles of contract law considered in the next few chapters are intended to provide the basis for a better understanding of the operation of the laws of the Gulf on construction contracts and on the issues that commonly arise during a construction project.<sup>1</sup>

### 3.1 Components of a valid contract

There is no universal or comprehensive test for determining the existence of a contract. Nor is a contract required to take a particular form. Instead, the formation of a contract is governed by a collection of general principles

<sup>1</sup> The following discussion focuses on innominate contracts, which are those that are not within one of the categories identified elsewhere in the region's civil codes. A construction contract is a nominate contract by virtue of its classification as a *muqawala*, a category of contract that has its own section of the civil code. When dealing with nominate contracts regard must be paid to any provisions applicable to that category of contract. These are examined in the relevant context in subsequent chapters.

gathered together in the region's civil codes,<sup>2</sup> the application of which is a matter for the Court of Merits.

In practice, the measure of whether a valid contract has come into existence typically includes a review of the surrounding circumstances, having particular regard to evidence of:

- offer and acceptance
- sufficient certainty as to the main elements of the bargain
- mutual intentions or a meeting of minds and
- capacity.

Notwithstanding that assessment of the evidence to ascertain whether a contract exists on the basis of these criteria is a matter for the Court of Merits, introducing an element of judicial discretion into process, a consistent approach to some aspects of these criteria can, nevertheless, be discerned. An individual examination of each one is, thus, worthwhile.

### 3.2 Offer and acceptance

Offer and acceptance result in a contract provided that there is certainty as to the effect of the resulting obligations.<sup>3</sup> Unlike in common law jurisdictions there is no requirement, except in Bahrain, for offer and acceptance to be accompanied by payment or the transfer of any other form of consideration. A bare promise, if accepted, is sufficient to give rise to a binding contract provided this is the parties' mutual intention. In Bahrain a contract is void in the absence of consideration,<sup>4</sup> though consideration is presumed in the absence of evidence to the contrary.<sup>5</sup>

Offer and acceptance are capable of creating a binding contract notwithstanding that they are contained in separate documents. Accordingly, there is no requirement for a contract to be formalised in a single document<sup>6</sup> or, indeed, to be recorded in writing at all<sup>7</sup> provided that the evidence

<sup>2</sup> Bahrain Civil Code, Articles 29–68, Kuwait Civil Code, Articles 31–64, Oman Civil Code, Articles 69–90, Qatar Civil Code, Articles 68–79 and the UAE Civil Code, Articles 129–148.

<sup>3</sup> Bahrain Civil Code, Article 29, Kuwait Civil Code, Article 31, Oman Civil Code, Article 69, Qatar Civil Code, Article 72 and the UAE Civil Code, Article 125. The UAE courts have applied Article 125 on numerous occasions. For example, see Dubai Cassation No. 313/2007 dated 21 April 2008.

<sup>4</sup> Bahrain Civil Code, Article 111. Both the Oman Civil Code, Article 122 and the UAE Civil Code require a lawful benefit for both parties but this is part of the civil law requirement for a valid 'cause'.

<sup>5</sup> Bahrain Civil Code, Article 112.

<sup>6</sup> Dubai Cassation No. 350/2004 dated 16 April 2005.

<sup>7</sup> Bahrain Civil Code, Article 32, Kuwait Civil Code, Article 34, Oman Civil Code, Article 70, Qatar Civil Code, Articles 65 and 91 and the UAE Civil Code, Article 132.

demonstrates mutual consent.<sup>8</sup> The absence of a formal written contract can, however, result in uncertainty, especially if the negotiations have produced a written record of some but not all of the contemplated terms. Further, the construction industry practice of exchanging offers and counter-offers over a prolonged period, often after preliminary work has begun and costs have been incurred, means that identifying the precise point at which a contract is brought into existence is not merely a theoretical challenge.

Although there is no formal status attributed to heads of agreement, memoranda of agreement, letters of intent or similar commercial instruments that tend to blur the line between negotiations and a concluded contract, the courts have identified some of the characteristics of the former and latter respectively. The Dubai Court of Cassation has expressed the distinction in the following terms:

the invitation to contract and the negotiations preceding the contract are steps towards the offer and are not binding. The offer is a step towards the conclusion of the contract; if the offer is accepted then a contract is concluded. In such event the offeror may not resile from his offer. This is because by his offer he is expressing his wish to conclude the contract. He may not withdraw from the transaction upon the conjunction of the offer and the acceptance along with his knowledge of the same, by unilateral termination of the contract. If the offer is open and the acceptance is known to the offeror, the contract is considered concluded.<sup>9</sup>

The courts will determine whether the parties' conduct is sufficient to constitute a concluded contract. It follows that unless a contract has been concluded (by offer and acceptance) the parties are entitled to withdraw from negotiations.<sup>10</sup>

Acceptance will be effective provided that such acceptance is communicated to the other party by any means, including by transmission through a third party or even by conduct from which acceptance is inferred.<sup>11</sup> If made by exchange of correspondence the contract shall be treated as being concluded on receipt by the offeror of written acceptance.<sup>12</sup> Thus, the Dubai

<sup>8</sup> Dubai Cassation No. 286 and 307/2004 dated 13 March 2005 and Dubai Cassation No. 667/2013 dated 28 December 2014, both of which involved the appointment of a design consultant. In accordance with Dubai Law No. 2/2002, Article 13, offer and acceptance are effective if communicated by email.

<sup>9</sup> Dubai Cassation No. 350/2004 dated 16 April 2005; and see also Dubai Cassation No. 246/2007 dated 5 February 2008.

<sup>10</sup> Dubai Cassation No. 270/2001 dated 18 November 2001 and 22/2001 dated 1 April 2001.

<sup>11</sup> Dubai Cassation No. 799/2013 dated 31 March 2014.

<sup>12</sup> Dubai Cassation No. 375/1997 dated 26 April 1998. In this case the acceptance was received in Dubai and, therefore, the Dubai courts had jurisdiction to hear a dispute arising out of the contract.

Court of Cassation rejected an appeal against a finding of liability against a bank after the bank declined to issue a confirmed letter of credit citing the Claimant's failure to communicate acceptance of the terms for its issue to the issuing bank itself. The acceptance was, however, forwarded to and received by the defendant bank. Rejecting the bank's appeal the Court of Cassation described the formalities for the formation of a contract in the following terms:

The matters of the offer and the acceptance and the knowledge of the offeror of the acceptance, whether at the place of contracting or by way of correspondence or the like, such as post, telegram, telex or telephone, are within the power of the Court of Merits without interference as long as its findings are sound and have the support of the evidence in the case file.<sup>13</sup>

Determining whether the evidence proves that there is a confluence of offer and acceptance is a matter to be decided by the Court of Merits. Proving an agreement, the burden of which falls on the party asserting the existence of a contract,<sup>14</sup> absent a written record, is challenging in any jurisdiction but is especially so in one that places a strong emphasis on the value of documentary evidence.

### 3.3 Certainty

Although the confluence of offer and acceptance, including successful communication of acceptance are questions of fact it remains a requirement that offer and acceptance must establish with sufficient clarity the effect of the contract. Without such clarity as to the main elements of a bargain, offer and acceptance alone are insufficient to create an effective contract.

Thus, each contract must identify its subject matter.<sup>15</sup> This principle is expressed at its most tangible in the requirement for any contract to contain the 'essential elements' of the bargain made.<sup>16</sup> The Federal

<sup>13</sup> Dubai Cassation No. 350/2004 dated 16 April 2005.

<sup>14</sup> Kuwait Law of Proof Law, Article 1, Oman Law of Proof, Article 1, Qatar Civil Procedure Law, Article 211, the UAE Civil Code, Article 117 and the UAE Law of Proof, Article 1(1).

<sup>15</sup> The subject matter corresponds to the *objet* in the French Civil Code, a concept which can be found, for example, in the Kuwait Civil Code, Article 167 and the Oman Civil Code, Article 115.

<sup>16</sup> Bahrain Civil Code, Articles 37 and 50, Kuwait Civil Code, Article 39, Oman Civil Code, Article 79, Qatar Civil Code, Article 79 and the UAE Civil Code, Articles 129 and 141.

Supreme Court has recognised and expressed this requirement in the following terms:

Articles 125, 129 and 141 of the UAE Civil Code indicate that, for a contract to be concluded, agreement has to be reached on all the essential elements of the contract and on all the other elements that the parties regard as essential.<sup>17</sup>

In the case of construction contracts specifically, the details required to satisfy the requirement for certainty as to the obligations created include the subject matter of the contract (such as types and quantities of work), the price and the contract period.<sup>18</sup>

The Federal Supreme Court addressed these requirements in a construction context in a judgment delivered in 1999. The contractor brought a claim against the Ministry of Electricity and Water (as it then was) for loss of profit and other damages totalling AED 300,000. The Ministry had withdrawn from a project – on the advice of its consultants – after the contractor had prepared and submitted drawings. The contractor submitted that it had proceeded with the design work in reliance upon a letter from the Ministry accepting its proposals which had set out the essential details required under Federal law, such as the price, the date for completion and a description of the works. In its judgment the Federal Supreme Court gave the following guidance on the formation of contracts:

The offer and acceptance should clearly indicate the intention of the contracting parties, such that each party is aware of the terms the other has proposed regarding the subject, type, quality, method of performance, duration and price of the contract, as well as all key elements and material aspects of the contract and all the legal terms which the parties consider essential ... The Court of Merits' view is that the correspondence in question and the price quotes given by the Appellant company and the ensuing correspondence are no more than matters within the framework of negotiations and physical acts which do not amount to acceptance for the project to go ahead due to the lack of agreement on material and essential issues within the contemplation of Article 874 of the Civil Code.<sup>19</sup>

The Federal Supreme Court observed that the correspondence upon which the Claimant relied was expressly stated to be a letter of intent and subject to confirmation by the Ministry and the Ministry's consultant, together

<sup>17</sup> Federal Supreme Court No. 140/22 dated 26 March 2002. This appears to contemplate a two limb test comprising an objective and a subjective element.

<sup>18</sup> Oman Civil Code, Article 628 and the UAE Civil Code, Article 874.

<sup>19</sup> Federal Supreme Court No. 525/19 dated 13 June 1999.

with the preparation of drawings by the Claimant and their acceptance by the relevant statutory authorities. Declining to interfere with the finding of the Court of Merits that the correspondence was exchanged within the framework of negotiations due to the lack of agreement on material and essential issues, the claim was rejected.

That such conclusions are based to a significant extent on the Court of Merits' interpretation of the available evidence is illustrated by a decision of the same court in 2001 which produced the opposite result. A main contractor that was successful in a tender for a project procured by the Abu Dhabi Water & Electricity Department confirmed after a protracted tender process that it would appoint the Claimant mechanical and electrical subcontractor for the MEP portion of the works. In fact, these works were awarded to an alternative, more expensive subcontractor, resulting in a claim for damages, including the costs of the tender process. The main contractor submitted that the document on which the claim was based constituted a letter of intent and was no more than a draft contract proposing negotiations in respect of the scope of work, period of performance and mobilisation, and that subsequent conditions precedent, including approval of the subcontractor by the Abu Dhabi Water & Electricity Department had not been satisfied. In other words, the essential elements of the agreement had not been finalised. The Federal Supreme Court concluded that the letter of intent, in fact, contained only one condition precedent, which was that the main contract was confirmed and awarded to the Respondent, a condition that had been satisfied. Accordingly, the subcontractor was awarded damages for the main contractor's subsequent failure to proceed with the award of the MEP package.<sup>20</sup>

If the parties agree as to the essential elements of a contract but leave some details for a future agreement, the contract is regarded as complete unless failure to reach a final agreement regarding the details is expressed to result in the parties being released from any further obligation.<sup>21</sup> The missing elements of the agreement are sought from the nature of the transaction and from the applicable law:

If the parties agree on the essential elements of the obligation and the remainder of the other lawful conditions that both parties regard as essential and they reserve matters of detail to be agreed upon afterwards but they do not stipulate that the contract shall be ineffective in the event of absence of agreement upon such matters, the contract shall be deemed to have been made, and if a dispute arises as to the matters which have not

<sup>20</sup> Federal Supreme Court No. 435 and 516/21 dated 12 June 2001. It is possible that this decision shows that the test for whether the essential elements for the formation of a contract are present is easier to satisfy for a subcontract than for a main contract.

<sup>21</sup> Bahrain Civil Code, Article 43, Kuwait Civil Code, Article 52, Qatar Civil Code, Article 79, Oman Civil Code, Article 79 and the UAE Civil Code, Article 141(2).



been agreed upon, the judge shall adjudicate thereon in accordance with the nature of the transaction and the provisions of the law.<sup>22</sup>

Reference to the nature of a transaction and custom and practice is a common theme in both statutory provisions applicable to commercial contracts and in judicial reasoning, highlighting the discretionary power that the Court of Merits wields over the outcome of contractual disputes. Likewise, if a contractor and subcontractor reach an agreement that is not reduced to writing this may be found to include an obligation to perform the work within a reasonable time, taking account of the nature and quantity of the work, and an obligation to achieve a standard of workmanship, including selection of materials, that would be expected of a 'reasonable man'.<sup>23</sup>

An agreement to agree, similarly, can only be effective if the form and content of the future contract are specified, as is the period within which such contract is to be made.<sup>24</sup> The Dubai Court of Cassation described the position as follows:

Article 146 of the Civil Code means as settled by this Court, a contract of promise is a binding contract on one party and may be binding on both parties when it is a promise to make a contract within a specific period of time. A promise to sell or buy does not result in the effects of sale because the parties' wills did not intend to make the contract. As such, if the specific period of time has lapsed without the parties expressing their intention to make the final contract, such promise will lapse accordingly.<sup>25</sup>

Although the precise role afforded to intentions by the Islamic Shari'ah is a source of some controversy<sup>26</sup> the parties' intentions are, thus, a further feature of a valid contract in the United Arab Emirates.

<sup>22</sup> Dubai Cassation No. 286 and 307/2004 dated 13 March 2005, in which the court found that an employer and consultant's conduct was consistent with the existence of a contract between them. Also Dubai Cassation No. 320/1994 dated 11 March 1995.

<sup>23</sup> Federal Supreme Court Nos. 446 and 541/2001 dated 15 May 2001. This is consistent with the test contained in the Oman Civil Code, Article 631, which provides that if the duration of the works is not agreed this shall be a reasonable period having regard to the nature of the work and common practice.

<sup>24</sup> Bahrain Civil Code, Article 50, Kuwait Civil Code, Article 72, Qatar Civil Code, Article 96 and the UAE Civil Code, Article 146.

<sup>25</sup> Dubai Cassation Nos. 64/2006 and 82/2007 dated 17 June 2007.

<sup>26</sup> 'Definition and Formation of Contract under Islamic and Arab Laws', N. Saleh, ALQ, Vol. 5, No. 2 (1990), pp. 101–116. The significance attached to intentions in the United Arab Emirates is a product of the precedence given by the UAE Civil Code, Article 1, to the jurisprudence or teachings of the schools of Imam Malik and Imam Ahmad bin Hanbal. Although the civil codes of Bahrain, Kuwait and Oman also enshrine Islamic jurisprudence as a touchstone of judicial reasoning these codes do not make specific reference to any particular school of teaching. For a detailed study of the various competing theories as applied to contracts and other areas of law see Paul R. Powers, 2005, *Intent in Islamic Law: Motive and Meaning in Medieval Sunni Fiqh*, Leiden: Brill.

### 3.4 Mutual intentions

The Federal Supreme Court has identified the coming together of the parties' intentions as being another critical component of the formation of a contract:

A contract will be deemed to be perfected and binding upon there being evidence that the two intentions have come together to create the subject matter of the contract, and to render it effective.<sup>27</sup>

An expression of intent may be made in writing,<sup>28</sup> verbally or by circumstances that leave no doubt that they demonstrate mutual consent.<sup>29</sup>

Such consent must be given freely and without duress or undue influence.<sup>30</sup> To establish duress or undue influence the means by which the pressure is exerted must be illegitimate as well as causative of the consent being given. Thus, a threat to commence legal action that induces a party to enter into a settlement agreement does not constitute duress or result in such settlement agreement becoming void for lack of valid consent as the initiation of legal proceedings is a legitimate response to the existence of a dispute.<sup>31</sup>

If consent is procured by deception or fraudulent misrepresentation any resulting contract is voidable.<sup>32</sup> An innocent party seeking this remedy must show that the contract would not have been agreed but for the deception or fraudulent misrepresentation.<sup>33</sup>

<sup>27</sup> Federal Supreme Court No. 771/23 dated 5 December 2004.

<sup>28</sup> Dubai Cassation No. 350/2004 dated 16 April 2005.

<sup>29</sup> Dubai Cassation No. 286 and 307/2004 dated 13 March 2005, which involved the appointment of a design consultant.

<sup>30</sup> Bahrain Civil Code, Article 94, Kuwait Civil Code, Article 156, Qatar Civil Code, Article 137, Oman Civil code, Article 98 and the UAE Civil Code, Article 176.

<sup>31</sup> Federal Supreme Court No. 156/12 dated 18 December 1990. See also Dubai Cassation No. 76/2010 dated 18 April 2010 in which the court held that the burden of proving duress is on the party alleging it.

<sup>32</sup> Bahrain Civil Code, Article 85, Kuwait Civil Code, Article 151, Oman Civil Code, Articles 103 and 104, Qatar Civil Code, Article 134 and the UAE Civil Code, Articles 185 and 187.

<sup>33</sup> In Dubai Cassation No. 89/2005 dated 15 October 2005 the court emphasised the need for evidence of fraud 'by word or deed', though silence can also be sufficient grounds for misrepresentation. In Dubai Cassation No. 156/2004 dated 3 April 2005 the court found that an experienced business owner had failed to prove that he was induced by misrepresentation to agree to the sale of shares at an undervalue.

### 3.5 Capacity

In addition to being given freely, an expression of intent must be made with due authority. Authority, for the purpose of creating a binding obligation may be explicit, implicit or ostensible,<sup>34</sup> which the Court of Cassation, Dubai's highest court, has explained in the following terms:

Authority may be explicit; implied if it is to be inferred from the normal course of things or acts. The authority shall be ostensible if the principal behaved or acted in a way from which it can be inferred that a particular person was authorised by or acted on the principal's behalf no matter whether or not the representative was in fact authorised to carry on such act or behaviour.<sup>35</sup>

A valid contract is, thus, created on behalf of a corporate entity provided that it can be inferred, on an objective basis, that the individual representative possesses the required authority. Likewise, a manager or director of an establishment – equivalent to a sole proprietorship – is treated as the owner's agent for the purpose of managing the establishment.<sup>36</sup>

<sup>34</sup> The formalities required to prove the necessary authority to execute a binding arbitration agreement and other special cases such as those listed, for example, in the Bahrain Civil and Commercial Procedures Act (Law No. 12/1971)), Article 43, and the UAE Civil Procedure Code, Article 58(2) are subject to stricter requirements: Chapter 24.1 [Right to arbitrate].

<sup>35</sup> Dubai Cassation No. 7/2001 dated 10 March 2001.

<sup>36</sup> Dubai Cassation No. 51/2003 dated 18 May 2003.



# 4

## Interpretation

The principles applicable to the interpretation of contracts in the United Arab Emirates<sup>1</sup> derive from the proposition that parties are bound by what they have freely agreed.<sup>2</sup>

### 4.1 Statutory maxims

In a manner consistent with the civil law tradition further maxims of interpretation augment this fundamental principle. First among these are the following:

- (1) The criterion in (the construction of) contracts is intentions and meanings and not words and form.
- (2) The primary rule is that words have their true meaning and a word may not be construed figuratively unless it is impossible to give it its direct meaning.<sup>3</sup>

This opening provision, which is unique to the United Arab Emirates, is supplemented by, and tends to be quoted in tandem with, subsequent provisions which provide further guidance on the approach to be adopted to the interpretation of contracts.

<sup>1</sup> UAE Civil Code, Book 1, Chapter 1, Part 1, Section 4, Articles 257 to 273.

<sup>2</sup> UAE Civil Code, Article 257 and Dubai Cassation Nos. 200 and 262/2002 in which Article 257, was applied in a dispute involving a claim by a consulting engineer for overdue fees.

<sup>3</sup> UAE Civil Code, Article 258.

## 4.2 Intentions

Unlike in the United Arab Emirates, the civil codes of Bahrain, Kuwait, Oman and Qatar do not single out intentions for specific attention in a preamble to the principles of interpretation. The civil codes of these Gulf states, instead, express the role of words and intentions in the following or very similar terms:

If the expression of the contract is clear it may not be departed from by means of interpretation to determine the will of the parties to the contract.

However if there is scope for interpretation of the contract, the common intention of the parties to the contract must be sought without stopping at the literal meaning of the words, guided in this process by the nature of the dealing and the need for trust and confidence between the parties to the contract, in accordance with current custom in transactions.<sup>4</sup>

Although the UAE Civil Code incorporates an almost identical provision<sup>5</sup> this must be reconciled with the special status, if any, afforded to intentions by virtue to the opening words of Article 258. Unsurprisingly, the tension between the applicable provisions is a common source of controversy. In particular, the interplay between the contract as recorded in writing and the parties' intentions provides fertile ground for disputes.

The resolution of such disputes is a task for the Court of Merits, which is required to apply the maxims of interpretation and to ascertain the meaning and effect of contracts, as confirmed by the Federal Supreme Court:

It is established in the jurisprudence of this court that the Court of Merits shall have absolute authority to interpret the meaning of disputed wordings and contracts to ascertain the intention of the contracting parties. In this regard, the nature of the transaction and the trust and confidence between the parties must be taken into consideration. The Supreme Court may not exercise supervision over the Court of Merits in this regard as long as its interpretation is valid and does not depart from the explicit meaning and the grounds on which it relies support the conclusion reached by the Court of Merits.<sup>6</sup>

<sup>4</sup> Qatar Civil Code, Article 169. Also, Bahrain Civil Code, Article 125, Kuwait Civil Code, Article 193 and the Oman Civil Code, Article 165.

<sup>5</sup> UAE Civil Code, Article 265. Similarly, Article 259 provides that 'There shall be no scope for implications in the face of clear words.'

<sup>6</sup> Federal Supreme Court No. 322/1999 dated 26 January 1999. For the principle that it is for the Court of Merits to interpret the contract according to the intention of the parties see also Dubai Cassation Nos. 430/2001 dated 28 January 2001 and 125/2007 dated 25 June 2007.

The approach taken by the Court of Merits is not subject to review on appeal, provided that the finding is one that is consistent with the Court of Merits' discretionary authority. The supervisory jurisdiction of the appellate court is limited to ensuring that the rules of interpretation contained in the Civil Code are applied correctly and in accordance with any principles established by the appellate court. The result is that a decision of the Court of Merits on the interpretation of a contract is rarely remitted back to the Court of Merits for reconsideration following an appeal.

Notwithstanding the largely discretionary nature of decisions on interpretation some guidance is available on the general approach to be adopted. Thus, in a case involving an employee's claim for commission on sales, the Dubai Court of Cassation reconciled the prioritisation of intentions over words<sup>7</sup> and the rule that words have their true meaning<sup>8</sup> as follows:

Thus, it is established in the jurisprudence of this court that if the wording of a contract is clear, it may not be departed from by way of interpretation to achieve the intention of the parties. However, if there is scope for interpretation, the mutual intention of the contracting parties must be ascertained without being restricted to the literal meaning of the words. In this regard, the nature of the transaction and the trust and confidence between the parties must be taken into consideration. The Court of Merits shall have absolute authority to interpret the text of contracts to ascertain the intention of the contracting parties and to determine their rights pursuant to the provisions of the contract. This is subject to the rule that the interpretation of the mutual intention of the parties must be acceptable and not contradictory to the facts established by the documents or the explicit meaning of the contract.<sup>9</sup>

As the intention of the parties is that which is recorded in writing<sup>10</sup> there is no scope for implication based on the intentions of the parties if the words of the agreement are clear, unless the wording of the agreement is clearly contrary to the parties' intentions.<sup>11</sup> Recourse to the parties' intentions for the purpose of interpreting contracts is for resolving ambiguity, not for reshaping the parties' explicit agreement.<sup>12</sup> Crucially, the rules of interpretation are

<sup>7</sup> UAE Civil Code, Article 258.

<sup>8</sup> UAE Civil Code, Article 259.

<sup>9</sup> Dubai Cassation No. 18/2000 dated 21 May 2000.

<sup>10</sup> Dubai Cassation No. 125/2007 dated 25 July 2007. In Federal Supreme Court No. 24/15 dated 5 October 1993 the court held that reliance would be placed on the parties' intentions 'exceptionally'.

<sup>11</sup> Dubai Cassation No. 54/1999 dated 25 April 1999.

<sup>12</sup> Dubai Cassation No. 352/1994 dated 22 April 1995.

subordinate to the overarching principle that the parties are required to perform their obligations in accordance with the agreement that they have reached.

The UAE Ministry of Justice commentary explains that ‘intentions’<sup>13</sup> in the official Arabic text conveys the sense of ‘meanings intended by certain words’ rather than that which is willed by a party.<sup>14</sup> The parties’ intentions are to be gleaned from the wording of an agreement and surrounding circumstances rather than from the subsequently expressed intentions of the parties. Intentions are, thus, an interpretative tool and not a component of an agreement in their own right.

The Dubai Court of Cassation, in a case involving a dispute between a contractor and subcontractor as to the meaning and effect of a conditional payment clause, provided an illustration of the application of these principles to construction contracts:

Where there is scope for interpreting the contract, this should be done not so much by reference to the literal meaning of the words, than by considering the mutual intention of the parties in the context of the nature of the transaction and the requirement for trust and goodwill between contracting parties, according to the standard practice in the industry and in their mutual interests.<sup>15</sup>

If the circumstances merit a consideration of the parties’ intentions these are to be ascertained objectively by reference to the words used and other objective criteria, such as custom and practice.<sup>16</sup> The aim is to identify the parties’ mutual intentions,<sup>17</sup> not to apply the intentions of one party in preference to those of the other.

<sup>13</sup> In Arabic: *maqāsid*.

<sup>14</sup> This is not easily reconciled with the significance attached to intentions in the jurisprudence or teachings of the schools of Imam Malik and Imam Ahmad bin Hanbal to which precedence is given by the UAE Civil Code, Article 1, and in which the real motive or purpose is of critical importance: Paul R. Powers, 2005, *Intent in Islamic Law: Motive and Meaning in Medieval Sunni Fiqh*, Leiden: Brill.

<sup>15</sup> Dubai Cassation No. 281/1995 dated 6 July 1996.

<sup>16</sup> Custom and practice plays a significant role in the interpretation of contracts but as with intentions does not override the parties’ agreement or, indeed, operate to supplement the agreement. In Dubai Cassation No. 138/1994 dated 13 November 1994 the court declined to cap delay damages at 10% of the contract sum despite the common practice of incorporating such a cap, as the contract was silent on this.

<sup>17</sup> Dubai Cassation No. 62/2007 dated 24 April 2007. The French Civil Code, Article 1156 refers to the parties’ ‘commune intention’ or ‘common intentions’.



### 4.3 Resolution of ambiguity

A notable modification of the hierarchy of factors by which contracts are to be interpreted is that:

A doubt shall be interpreted in favour of the obligor.<sup>18</sup>

Similarly to the common law *contra proferentem* doctrine, which provides that uncertainty in contract wording should be applied against the interests of the party that included such wording (especially in the context of onerous terms such as indemnities), this provision requires any remaining doubt about the meaning of a contract to be resolved in favour of the party on whom an asserted obligation would fall.

### 4.4 Absence of express terms

In the absence of a written contract between the parties or to the extent that a contract is silent on a particular issue, the domestic courts of the United Arab Emirates shall have resort, in descending order of priority, to:

- Federal laws of specific application
- the Code of Commercial Practice and other Federal commercial laws
- emirate laws
- construction industry custom
- general custom
- laws pertaining to civil matters.<sup>19</sup>

The Dubai Court of Appeal, in a dispute arising out of a failed joint venture between a local contractor and an Italian design and fabrication company both specialising in cladding and curtain walling, explained the inter-relationship of these provisions in the following terms in a judgment in 2001:

Under [Federal law] the agreement of the contracting parties must be applied, together with the provisions of the Code of Commercial Practice or, if no specific provision is made therein or in other laws, the rules of commercial custom must be applied. If there is no relevant commercial custom, the rules regarding civil matters shall be applied to the extent that they do not conflict with the general principles of commercial activity.<sup>20</sup>

<sup>18</sup> UAE Civil Code, Article 266(1). Bahrain Civil Code, Article 126, Kuwait Civil Code, Article 194, Oman Civil Code, Article 166 and the Qatar Civil Code, Article 170.

<sup>19</sup> UAE Code of Commercial Practice, Article 2.

<sup>20</sup> Dubai Court of Appeal No. 1477/1999 dated 20 January 2001.

In practice, laws regarding civil matters are applied to construction contracts more commonly than the above hierarchy and extract suggests, the principal reason for this being that these laws, specifically the applicable civil codes, address construction related issues more comprehensively than laws regarding commercial matters.<sup>21</sup>

In summary, therefore, the interpretation of contracts in Bahrain, Kuwait, Qatar, Oman and the United Arab Emirates is not radically different from the contextual approach adopted under English law.<sup>22</sup> The Gulf's domestic courts are, perhaps, less reticent than common law courts about resolving any ambiguity or doubt as to the effect of a contractual provision by reference to the intention of the parties at the time the contract was made. The decision-making process is tied less closely than in common law jurisdictions to analysis of the words used, their context and the structure of the contract. Instead, domestic courts are more inclined, in the presence of ambiguity or doubt, to apply the intent of the parties as deduced from the contract itself, and other sources such as contemporary correspondence, the nature of the transaction, commercial custom and practice and the expectation that transactions are created in a spirit of goodwill, trust and in the parties' mutual interests. This expansive set of criteria gives the Court of Merits freedom to adopt an equitable approach to the interpretation of contracts.

<sup>21</sup> The provisions of the Kuwait Civil Code apply to commercial contracts explicitly by virtue of the Kuwait Commerce Law, Article 96.

<sup>22</sup> See the dicta of Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28.

# 5

## Contractual Principles

Although a contract governed by the laws applicable in the Gulf shares many key features with those of a common law counterpart there are a sufficient number of differences to make an examination of the key characteristics of these laws worthwhile.

### 5.1 Binding obligations

A contract is binding and effective pursuant to Federal law. This is consistent with the Islamic Shari'ah and the Qur'an, which admonishes Muslims to perform an agreement.<sup>1</sup> Thus, in relation to a commercial contract it is provided that:

Traders and commercial activities shall be governed by the agreement entered into by the two contracting parties unless such agreement contradicts a mandatory provision of this Law.<sup>2</sup>

<sup>1</sup> Qur'an, chapter 5 (The Repast), verse 1: 'Oh you who believe, honour your contracts.' Alternative translations, of which there are many, have 'obligations' or 'covenants' in place of 'contracts'.

<sup>2</sup> UAE Code of Commercial Practice, Article 2(1). Also, Bahrain Commerce Law, Article 2(1) and the Oman Commerce Law, Article 2. Neither the Kuwait Commerce Law nor the Qatar Commerce Law contains a corresponding provision.

Likewise, a party to a civil contract 'must perform that which he is obliged to do under the contract'<sup>3</sup> and, in consequence, is in substantially the same position. In applying these provisions, the agreement between the parties is often described by the domestic courts as the law of the parties.<sup>4</sup> Indeed, the Bahrain Civil Code explicitly provides that:

The contract makes the law of the parties. It can be revoked or altered only by the mutual consent of the parties or for reasons provided for by the law.<sup>5</sup>

Both in principle and in practice the courts apply the terms and conditions of a contract.

The parties' freedom to govern their contractual relationship is, however, subject to a number of qualifications. First and foremost, the subject matter of a contract must have a valid *cause*,<sup>6</sup> in the sense of a purpose or motive. *Cause* is a defining feature of the French Civil Code and its presence is evidence that the French Civil Code is one of the sources of the UAE Civil Code. In contrast, the German Civil Code does not include a requirement for *cause*.

A contract that comes into existence for an invalid cause is void.<sup>7</sup> Likewise, a contract is unenforceable to the extent that it conflicts with public order or decency,<sup>8</sup> which includes a conflict with laws passed for the public interest. Areas of public interest include marriage, inheritance and lineage, systems of government, freedom of trade, circulation of wealth, rules of private ownership and 'the other rules and foundations upon which society is based'.<sup>9</sup> The impact of these restrictions on parties' freedom of contract in the sphere of commercial dealings is limited but, nevertheless, has the capacity to impact construction contracts. Applications of public order to which construction

<sup>3</sup> UAE Civil Code, Article 243(2). A similar provision is contained in the Oman Civil Code, Article 155 and the Qatar Civil Code, Article 171.

<sup>4</sup> Often expressed by reference to the Latin maxim *pacta sunt servanda* (agreements must be kept) reflecting the Roman law origins of civil law: Dubai Cassation No. 273/1991 dated 9 February 1992, Dubai Cassation No. 430/2000 dated 28 January 2001 and Federal Supreme Court No. 24/15 dated 5 October 1993. The corresponding principle can be found in the French Civil Code, Article 1134.

<sup>5</sup> Bahrain Civil Code, Article 128. A similar provision is contained in the Kuwait Civil Code, Article 196.

<sup>6</sup> *Cause* is defined as the 'direct purpose of the contract' by the UAE Civil Code, Article 207.

<sup>7</sup> Kuwait Civil Code, Article 176, Oman Civil Code, Article 121, Qatar Civil Code, Article 155 and the UAE Civil Code, Article 208.

<sup>8</sup> Bahrain Civil Code, Article 109, Kuwait Civil Code, Article 176, Oman Civil Code, Article 121 and the UAE Code of Commercial Practice, Article 2(3) and the UAE Civil Code, Article 205(2).

<sup>9</sup> UAE Civil Code, Article 3.

contracts are particularly susceptible include the effect of legislation on existing contracts,<sup>10</sup> the application of time limits,<sup>11</sup> the referral of disputes to a foreign jurisdiction<sup>12</sup> and the referral of disputes to arbitration.<sup>13</sup>

In Saudi Arabia, pursuant to the Hanbali school of jurisprudence that is most commonly favoured by the courts, a party to a commercial contract is, similarly, held to the terms of any agreement. In place of public order or other constraints on each party's freedom of contract, no agreement is enforceable to the extent that this offends specific Shari'ah principles.

## 5.2 Mandatory obligations

Of greater practical relevance to construction contracts is the prohibition of any agreement to the extent that it conflicts with the mandatory provisions (*dispositions impératives*) of any commercial law.<sup>14</sup> A mandatory provision applies either to render part of an agreement void or to confer a discretionary power on the courts to adjust the agreement. The remainder of the agreement remains valid and effective.

Inevitably, finding ways of bypassing the effect of mandatory conditions is of interest to commercial entities, particularly entities more familiar with operating in a common law jurisdiction and whose aim is generally to achieve certainty and minimise the sources of unanticipated rights and remedies. The most popular among the options that are typically raised include contractual indemnities and a choice of foreign law to govern the parties' agreement, often accompanied by a choice of a foreign jurisdiction for the resolution of disputes. The choice of a foreign law to govern a contract that is made or to be performed in the Gulf will not necessarily have the effect of

<sup>10</sup> Dubai Cassation No. 301/2008 in which it was held that a sale and purchase agreement could not be enforced by the purchaser due to a subsequently enacted prohibition on the transfer of land granted to Emirati nationals by the Government. See Dubai Cassation No. 20/2001 and Dubai Cassation No. 183/2011 dated 8 January 2012 for contrasting decisions on the retrospective effect of such legislation.

<sup>11</sup> Federal Supreme Court No. 381/2001 dated 12 January 2002 and Dubai Cassation No. 52/1997 dated 6 April 1997.

<sup>12</sup> Federal Supreme Court No. 428/18 dated 15 April 1997.

<sup>13</sup> Dubai Cassation No. 146/2008 dated 9 November 2008, Dubai Cassation No. 180/2011 dated 12 February 2012, Dubai Cassation No. 14/2012 dated 16 September 2012 and Dubai Cassation No. 282/2012 dated 3 February 2013 in which it was held that cancellation of a real estate sale contract for non-registration is a matter of public order that cannot be arbitrated. Real estate transactions fall within the public order definition as these relate to private ownership: Dubai Cassation No. 156/2009 dated 22 April 2009.

<sup>14</sup> Bahrain Commerce Law, Article 2(1) and the UAE Code of Commercial Practice, Article 2 and the UAE Civil Code, Article 31.

exempting the parties from the application of such mandatory provisions.<sup>15</sup> Likewise, the courts can be expected to rely on the general public order exception to the validity of a contract to decline to enforce an indemnity the effect of which is to neutralise a mandatory provision.<sup>16</sup>

There is no room for doubt that some provisions are mandatory, specifically those that provide explicitly that an agreement of a specified type is void or that prohibit any agreement having a proscribed effect. Such mandatory provisions are numerous and appear in a variety of laws, most notably the region's civil codes. Of these, the most pertinent in the context of construction contracts<sup>17</sup> are those concerning:

- circumstances of an exceptional nature<sup>18</sup>
- unfair contract terms<sup>19</sup>
- exemption from liability for harmful acts<sup>20</sup>
- exemption from liability for fraud or gross mistake<sup>21</sup>
- agreement of compensation<sup>22</sup>
- amendment of prescription period<sup>23</sup>
- liability for structural failure or defects.<sup>24</sup>

Whereas the mandatory status of these provisions is clear, there is scope, in the absence of any statutory enumeration of the characteristics of mandatory

<sup>15</sup> This will depend on a number of factors, including the jurisdiction in which a dispute is determined and the type of mandatory provision involved. See, for example, the Rome Convention, Articles 3(3) and 7(2), which to a certain extent, codify the approach of other civil law jurisdictions to this issue.

<sup>16</sup> UAE Code of Commercial Practice, Article 2(3). Insurance in respect of decennial liability is, however, permitted, and is compulsory in certain jurisdictions, most notably France.

<sup>17</sup> For examples of others see the UAE Civil Code, Article 537 (exemption of liability for lack of ownership) and Article 1028 (insurance policy conditions) and the UAE Code of Commercial Practice, Articles 288(3), 309 and 311 (exemption of liability for damage or delay of goods in transit).

<sup>18</sup> Bahrain Civil Code, Article 130, Kuwait Civil Code, Article 198, Oman Civil Code, Article 159, Qatar Civil Code, Article 171(2) and the UAE Civil Code, Article 249.

<sup>19</sup> Bahrain Civil Code, Article 58, Kuwait Civil Code, Article 81, Oman Civil Code, Article 158, Qatar Civil Code, Article 106 and the UAE Civil Code, Article 248.

<sup>20</sup> Bahrain Civil Code, Article 181, Kuwait Civil Code, Article 254, Oman Civil Code, Article 183, Qatar Civil Code, Article 259(3) and the UAE Civil Code, Article 296.

<sup>21</sup> Bahrain Civil Code, Article 219, Kuwait Civil Code, Article 296, Oman Civil Code, Article 261(2), Qatar Civil Code, Article 259(1) and the UAE Civil Code, Article 383.

<sup>22</sup> Bahrain Civil Code, Article 226, Kuwait Civil Code, Article 303, Oman Civil Code, Article 267, Qatar Civil Code, Article 266 and the UAE Civil Code, Article 390.

<sup>23</sup> Bahrain Civil Code, Article 380(1), Kuwait Civil Code, Article 453, Oman Civil Code, Article 354, Qatar Civil Code, Article 418 and the UAE Civil Code, Article 487.

<sup>24</sup> Bahrain Civil Code, Article 620, Kuwait Civil Code, Article 697, Oman Civil Code, Article 636, Qatar Civil Code, Article 711 and the UAE Civil Code, Article 882.

provisions, for differences of opinion to arise as to the status of others. In particular, some statutory provisions are prescriptive without actually indicating that they take precedence over an agreement<sup>25</sup> while others create a statutory presumption or reverse the burden of proof.<sup>26</sup> It is important, therefore, to distinguish mandatory provisions that override any agreement to the contrary from those that merely apply in a contractual vacuum.

Mandatory provisions are, in general, aimed at protecting parties from the harsher consequences of the exercise by them of their right to enter into binding contractual arrangements, in effect designating certain issues as being of sufficient importance that the parties do not have unfettered power to govern these without court supervision.<sup>27</sup> Mandatory provisions are, in this way, closely connected with the public order exception to the effectiveness of an agreement. As a consequence, the distinction, if any, between mandatory provisions and the prohibition on the enforcement of agreements that contravene public order is not one that is clearly drawn.

The Dubai Court of Cassation, overriding a contractual entitlement of an employer to apply deductions from the claimant's salary, linked considerations of public order and mandatory provisions in the following terms:

If the wording or context of the legislation indicates that the intention of the legislator by introducing a certain legal rule is to regulate a particular situation in a particular way that should not be departed from, so as to protect the public interest over any inconsistent individual interest, then this rule shall be deemed a mandatory rule related to public order.<sup>28</sup>

It cannot, therefore, be taken for granted that mandatory provisions are only those that are explicit in rendering void an incompatible agreement.<sup>29</sup> A flexible approach to the application of the law, which allows the courts to weigh the circumstances including the relative bargaining strength of the parties and industry custom or practice, is consistent with the general philosophy of the law and the courts. However, in the context of construction

<sup>25</sup> An example is the UAE Civil Code, Article 267, which provides that a contract cannot be terminated other than by consent, court order or a statutory right.

<sup>26</sup> UAE Civil Code, Articles 315 and 878.

<sup>27</sup> It is no coincidence given the public order rationale underpinning mandatory provisions that many similar or analogous restrictions are placed on the ability of individuals to alter their rights by common law.

<sup>28</sup> Dubai Cassation No. 252/1995 dated 28 January 1996.

<sup>29</sup> In Dubai Cassation No. 280/2008 dated 22 February 2009 it was held that rules of public order are those 'designed to achieve a political, social or economic interest relating to the higher governance of society, above the interests of individuals'.

contracts the courts do not seem inclined, in practice, to extend the reach of mandatory provisions.<sup>30</sup>

### 5.3 Third parties

Privity of contract – the principle that the effects of a contract are confined to the parties – is a cornerstone of contract law in common law jurisdictions. There are, in effect, two propositions contained within the privity of contract doctrine: first, that a contract does not impose any obligations on a third party and, second, that a contract does not confer any rights on a third party. The second proposition has a relatively controversial history and has been largely overridden by statute in England and Wales.<sup>31</sup>

The position under English law, as modified by statute, is now broadly analogous to the position that has always prevailed in the Gulf states. The latter is succinctly expressed as follows:

The contract may not impose an obligation on a third party but it may create a right in him.<sup>32</sup>

While a provision purporting to impose an obligation on a third party will be ineffective, subject to a limited number of exceptions, a third party beneficiary can acquire enforceable rights. Any such third party beneficiary is entitled to enforce such rights against the original obligor, subject to any defences that the obligor may have pursuant to the underlying contract.<sup>33</sup>

The option of conferring an enforceable right on a third party, while not aimed specifically at the construction sector, has the potential to address some of the difficulties presented by the absence of any contractual relationship between the end user and most of the project participants, particularly in the commercial real estate sector where collateral warranties and

<sup>30</sup> In Dubai Cassation No. 340/2009 dated 25 April 2010, for example, it was held that the requirement for engineering firms in Dubai to have a written consultancy agreement as per Local Order 89/1994 does not prevent there being a verbal consultancy agreement because the requirement for a written agreement is not a matter of public order.

<sup>31</sup> Contracts (Rights Against Third Parties) Act 1999.

<sup>32</sup> UAE Civil Code, Article 252. Also, Bahrain Civil Code, Articles 135(1) and 136, Kuwait Civil Code, Articles 204(1) and 206(1), Oman Civil Code, Article 162, Qatar Civil Code, Article 177. In Dubai Cassation No. 45/2004 dated 16 April 2006 the court, relying on Article 252, rejected an appeal seeking to impose liability on the Respondents for a fraudulent property sale on the basis that they were not parties to the sale agreement.

<sup>33</sup> Bahrain Civil Code, Article 138, Kuwait Civil Code, Article 207, Oman Civil Code, Article 163(2), Qatar Civil Code, Article 181 and the UAE Civil Code, Article 254.



other forms of direct agreement owe their existence primarily to privity of contract principles. A right can, for example, be conferred on end users against a contractor, subcontractor or others for defects arising in the building after transfer of ownership by including such a right in the primary underlying contract.

Another means by which a third party might acquire an entitlement pursuant to a contract is by way of assignment or novation. The distinction between the two is an important one. A novation involves the substitution of one party for another as though this had been the arrangement from the outset.<sup>34</sup> The departing party is released from its obligations by the remaining party in return for an assumption by the joining party of such obligations. By its nature a novation, thus, requires a tripartite agreement and is for all practical purposes a new and independent contractual arrangement.

An assignment, on the other hand, involves the acquisition by a third party of all or part of the rights, not the obligations, of a contracting party. Conceptually, such rights, if existing at the time of the assignment, can be classed as an asset and be transferred or traded accordingly. Neither party is relieved of their obligations by way of an assignment.

An assignment is recognised at law and is described as:

The transfer of a debt and claim from the liability of the transferor to the transferee.<sup>35</sup>

A distinction is drawn between the assignment of a crystallised debt and a right which is neither quantified nor crystallised.<sup>36</sup>

Insofar as crystallised debts are concerned the Court of Cassation, Dubai's highest Court has held<sup>37</sup> that an assignment will be valid notwithstanding the absence of consent from the debtor provided the debtor is duly notified

<sup>34</sup> Bahrain Civil Code, Article 343.

<sup>35</sup> UAE Civil Code, Article 1106. The UAE Civil Code, Articles 1106–1133 address assignment. The corresponding provisions of the Bahrain Civil Code are Articles 287–313, the Oman Civil Code, Articles 772–780 and the Qatar Civil Code, Articles 324–353.

<sup>36</sup> 'An Unstoppable Force Meets a Moveable Object', N.H.D. Foster, ALQ Volume 19, Issue 1, p. 169 in which it is asserted that the transfer of rights is inconsistent with the Islamic Shari'ah and contrary to the proper application of the Civil Code notwithstanding that such transfers have been upheld in practice. Also, Dubai Cassation No. 40/2004 dated 26 September 2004 and Dubai Cassation No. 537/1999 dated 1 April 2000 in which a challenge to an arbitration award on the basis that the wrong party had been named was rejected on the grounds that an assignment had been made and that this included the arbitration agreement.

<sup>37</sup> Dubai Cassation No. 34/1999 dated 1 May 1999.

of the assignment.<sup>38</sup> The absence of a requirement for consent is consistent with the express terms governing assignment in Bahrain:

A creditor may assign his right to a third party unless there is a provision in the law or an agreement between the parties that prohibits such assignment or on account of its nature. The assignment is valid without the consent of the debtor.<sup>39</sup>

## 5.4 Subcontractors

In the context of a construction project in the United Arab Emirates the availability of an assignment as a means by which a subcontractor can acquire a right against an employer is expressly contemplated in the following terms:

A subcontractor shall have no claim against the employer for anything due to him from the main contractor unless he has made an assignment to him against the employer.<sup>40</sup>

Although a subcontractor has no rights against an employer in the absence of any agreement by the employer to the contrary, an assignment by a main contractor to a subcontractor will be effective to confer on a subcontractor a cause of action against the employer directly.<sup>41</sup> Likewise, in Oman a subcontractor has no claim directly against an employer, except in the case of an assignment from the main contractor.<sup>42</sup>

Notably, the position in Bahrain, Kuwait and Qatar differs from that in the United Arab Emirates and Oman. The position here not only follows the French Civil Code<sup>43</sup> which confers on labourers a claim directly against an employer but goes further, extending the right to subcontractors as follows:

A subcontractor and workmen employed by a contractor in the execution of a contract have a direct right of action against the employer but only to the extent of such sums as are due by the employer to the main contractor on the date that action is commenced.<sup>44</sup>

<sup>38</sup> The Court of Cassation based the decision on the Civil Code, Article 1130(2). Cf. Article 1109, Federal Supreme Court No. 33/15 dated 26 June 1994 and the discussion in Omer Eltom (2009). *The Emirates Law in Practice*. Dubai. pp. 92–95.

<sup>39</sup> Bahrain Civil Code, Article 287. Also, Kuwait Civil Code, Article 364 and

<sup>40</sup> UAE Civil Code, Article 891 and Dubai Cassation No. 270/2001 dated 18 November 2001.

<sup>41</sup> Dubai Cassation No. 270/2001 dated 18 November 2001 and Federal Supreme Court No. 108/22JY dated 23 January 2002.

<sup>42</sup> Oman Civil Code, Article 645.

<sup>43</sup> French Civil Code, Article 1798.

<sup>44</sup> Bahrain Civil Code, Article 605. Also Kuwait Civil Code, Article 682 and Qatar Civil Code, Article 702.

This rare example of a significant difference between Gulf states does not extend to the liability of a contractor, to an employer. A contractor remains liable for any default notwithstanding that this is attributable to a subcontractor.<sup>45</sup>

## 5.5 Good faith

The role that good faith plays in civil law systems<sup>46</sup> is one of the significant points of divergence between civil and common law systems. In the latter, a duty of good faith has no overarching role and, indeed, only a limited role outside a specific statutory or contractual context.<sup>47</sup> Even in these limited contexts a duty of good faith tends to make common law jurists queasy.<sup>48</sup>

In contrast, a duty of good faith clearly applies in the United Arab Emirates by virtue of the following key provision of Federal law:

The contract must be performed in accordance with its contents and in a manner consistent with the requirements of good faith.<sup>49</sup>

A similar provision is contained in the civil codes of Bahrain, Kuwait and Qatar<sup>50</sup> but not Oman.<sup>51</sup> In the United Arab Emirates, Bahrain, Kuwait and Qatar parties to a contract, therefore, have an explicit obligation to conduct themselves towards each other in the performance of a contract in a manner that is consistent with principles of good faith.<sup>52</sup>

<sup>45</sup> Bahrain Civil Code, Article 604, Kuwait Civil Code, Article 681(2) Oman Civil Code, Article 644(2), Qatar Civil Code 701(2) and the UAE Civil Code, Article 890(2).

<sup>46</sup> Good faith provisions can be found in all the major civil codes: e.g. French Civil Code, Article 1134, German Civil Code, Article 242 and the Italian Civil Code, Articles 1337 and 1375.

<sup>47</sup> 'Contracting in Good Faith – Giving the Parties What they Want', Jim Mason, *Construction Law Journal*, 23, (6), 436 for a starting point into the commentaries available on the duty of good faith under English law. Also, 'Good Faith in Contracts Particularly in the Contracts of Arbitration and Charterparty', Professor W. Tetley (2004) 35 *JMLC* 561 and more recently, 'Good Faith Obligations in Construction Contracts: a Sword or a Shield?' S. Frame, *Construction Law International* (December 2013), Volume 8, Issue 4.

<sup>48</sup> In *Walford v Miles* [1992] 1 All ER 453 Lord Ackner expressed the common law view that the imposition of a duty of good faith in the context of negotiations is 'inherently repugnant to the adversarial position of the parties'.

<sup>49</sup> UAE Civil Code, Article 246.

<sup>50</sup> Bahrain Civil Code, Article 129, Kuwait Civil Code, Article 197 and the Qatar Civil Code, Article 172.

<sup>51</sup> Cf. S.N.R. Denton LLP, 2011. *Business Laws of Oman*. 1st Edition. Lexgulf Publishers Ltd. p. 5, which pre-dates the Oman Civil Code.

<sup>52</sup> A distinction can be drawn between a duty to perform a contract in good faith and a duty to conduct negotiations in good faith. The duty of good faith here addresses only the former. For negotiations generally, see Dubai Cassation Nos. 270/2001 dated 18 November 2001 and 22/2001 dated 1 April 2001.

Although the good faith doctrine is a distinctive characteristic of civil law systems it is not one that lends itself to precise definition. Indeed, this lack of precision is a defining feature of the duty of good faith, providing the flexibility required for balancing the rights of the parties. Parties' obligations are suffused with a duty of good faith in a way that reinforces the discretionary nature of the principles and powers contained in each civil code. The domestic courts' role includes dispensing justice and not merely following precedents and applying the terms of contracts, a role in which the duty of good faith occupies a central part.

In general terms, the duty of good faith requires parties not to seek unfair advantage or to exploit the other, to cooperate and, wherever possible, avoid conflict. The parties are held to an objective standard of conduct that limits the potential for a party to benefit from unconscionable behaviour.

The duty of good faith is not, however, a tool for adjusting or interpreting a contract to produce a fairer result. Effect is given to the terms of a contract, which represents the law of the parties. Neither is it a defence to a claim for breach of contract for a party to prove that the default was committed despite a good faith effort.<sup>53</sup> The duty of good faith, thus, does not alter a party's contractual obligations. Instead, a party's conduct, and any perception of bad faith, potentially influences the deployment of other remedies including, significantly, the assessment of damages.<sup>54</sup> Although the domestic courts may decline to award a party its contractual entitlement if the claimant has not acted in good faith, the influence that the concept exerts is, in practice, more subtle.<sup>55</sup>

## 5.6 Related obligations

The duty of good faith is supplemented by a related recognition that the parties' rights and obligations may extend beyond those expressed in a contract:

The contract shall not be restricted to an obligation upon the contracting party to do that which is [expressly] contained in it, but shall also embrace that which is appurtenant to it by virtue of the law, custom, and the nature of the disposition.<sup>56</sup>

<sup>53</sup> Abu Dhabi Cassation No. 859/2010 dated 17 April 2011.

<sup>54</sup> Chapter 19 [Damages].

<sup>55</sup> For a French law perspective see John Bell, 2008. *Principles of French Law*. 2nd Edition. Oxford University Press. pp. 332–334.

<sup>56</sup> UAE Civil Code, Article 246(2). Also, the Bahrain Civil Code, Article 127, Kuwait Civil Code, Article 195, Oman Civil Code, Article 156 and the Qatar Civil Code, Article 172(2). In Abu Dhabi Cassation No. 859/2010 dated 17 April 2011 the court decided that even though a sales agreement did not specify a completion date the duty of good faith did not leave this to the absolute discretion of the developer. Also Abu Dhabi Cassation Nos. 501 and 434/4 dated 27 June 2010.

Subject to the clearly expressed intentions of the parties which remain paramount, their rights and obligations are a matter for interpretation and application in the context of custom, the law and the nature of the transaction. This includes an interpretation of the scope of their obligations if this is unclear or is not recorded in writing fully or at all.

The UAE Ministry of Justice commentary explains that:

This provides that that which is ancillary or appurtenant to a thing by its nature will follow it and be treated as part of it. In this regard the legislature relies on rules of jurisprudence such as that an appurtenant matter shall not be dealt with in isolation from the principal matter, and that he who owns a thing owns the things necessarily appurtenant to it, and if the root falls the branch falls with it, and if a thing becomes void then all that it contains also becomes void.

A contract is, thus, to be interpreted and applied holistically, taking account of any rights or obligations that are inextricably linked to the primary purpose expressed by the parties.

Although there are some similarities between this principle of appurtenant rights and implied terms at common law the critical difference is that the former is a function of interpreting the contract, a discretionary task that is performed by the Court of Merits. One significant consequence is that there is no stock of terms corresponding to those under common law that are routinely implied as a matter of practice or law.<sup>57</sup>

Instead, construction contracts by virtue of their status as nominate contracts are subject to the provisions of the applicable civil code dealing with a *muqawala*<sup>58</sup> – a contract for works and services. Some of these provisions, notably those addressing liability for defects and for physical loss or damage, are treated as imposing contractual obligations irrespective of the agreement that is recorded in writing.<sup>59</sup> Others apply in the absence of an agreement to the contrary. But there is no practice, unlike at common law, of supplementing a construction contract, whether by custom or otherwise, with precisely formulated implied terms derived from a long line of domestic court judgments.

<sup>57</sup> For example, under English law, by virtue of the Supply of Goods and Services Act 1982, section 13, a term is implied in an architect's or engineer's appointment that a service will be performed with reasonable skill and care. No such term is implied in an architect's or engineer's appointment in the United Arab Emirates.

<sup>58</sup> Bahrain Civil Code, Article 584–620, Kuwait Civil Code, Articles 666–697, Qatar Civil Code, Articles 682–715, the Oman Civil Code, Articles 626–650 and the UAE Civil Code, Articles 872–896.

<sup>59</sup> The contractual status of these provisions is discussed at Chapter 9.3 [Decennial liability: Contractual status] and Chapter 10 [Physical damage and personal injury].

## 5.7 Abuse of rights

In a further manifestation of the duty of good faith an otherwise legitimate exercise of a right can be unlawful.<sup>60</sup> Although similar to the doctrine of *abus de droit* in French law, this has never been codified in France.<sup>61</sup> Nevertheless, it is clear that a right shall not be exercised for the purpose of causing damage, to secure an improper right, if the benefit attained is disproportionate to the harm suffered by others or the exercise thereof exceeds the bounds of usage and custom.<sup>62</sup>

In a dispute between the developer of a factory and the bank providing project finance the Federal Supreme Court, the United Arab Emirates' highest court, applied the principles applicable to the unlawful exercise of rights in the context of the bank's withdrawal of part of the facility and the resulting difficulties of the developer, including prosecution for dishonoured cheques.<sup>63</sup> The bank maintained (and was successful in the lower court) that the provision of financing to the full extent of the facility was discretionary and that, accordingly, the developer rather than presume that financing would continue should have sought confirmation that the discretion would continue to be exercised in favour of the project prior to incurring further expenses. Notwithstanding that the terms of the facility provided the bank with such discretion the Federal Supreme Court, remitting the case for reconsideration, found that as the facility was provided for a construction project that would involve incurring costs with contractors and suppliers and thus reliance upon the provision of facilities by the bank, consideration should have been given by the Court of Merits to whether discontinuing the facility without notice constituted an abuse of rights in the light of banking and commercial practice.<sup>64</sup>

<sup>60</sup> UAE Civil Code, Article 106, Bahrain Civil Code, Article 28, Kuwait Civil Code, Article 30, Oman Civil Code, Article 59 and the Qatar Civil Code, Article 63.

<sup>61</sup> For an example of a codified version see Quebec Civil Code, Article 7. For a Scottish perspective see 'The Doctrine of Abuse of Rights: Perspective from a Mixed Jurisdiction', Elspeth Reid, *Electronic Journal of Comparative Law*, Vol 8.3 (October 2004) and for a wide ranging comparative review, 'Abuse of Right: An Old Principle, A New Age', Michael Byers, (2002) 47 *McGill L.J.* 389.

<sup>62</sup> Dubai Cassation No. 105/1999 dated 16 October 1999 and Dubai Cassation No. 217/2004 dated 24 April 2005, in which the court held that litigation should not be conducted in malice or be defamatory.

<sup>63</sup> The prosecution was unsuccessful as the signatory was able to demonstrate that there was no act of bad faith given his genuine belief that adequate financing was available to cover the amounts for which the cheques were issued.

<sup>64</sup> Federal Supreme Court No. 375/21 dated 22 May 2001. The approach is consistent with the more recent decision of the Supreme Court in Italy in which the appeal was remitted to the Court of Merits for consideration of whether Renault had exercised a contractual termination right in certain dealership agreements for reasons not permitted by law, the Court of Merits having found that Renault had correctly applied the termination provisions:

The significance of the exercise of judgment by the Court of Merits was further emphasised in a decision of the Federal Supreme Court<sup>65</sup> in which the court noted that lawfully exercising a right does not result in liability for the harm caused.<sup>66</sup> The court refused to interfere with the Court of Merits' conclusion that the Respondent company was entitled to make statements of fact distancing itself from the Appellant despite the damage caused to the commercial relationships of the latter as there was no evidence of an intention to cause harm, merely a legitimate attempt to protect its reputation. Motivation of the exercise of a right is thus a relevant consideration.

## 5.8 Unfair contract terms

Prevention of an abuse of rights vests in domestic courts an overarching power to exercise a discretion over the enforcement of contractual rights. Although it does not follow that these same domestic courts have a wide ranging discretion over the application of a contract itself the civil codes of the Gulf states, nevertheless, include a power to adjust unfair contract terms.

In the United Arab Emirates this power takes the following form:

If the contract is made by way of adhesion and contains unfair provisions, it shall be permissible for the judge to vary those provisions or to exempt the adhering party therefrom in accordance with the requirements of justice, and any agreement to the contrary shall be void.<sup>67</sup>

This provision is clearly a mandatory one, the application of which cannot therefore be excluded by the parties. However, its application is restricted to contracts made by way of adhesion, which means those where there is significant inequality between the bargaining positions of the parties, for example, an element of monopoly and limited scope for negotiation of the

*(continued)* Decision No. 20106 dated 30 March 2010 reported by LCA Studio Legale. See also *4A\_124/2014* in which the Swiss Supreme Court, declining to enforce the requirement for a dispute to be referred to a DAB pursuant to the FIDIC Conditions, found that it was an abuse of rights for a party that obstructed the appointment of a DAB subsequently to insist on the performance of this requirement by the Claimant prior to the latter proceeding to arbitration.

<sup>65</sup> Dubai Cassation No. 448/2008 dated 30 October 2008.

<sup>66</sup> UAE Civil Code, Article 104.

<sup>67</sup> UAE Civil Code, Article 248. See also Article 266(2) which mandates the interpretation of ambiguity in contracts of adhesion in favour of the 'adhering' party. See also the Oman Civil Code, Articles 158 and 166 and the Qatar Civil Code, Articles 105 and 106.

applicable terms and conditions.<sup>68</sup> The Dubai Court of Cassation has offered the following definition of a contract of adhesion:

For a contract to be considered as an 'adhesion contract' it has to involve legal and actual monopoly for the goods and services in a way that makes the scope of competition limited.<sup>69</sup>

In Bahrain<sup>70</sup> and Kuwait<sup>71</sup> reference to a contract of adhesion is replaced with equivalent but express references to a general concept of taking unfair advantage of a superior negotiating position.

Thus, for example, if a contractor is compelled by the terms of a specification to source materials from a specific supplier, enabling the supplier to insist on the use of its standard terms containing onerous provisions, the resulting contract might be one made by way of adhesion. In the case of nominated subcontractors, a right to object, such as that provided in the FIDIC Conditions, is likely to suffice to avoid terms imposed by an Employer being designated a contract of adhesion but conditions imposed without any scope for negotiation present some risk.

As there is no system of binding precedent there is no guidance from the courts as to the criteria to be applied for ascertaining whether a provision is unfair, or as to how the discretion to vary or exclude such a provision ought to be exercised. This will fall to be considered on a case-by-case basis by the Court of Merits.<sup>72</sup> Although the courts are likely to use the power sparingly in disputes arising out of commercial transactions, this is tempered by their general approach to the interpretation and application of contracts, which is guided not merely by the words of the agreement itself but also by intentions, good faith and the mutual interests of the parties.

## 5.9 Unforeseen circumstances

Another means of obtaining relief from the harsh consequences of a contract is presented by a statutory right to relief from grave loss arising in 'exceptional circumstances of a public nature'.<sup>73</sup> This mandatory provision, which

<sup>68</sup> UAE Civil Code, Article 145, suggests that absence of any scope for negotiation of standard terms is evidence of a contract of adhesion. 'Adhesion' is sometimes translated as 'acquiescence', to reflect the impairment of a party's freedom to negotiate.

<sup>69</sup> Dubai Cassation No. 6/1992 dated 10 May 1992. The court rejected a challenge to the rate of interest charged by a credit card issuer as the Claimant could have chosen not to have a credit and could have chosen a different issuer.

<sup>70</sup> Bahrain Civil Code, Article 96.

<sup>71</sup> Kuwait Civil Code, Article 159.

<sup>72</sup> Dubai Cassation No. 54/1999 dated 25 April 1999.

<sup>73</sup> UAE Civil Code, Article 249. Bahrain Civil Code, Article 130, Kuwait Civil Code, Article 198, Oman Civil Code, Article 159 and the Qatar Civil Code, Article 171(2). Provisions similar to the UAE Civil Code, Article 249 are contained in Government procurement laws: Federal Ministerial Decision 20/2000, Article 93; Dubai Law No. 6/1997, Article 66.



was relied upon by contractors to seek relief from the consequences of fixed price contracts during the period of rampant commodity price escalation from 2005 to 2008 was then, ironically, relied upon by developers suffering the consequences of the global financial crisis.<sup>74</sup>

The relevant provision states that:

If exceptional circumstances of a public nature which could not have been foreseen occur as a result of which the performance of the contractual obligation, even if not impossible, becomes oppressive for the obligor so as to threaten him with grave loss, it shall be permissible for the judge, in accordance with the circumstances and after weighing up the interests of each party, to reduce the oppressive obligation to a reasonable level if justice so requires, and any agreement to the contrary shall be void.<sup>75</sup>

The reference to circumstances of a public nature creates some uncertainty around the qualifying circumstances for the exercise of the discretion conferred by this provision and, in particular, whether there is a requirement that there should be some element of State intervention or public interest.<sup>76</sup> In the context of the above provision, the Arabic word translated as ‘public’ can mean either an act of the state affecting the public or a circumstance having far reaching effect. Notwithstanding the administrative law provenance<sup>77</sup> of the principle of *imprévision*, which lends support to the former interpretation, the latter has received judicial support and, furthermore, is more consistent with the applicable civil codes of Bahrain and Kuwait.<sup>78</sup>

Although the principle has some similarities with force majeure<sup>79</sup> the Court, exercising a discretion pursuant to Article 249 is able to adjust the effect of the contract so as to balance the respective interests of both parties and is not limited, therefore, to determining that a force majeure event has

<sup>74</sup> Dubai Cassation No. 317/2011 dated 18 March 2012, in which such reliance on the global financial crisis was unsuccessful and Dubai Cassations No. 13 and 15/2010 dated 15 April 2010 in which the Abu Dhabi Court of Cassation reached the same conclusion holding that both inflation and recession were normal risks of business.

<sup>75</sup> Price fluctuations are explicitly excluded from the effects of the unforeseen circumstances provision by virtue of the Bahrain Civil Code, Article 602, Kuwait Civil Code, Article 679 and the Qatar Civil Code, Article 700.

<sup>76</sup> Administrative law in some jurisdictions, most notably in France, recognises a court’s right to hold a party to its obligations notwithstanding that performance has become oppressive but to grant discretionary relief from the consequences thereof in order to protect the public interest.

<sup>77</sup> The UAE Ministry of Justice commentary attributes the principle to the Islamic law theory of ‘excuse’.

<sup>78</sup> Dubai Cassation No. 317/2011 dated 18 March 2012. The court identified seven conditions that must be met, including that the event ‘is public and not limited to the debtor or a specific number of people.’

<sup>79</sup> See Chapters 16 [Suspension] and 17 [Termination].

occurred and that in consequence the contract is terminated and the parties relieved from their respective obligations. The principle differs from the English law doctrine of frustration for the same reason and due to the absence of a requirement for performance to have become impossible or illegal. If relief is sought in the form of additional time for performance, such relief will not be available unless performance within a specified time was part of the original obligation.<sup>80</sup>

The determination of whether circumstances have occurred that qualify for the exercise of the Court's discretion and whether such discretion should be exercised is a matter for the Court of Merits.<sup>81</sup> The UAE Ministry of Justice commentary provides that:

The theory of unforeseen events is in response to a pressing need necessitated by justice. It is open to criticism as leaving the way open to arbitrary conduct on behalf of the judge, but the legislature has been careful to give it a measure of stability and has provided for a material characteristic that must be present, namely that there must be an unforeseen event. The mere fact that such an event has occurred does not leave the way open to the judge to exercise his own subjective personal judgment. Rather, the legislature uses the expression 'If justice so requires', which implies the necessitating of applying an objective judgment. In addition to that, if it is demonstrated to the judge that there has been an unforeseen emergency, he may reduce the obligation that has become excessive to a reasonable level. This is another material restriction, in addition to the requirement that it should be an exceptional event of a public nature such as a flood or plague, and not particular to the obligor such as the burning of crops for example.

One manifestation of the need to temper the scope for interference in the parties' contractual arrangements is that the party seeking the benefit of the discretionary relief must not itself be at fault. A party, for example, that reached an agreement to pay a reduced commission on the sale of a commercial property after the global financial crisis occurred was not entitled to a further reduction as this would have allowed the applicant to take advantage of its own poor commercial judgment.<sup>82</sup>

Likewise, it is for the Court of Merits to determine whether the party seeking relief could not have foreseen the exceptional circumstances giving rise to the loss. In a judgment arising from events pre-dating the enactment

<sup>80</sup> As above in which it was held that the broker's commission was earned and fell due on completion of the sale and, therefore, additional time could not be granted.

<sup>81</sup> Dubai Cassation No. 24/1993 dated 5 October 1993.

<sup>82</sup> Dubai Cassation Nos. 1075 and 1085/3/2009, issued on 17 December 2009.

of the UAE Civil Code, the Supreme Court, the highest Federal court, concluded that a contractor was not entitled to relief from delays and equipment shortages caused by the Arab–Israeli conflict in 1973 on the basis that war was a foreseeable consequence of the longstanding and ongoing state of hostility between the protagonists.<sup>83</sup>

<sup>83</sup> Supreme Court judgment 102/7 dated 23 November 1986. War, of course, constitutes a force majeure event under many forms of contract, including the FIDIC Conditions.



# 6

## Health, Safety and Welfare

The pace of development in the Gulf over the past few decades coupled with the region's rising profile and influence on the world stage has drawn attention not only to the monetary cost but also to the human cost of the projects that are the tangible evidence of the progress that has been made.

Despite this increasing level of scrutiny there is no law in any of the Gulf states that is devoted exclusively to health, safety and welfare. Indeed, although the trend in recent years has been towards greater regulation of this sector the initiative has for the most part been taken, in the United Arab Emirates at least, by municipalities and other government agencies in lieu of any significant moves by the UAE Federal Government to overhaul the existing legal regime. Elsewhere around the region some moves have been made to introduce secondary legislation to improve the regulatory regime but in general the changes have been incremental and modest. In consequence, health, safety and welfare issues are governed by a patchwork of legislation, regulations and guidance from a variety of sources, principally governmental and quasi-governmental bodies.

### 6.1 Construction safety

The primary source of law on health, safety and welfare is the labour law of each Gulf state.<sup>1</sup>

<sup>1</sup> UAE Labour Law (Law No. 8/1980), Bahrain Labour Law for the Private Sector (No. 36/2012), Kuwait Labour Law for the Private Sector (Law No. 6/2010), Oman Labour Law (Law No. 35/2003), Qatar Labour Law (Law No. 14/2004) and KSA Labour Law (Royal Decree No. M/51/2005). Also, the UAE Civil Code, Article 913.

In a section entitled *Industrial Safety, Preventive Measures, Health & Social Care for Workers* the UAE Labour Law imposes general health, safety and welfare obligations on employers and employees. The opening provision states that:

Every employer shall provide appropriate safety measures to protect workers against the hazards of occupational injuries and diseases that may occur during work, and also against fire and other hazards that may result from the use of machines and other equipment. The Employer shall adopt all other safety measures prescribed by the Ministry of Labour and Social Affairs. Every employee shall use the protective equipment and clothing supplied to him for this purpose, shall comply with all instructions given by the Employer to protect him against hazards and shall refrain from taking any action that may obstruct the enforcement of such instructions.<sup>2</sup>

The labour laws of the other Gulf states similarly include a section aimed at health, safety and welfare.<sup>3</sup>

Although these laws are not aimed exclusively at the construction industry many of the provisions do apply to construction activities. Specifically, among the minimum requirements identified by the UAE Labour Law, the following are directly relevant to construction activities:<sup>4</sup>

- prominent display of health and safety instructions in Arabic and workers' native language
- provision of at least one readily accessible first aid box for every 100 employees
- provision of individuals trained in first aid<sup>5</sup>
- provision of a clean, ventilated and adequately lit working environment
- provision of clean drinking water
- provision of adequate sanitary facilities

<sup>2</sup> UAE Labour Law, Article 91.

<sup>3</sup> Bahrain Labour Law for the Private Sector, Part 15, Kuwait Labour Law for the Private Sector, Part 4, Oman Labour Law, Part 6, Qatar Labour Law, Part 10 and the KSA Labour Law, Part 8.

<sup>4</sup> UAE Labour Law, Articles 94–98. Similar provisions are reflected in the corresponding sections of the laws of the other Gulf states listed in the preceding footnote.

<sup>5</sup> Preservation of life and property is classified as one of the five 'necessities' pursuant to the Islamic Shari'ah and, therefore, provision of first aid is an Islamic duty. There is no prohibition against a non-Muslim administering first aid to a Muslim or a man administering first aid to a woman and vice versa: General Authority of Islamic Affairs & Endowments Fatwa issued on 1 September 2011. Liability for administering, or failing to administer, first aid is governed by the applicable laws, notably the delict provisions of the Civil Code.

- medical examination at intervals of not more than six months for employees exposed to specified occupational illnesses<sup>6</sup>
- provision of medical facilities complying with the standards imposed by the Ministry of Labour
- on commencing employment, identification of occupational hazards and the measures to be taken to avoid such risks

Further, there is an obligation on an employer to provide employees with personal protective equipment.<sup>7</sup>

The duty of an employer to provide personal protective equipment was considered by the Dubai Court of Cassation in a judgment in 1999 following the death of an employee as a result of smoke inhalation while cutting metal in an oil tanker.<sup>8</sup> Rendering judgment on the claim filed by the employee's heirs the court found that the employer had not fulfilled its obligations under Article 91 of the UAE Labour Law and that the heirs were entitled to damages. The Court of Cassation relied on the employer's obligation to provide equipment to adequately protect employees from injuries, occupational diseases, fire hazards and other hazards resulting from the use of machinery and equipment during the course of their work even if, as in this case, the employee was working in an environment controlled by a third party.

An employer is permitted to prescribe the disciplinary procedures and penalties applicable to workers who fail to comply with instructions given for their own safety, including any failure to use protective equipment or clothing and for any damage caused to any such equipment or clothing.<sup>9</sup> Responsibility for ensuring that protective equipment and clothing is used is not displaced by such disciplinary procedures because the obligations imposed by the UAE Labour Law are mandatory.<sup>10</sup>

Employers' and employees' responsibilities are supplemented by secondary legislation<sup>11</sup> covering, among other things, working conditions, provision of

<sup>6</sup> A schedule of the specified illnesses and the activities presenting a high risk of contracting these illnesses is appended as Schedule 1 to the UAE Labour Law.

<sup>7</sup> Bahrain Labour Law for the Private Sector, Article 166, Kuwait Ministerial Decree No. 43/1979, Article 8, Oman Labour Law, Article 87 and the KSA Labour Law, Article 121.

<sup>8</sup> Dubai Cassation No. 104/1999 dated 16 May 1999.

<sup>9</sup> UAE Labour Law, Article 100 and UAE Ministerial Decision 28/1/1981.

<sup>10</sup> Federal Supreme Court No. 52/20 dated 26 October 1999 in which the employer's defence that workers failed to return protective equipment and that the deceased failed correctly to install scaffolding, was rejected citing the mandatory nature of the UAE Labour Law, Articles 91 and 92.

<sup>11</sup> UAE Ministerial Order No. 32/1982. Also Bahrain Ministerial Order No. 8/2013 Regulating Occupational Safety and Health in Establishments, Oman Ministerial Decision No. 286/2008, Kuwait Ministerial Decree No. 43/1979 regarding the Requirements and Conditions that Should be Provided in Work Places to Protect Employees from Work Hazards and the Saudi Arabia Executive Regulations dated 20 April 2007.

personal protective equipment and safety training, fire safety, handling of dangerous materials, operation of machinery, regulation of excavation and demolition work, use of scaffolding and the maintenance and operation of hoists and cranes.

Specifically, the UAE Ministerial Order requires:<sup>12</sup>

- any excavation in excess of 1.5 metres deep to be independently supported to prevent collapse
- safe access across excavations
- warning signs for any deep excavation
- spoil to be removed a sufficient distance from any excavation to avoid the risk of collapse
- construction debris to be removed by hoist or through refuse chutes, the base of which must be properly fenced
- scaffolding at heights in excess of 8 metres to have handrails and toe boards
- employees to be provided with safety belts for protection against falls
- the perimeter of any building on which work is being undertaken to be fenced
- lift shafts and other openings to be covered or protected
- protective walkways to be provided for employees and passers-by where access is required in an area where there is a risk from falling objects.

A similar set of provisions applies to construction, drilling, demolition and civil engineering works in Oman.<sup>13</sup>

There are also specific provisions<sup>14</sup> governing hoists and cranes. These must be properly maintained and regularly examined, at least once a year by a specialist. Access to the area occupied by hoists must be protected and the doors must not be opened while the hoist is in motion. The maximum safe working load must be displayed in a conspicuous place. Ropes, chains and wires must be maintained in a good condition and must be subject to routine maintenance at not less than six monthly intervals and must be used within their safe working load only.

In Bahrain businesses engaged in hazardous activities, which include working at heights and with mechanical equipment, are subject to a special regime, which includes a requirement to draw up a health and safety plan and an occupational health and safety management system.<sup>15</sup> For any such business having in excess of 500 employees there are specific requirements for the employment of health and safety management staff as well as the

<sup>12</sup> Ministerial Order 32/1982, Article 19.

<sup>13</sup> Oman Ministerial Decision No. 286/2008, Article 41.

<sup>14</sup> UAE Ministerial Order No. 32/1982, Article 20.

<sup>15</sup> Bahrain Ministerial Order No. 8/2013, Articles 18 and 19.



formation of committees that include members of the workforce. Likewise, in Oman any employer with more than ten employees is required to establish an occupational safety and health programme that is 'adequate to the nature and size of the establishment.'<sup>16</sup>

In Qatar the National Committee of Occupational Health and Safety at the Ministry of Labour is tasked with proposing a national policy and system for occupational health and safety, devising and revising occupational health and safety rules and regulations and proposing mechanisms of compliance and enforcement.<sup>17</sup> In the meantime, the Qatar Construction Specifications 2014, which incorporate minimum standards for occupational health, safety and welfare, have been brought into force.<sup>18</sup> All 'competent authorities' in Qatar are required to implement and enforce the Qatar Construction Specifications.<sup>19</sup>

In Abu Dhabi contractors are required to 'take all precautions necessary to ensure the general safety of those responsible for execution, and the safety of pedestrians and adjacent buildings'<sup>20</sup> and powers are conferred on the Abu Dhabi Department of Municipal Affairs to issue orders for the demolition of any building that poses a threat to health, safety or the environment. More significantly Abu Dhabi has adopted the Environment Health & Safety Management System, which is discussed further below.

Local regulations<sup>21</sup> in Dubai impose an obligation on workers to report problems with premises and equipment which pose a safety risk<sup>22</sup> and specify the duties of health and safety representatives appointed by the employer.<sup>23</sup> There is also an obligation on individuals not to disturb the scene of an accident pending investigation by the Dubai authorities.<sup>24</sup> A cumulative hierarchy of penalties for breaches of the order is imposed ranging from warnings to fines and ultimately to the closure of premises and the withdrawal of trade licences.

The Director General of Dubai Municipality is also empowered to introduce subordinate legislation, an example of which is the Code of Construction Safety Practice covering a range of safety and health issues, including:

- provision of training for the prevention of accidents
- supply and use of safety equipment

<sup>16</sup> Oman Ministerial Decision No. 286/2008, Article 10.

<sup>17</sup> Qatar Cabinet Resolution No. 16/2011.

<sup>18</sup> Qatar Ministerial Decision No. 210/2014 issuing the Qatar Construction Specifications 2014, which came into force on 29 March 2015.

<sup>19</sup> Above, Article 3.

<sup>20</sup> Abu Dhabi Law No. 4/1983, as amended by Law No. 16/2009, Article 14.

<sup>21</sup> Local Order 61/1991.

<sup>22</sup> Above, Article 42.

<sup>23</sup> Above, Article 44.

<sup>24</sup> Above, Article 43.

- material handling and lifting (including the use of forklift trucks, excavators, conveyors, cranes and hoists)
- excavations
- demolition, including the need to provide a detailed method statement before demolition works can take place
- working in confined spaces and the use of concrete pumps.

Other sources of health and safety regulation within Dubai include the Building Specifications and Conditions,<sup>25</sup> the Code of Practice for the Management of Dangerous Goods and the Technical Guidelines, all produced by Dubai Municipality. The Building Specifications and Conditions are mainly concerned with imposing minimum standards for a finished building, including such matters as fire safety and environmental efficiency. However, the design is required to have regard to health and safety considerations in the selection of materials, ventilation, lighting and solar gain. The storage of building materials must be restricted to areas away from areas heavily trafficked by members of the public and in quantities that do not present a hazard to health and safety.<sup>26</sup> Buildings with a significant proportion of glazed elevations or curtain walling are required to be provided with access cradles or other specialist cleaning equipment as determined by Dubai Municipality.

The Code of Practice for the Management of Dangerous Goods contains twelve sections some of which have particular application to the construction industry such as those dealing with packaging and labelling, storage and handling, transportation and accident management. The Technical Guidelines take the form of over sixty sheets covering topics such as the use of hazardous machinery, the use of concrete mixing and handling asbestos.<sup>27</sup>

Following completion, building owners and tenants are subject to rules imposing obligations to ensure that the drainage, air conditioning systems, emergency exits and firefighting equipment are adequate to ensure the safety of those in the building.<sup>28</sup>

Free zones in Dubai have in some cases supplemented the Federal and local regime with their own regulations as in the case of the Jebel Ali Free Zone Authority Health & Safety Manual which covers areas such as occupational health and safety, fire regulations and electrical regulations.

<sup>25</sup> Implemented by Administrative Decision No. 125/2001.

<sup>26</sup> Above, Article 26.

<sup>27</sup> Dubai Municipality Building Circulars also address health and safety issues.

<sup>28</sup> Local Order No. 11/2003 (as amended) and Administrative Decision No. 30/2007.

## 6.2 Design and management responsibilities

The preceding duties arise out of the relationship of employer and employee. The result is that responsibility for health, safety and welfare is borne by contractors and subcontractors in their capacity as employers of the workmen performing and supervising construction activities. This regime is notably short of obligations on any other project participant, including a project sponsor (i.e. a developer or employer under a construction contract) and a consultant<sup>29</sup> despite their capacity to influence health and safety standards on site. Indeed, regulatory regimes elsewhere have increasingly used the influence of project sponsors and consultants to reinforce improvements to health and safety standards in the industry.<sup>30</sup>

A project sponsor, however, is not entirely exempt from obligations in relation to health and safety. Responsibility for site safety is allocated in general terms as follows:

Responsibility for providing industrial safety equipment for construction works by the building owner, main contractor and sub-contractor shall be according to the following:

- (i) the building owner shall be responsible for the industrial safety conditions related to the work site and the equipment used;
- (ii) personal safety equipment for workers shall be provided by the contracting companies.<sup>31</sup>

A distinction is thus drawn between responsibility for sites and responsibility for workers. Broadly, a project sponsor or building owner is responsible for the place; a contractor for the person. Nevertheless, a building owner has no statutory obligation to engage the services of an individual or individuals to take responsibility for health and safety on site<sup>32</sup> and neither is the extent of the sponsor's obligations enumerated beyond this general statement of principle.

<sup>29</sup> Building regulations require some elements of health and safety to be taken into account in the designs submitted for building permit approval. Further, Dubai Municipality Circular 139/2006 imposes on consultants an obligation to report on site safety as part of the periodic inspections of all sites by Dubai Municipality.

<sup>30</sup> For example, the Occupational Health and Safety Regulations 2000 (New South Wales, Australia) and the Construction (Design and Management) Regulations 2015 (United Kingdom).

<sup>31</sup> UAE Ministerial Resolution No. 32/1982, Article 22.

<sup>32</sup> Unlike in the model adopted by the Construction (Design and Management) Regulations 2007 (UK) which requires the project sponsor to appoint a planning supervisor to perform a health and safety role as set out in the regulations.

Abu Dhabi has adopted the Environment Health & Safety Management System, combining occupational and community health and safety as well as protection and preservation of the environment.<sup>33</sup> Although overall responsibility for implementation of the Environment Health & Safety Management System and health and safety in general is assigned to the Abu Dhabi Health & Safety Centre, the Abu Dhabi Department of Municipal Affairs has responsibility for supervising the implementation of the management system for the building and construction sector.<sup>34</sup> By means of secondary legislation in the form of codes of practice, compliance with which is a requirement of the management system, the applicable health and safety standards can be readily modified and augmented. A raft of codes of practice specifically for the building and construction sector has been developed<sup>35</sup> and guidelines have been published for the development of a compliant management system.<sup>36</sup>

### 6.3 Welfare

Since introducing the UAE Labour Law and the Ministerial Order, there have been few Federal law initiatives to improve the regulation of health, safety and welfare in the United Arab Emirates. One exception, introduced in June 2005 is a prohibition on work 'under the sun and in open areas' between 12.30pm and 4.30pm<sup>37</sup> during the months of July and August each year.<sup>38</sup> Shifts are limited to a maximum of eight hours per day with any excess to be treated as overtime.<sup>39</sup>

Exceptions to the ban are permitted for activities that require uninterrupted working.<sup>40</sup> These include asphalt and concrete pouring provided that it is not possible for technical reasons to interrupt the laying or pouring; repair of utilities and services; road works where 24 hour working has been

<sup>33</sup> Abu Dhabi Decree 42/2009.

<sup>34</sup> The other sectors are: industrial, energy, transport, waste, education, food, waste water, commercial, tourism and health.

<sup>35</sup> These can be found on the Abu Dhabi Health & Safety Centre's website: <https://www.oshad.ae>.

<sup>36</sup> The Contractor's Classification Legislation requires contractors with a special licence to have ISO14001, ISO9001 and OHSAS18001 certification in Abu Dhabi and for whom, therefore, the guidelines will be particularly relevant.

<sup>37</sup> Amended to 3pm from 2006 onwards.

<sup>38</sup> Ministerial Decision 467/2005 revoked and replaced by Ministerial Decision 410/2006 and renewed annually. Refer, for example, to Ministerial Resolutions 408/2007, 335/2008, 587/2009 and 443/2010. For the sanctions applicable in the event of non-compliance refer to Chapter 6.6 [Sanctions and penalties]. The summertime working ban is linked to the UAE's adoption of the ILO's Hours of Work (Industry) Convention.

<sup>39</sup> Ministerial Resolution 443/2010, Article 2.

<sup>40</sup> Above, Article 5.

permitted due to the effect on traffic flows; and other works approved by the Director General of the Ministry of Labour. In such cases, measures must be taken to protect workers including the provision of drinking water, re-hydration products, cooling equipment and sun shades.

A number of Gulf states have responded to criticism of accommodation provided for labourers, including those employed in the construction industry, by introducing regulations governing collective accommodation.

In Oman<sup>41</sup> and the United Arab Emirates<sup>42</sup> specific regulations govern the provision of collective labour accommodation. The regulations are consistent with the ILO's Worker's Housing Recommendation (1961), which while not detailing the standard of accommodation, requires that local laws set minimum standards for key aspects of such accommodation. These include occupiable space (i.e. floor area, cubic volume or size and number of rooms), safe water, adequate sewerage and rubbish disposal, protection against heat, cold, damp, noise, fire and disease-carrying animals and insects, adequate sanitary and washing facilities, ventilation, cooking and storage as well as natural and artificial lighting, privacy and in the case of communal accommodation for single workers, shared canteens, rest and recreational and health facilities. The applicable regulations cover the minimum standards and additional requirements for collective accommodation by means of a manual<sup>43</sup> that provides, among other things, details of the location, proportions of built-up area allocated for various uses (e.g. parking, recreational, storage and landscaping), materials and standards of construction, space, lighting, ventilation, security and the like.

Transitional provisions allowed businesses until September 2014 to bring collective accommodation with a capacity of more than 500 workers into line with the regulations.<sup>44</sup> Building permits for any new collective accommodation are to be granted only for accommodation that is in conformance with the Regulations.<sup>45</sup>

In Dubai, regulations governing the minimum requirements for workers' accommodation include:<sup>46</sup>

- minimum allocated space of 30 square feet per worker
- one set of washing and sanitary facilities per ten workers

<sup>41</sup> Oman Ministerial Decision No. 286/2008, Chapter 2.

<sup>42</sup> UAE Cabinet Resolution No. 13/2009 as amended by Cabinet Resolution No. 24/2010. These apply to collective accommodation for more than 500 employees.

<sup>43</sup> The Manual for General Standards for Collective Labour Accommodation and Ancillary Facilities in the United Arab Emirates.

<sup>44</sup> Above, Article 3.

<sup>45</sup> Above, Article 2.

<sup>46</sup> Administrative Decision No. 125/2001, Article 31. Also, Circular 13/1991.

- ceilings or roofs to be constructed from concrete or to be adequately protected by thermal insulation and false ceilings
- kitchens and canteens to be provided and maintained in accordance with other applicable regulations
- access to accommodation to be from within the labour compound.

The regulations applicable in Oman similarly specify minimum standards for lighting, washrooms, canteens, sleeping quarters and common areas for labour accommodation.<sup>47</sup>

## 6.4 International Labour Organisation

The International Labour Organisation is an agency of the United Nations, whose main brief is to promote social justice and basic human and labour rights. The main tools of the ILO are International Labour Conventions which act as the benchmark for, among other things, the standards of health, safety and welfare of workers within member states.

All of the Gulf states are members of the ILO<sup>48</sup> and each has ratified a variety of conventions. The United Arab Emirates has ratified and brought into force nine ILO Conventions,<sup>49</sup> including six out of eight of the conventions that are identified by the ILO as fundamental.

**Table 6.1** Ratifications of Fundamental ILO Conventions

Convention	Date	Bahrain	Kuwait	Qatar	Oman	KSA	UAE
Forced Labour Convention	1930	√	√	√	√	√	√
Freedom of Association and Protection of the Right to Organise Convention	1948	x	√	x	x	x	x
Right to Organise and Collective Bargaining Convention	1949	x	√	x	x	x	x
Equal Remuneration Convention	1951	x	x	x	x	√	√
Abolition of Forced Labour Convention	1957	√	√	√	√	√	√
Discrimination (Employment and Occupation) Convention	1958	√	√	√	x	√	√
Minimum Age Convention	1973	√	√	√	√	√	√
Worst Forms of Child Labour Convention	1999	√	√	√	√	√	√

<sup>47</sup> Oman Ministerial Decision No. 286/2008, Article 17.

<sup>48</sup> Bahrain (1977), Kuwait (1961), Qatar (1972), Oman (1994), Saudi Arabia (1976) and the United Arab Emirates (1972).

<sup>49</sup> Source: ILO Normlex Information System on International Labour Standards as at 1 June 2015.

Furthermore, and critically for the construction sector, all of the Gulf states, with the exception of Oman, have adopted the Labour Inspection Convention and have thereby committed:

to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work, such as provisions relating to hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters, in so far as such provisions are enforceable by labour inspectors.<sup>50</sup>

Each state's performance against this and the other obligations accepted by virtue of the adoption of ILO Conventions is subject to periodic monitoring by the Committee of Experts on the Application of Conventions and Recommendations (CEACR), which publishes its findings in the form of observations, and which issues direct requests in relation to compliance with the country's convention obligations.

Other ILO conventions include the ILO's Occupational Safety and Health Convention (1981) and the Safety and Health in Construction Convention (1988), the mainstays of international standards of occupational health and safety. The Safety and Health in Construction Convention (1988), which came into force on 11 January 1991, includes an obligation to impose on those concerned with the design and planning of construction projects, an obligation to take into account the safety and health of construction workers in accordance with national laws, regulations and practice. The convention also requires national laws and regulations to entitle workers to remove themselves from danger where they have a good reason to believe that there is an imminent and serious danger to their safety or health. Neither of these two conventions has been adopted by the Gulf states, with the exception of Bahrain which, in 2009, adopted the Occupational Safety and Health Convention (1981).

## **6.5 Inspection and reporting**

A mixture of preventative and punitive measures comprise the enforcement regime, established mainly under the applicable criminal and labour laws. Preventative measures are composed of inspections and reporting; punitive measures of criminal, civil and administrative sanctions.

The applicable labour laws establish an inspection regime under the guidance and control of the relevant labour department or ministry.<sup>51</sup> The UAE

<sup>50</sup> ILO Labour Inspection Convention, Article 3.

<sup>51</sup> Bahrain Labour Law for the Private Sector, Articles 177–182, Kuwait Ministerial Decree No. 43/1979, Articles 133–136, Oman Labour Law, Articles 8 and 9 and Ministerial Decision No. 286/2008, Articles 1–6, KSA Labour Law, Article 194–209 and the UAE Labour Law, Articles 166–180.

Labour Law, for example, provides that labour inspectors shall be employed within the Ministry of Labour and that their role will be to:

- monitor compliance with the provisions of the law, particularly conditions of work, health and safety and remuneration
- provide technical information and advice on the application of health and safety standards
- advise the relevant government departments on any improvements to be made to the health, safety and welfare requirements laid down by law
- record and report any violations of the health, safety and welfare regulations laid down by law.

Powers conferred on inspectors to facilitate the performance of these functions include the rights to inspect any premises during working hours without prior notice; to question the employer's representatives or workers; inspect documents; remove samples of materials for analysis; and to require the notices and information prescribed by the regulations to be displayed, as required. Inspectors are empowered to call on the police to provide support for the performance of their duties and, if a health, safety or welfare violation is uncovered, must submit a report to the UAE Ministry of Labour for further action to be taken. The building owner is required to notify the Ministry of Labour of some details of any proposed construction works.<sup>52</sup> This information is intended to facilitate inspections, and accounts for a significant proportion of the inspections that take place.

By virtue of the ratification of the Labour Inspection Convention (1947) by all Gulf states except for Oman, the performance of each Labour Inspectorate has, in recent years, come under scrutiny from the ILO. In the case of Qatar, for example, the observations made by the CEACR and adopted in 2015 include the following:

The Committee urges the Government to pursue its efforts to strengthen the capacity of labour inspection with respect to monitoring OSH, particularly in the construction sector. It also requests that the Government take measures to ensure coordination and collaboration between labour inspectors and inspectors under the new department on OSH. The Committee further requests the Government to take the necessary measures to ensure that the labour inspectorate is notified of all industrial accidents, and that relevant statistics, including on fatal occupational accidents, are included in the annual report on labour inspection.

<sup>52</sup> UAE Ministerial Decision No. 32/1982, Article 21.



In the case of the United Arab Emirates and other Gulf states labour inspections tend, according to the ILO, to concentrate their resources on irregular employment including the requirement that workers have a valid employment visa, to the detriment of their primary enforcement functions in the area of labour conditions.<sup>53</sup> The United Arab Emirates has committed itself to more energetic enforcement of the existing legal framework for safety and health.<sup>54</sup>

In Bahrain, any employer of more than 500 staff must establish a dedicated safety and health team the function of which includes inspection of workplaces, investigating accidents and reporting incidents to their employer. In Kuwait, the Labour Law provides that:

Firms shall report to the safety department of the Ministry of Social Affairs and Labour any serious accidents which result in injuries to workers or damage to machinery.<sup>55</sup>

The UAE Labour Law imposes reporting obligations on an employer following an accident.<sup>56</sup> In addition to fatal accidents, which must be reported to the police, any accident that results in an employee being unable to work for more than two days must be reported to the Labour Ministry.

## 6.6 Sanctions and penalties

A breach of the applicable obligations may result in one or more of a variety of penalties, ranging from those accompanying a crime, blood money, statutory compensation, compensatory damages and administrative sanctions.

### *Criminal penalties*

The applicable penal codes of the Gulf states create a number of specific and generic offences, related to health and safety. The generic offences are those

<sup>53</sup> See, for example, Direct Request (CEACR) to the UAE – adopted 2012, published 102nd ILC session (2013) and Observation (CEACR) on Saudi Arabia – adopted 2013, published 103rd ILC session (2014).

<sup>54</sup> Refer, for example, to the report (Gulf News, 26th January 2006) that an additional 50 inspectors were taken on by the Ministry of Labour to ‘monitor workers’ rights’ and the Government’s claim – recorded in the 2009 report of the ILO’s Committee of Experts on the Application of Conventions and Recommendations (CEACR) – that the number of inspectors is close to 2000. The Minister of Labour cited with approval the ILO’s June 2003 study of occupational safety and health which contains detailed recommendations for improving the impact of the ILO’s Conventions.

<sup>55</sup> Kuwait Labour Law, Article 22.

<sup>56</sup> UAE Labour Law, Part 8.

most commonly relied on by the public prosecutor in response to site accidents and other health and safety incidents. These include acts that intentionally put at risk another person's health or safety and, most significantly, causing death by 'fault'. Expressly included within the ambit of this latter offence – often referred to as negligent manslaughter – is death or injury as a result of:

failure to perform the duties imposed on the offender by virtue of his function, profession or craft<sup>57</sup>

Criminal prosecutions are generally directed at individuals, including individuals within the management of a corporate entity, though in some jurisdictions, such as Bahrain, corporate entities may also be convicted of a criminal offence.<sup>58</sup> Failure to perform a supervisory function is sufficient to constitute an offence.<sup>59</sup>

The penalties for causing death through fault include imprisonment and a fine. Thus, in the United Arab Emirates penalties for causing death through fault include a minimum prison term of one year and a fine, though it is possible for the sentence to be suspended and in Bahrain up to ten years' imprisonment. In Bahrain, Oman, Qatar and the United Arab Emirates an offence that results in more than three fatalities attracts an increased scale of penalties, including, for example, in Bahrain a potential sentence of five years in prison.

Likewise, violations of the applicable labour laws carry sanctions in the form of fines. Failure to comply with the health and safety provisions of the Oman Labour Law is liable to result in a fine of 100–500 Omani rials, which may be doubled if the breach is repeated.<sup>60</sup> Fines are also applicable in Bahrain,<sup>61</sup> Kuwait,<sup>62</sup> Qatar,<sup>63</sup> Saudi Arabia<sup>64</sup> and the United Arab Emirates.<sup>65</sup>

<sup>57</sup> UAE Penal Code, Article 342. Also, Bahrain Penal Code, Articles 342 and 343 the Qatar Penal Code, Article 313. Neither the Kuwait Penal Code, nor the Oman Penal Code has specific crimes for failing to perform a trade or profession but Article 44 of the former and Article 84 of the latter relate to crimes of negligence.

<sup>58</sup> Bahrain Labour Law, Article 197.

<sup>59</sup> In Dubai Cassation No. 47/2007 dated 12 March 2007 the court held, in a case involving a death on site caused by a mechanical shovel, that negligent manslaughter can be committed either directly or indirectly. Neither absence from the site nor the absence of any specific responsibility for health and safety was a valid defence because the Court of Merits had concluded that the death or injury would not have occurred but for the neglect of the appellant.

<sup>60</sup> Oman Labour Law, Article 118.

<sup>61</sup> Bahrain Labour Law, Article 192.

<sup>62</sup> Kuwait Labour Law, Article 141.

<sup>63</sup> Qatar Labour Law, Articles 144 and 145.

<sup>64</sup> KSA Labour Law, Article 326.

<sup>65</sup> UAE Labour Law, Article 182

In a judgment of the Federal Supreme Court,<sup>66</sup> allowing an appeal and finding against the employer, it was held that the employer was in breach of its obligations to provide safety equipment and to display instructions on the use of that equipment.<sup>67</sup> In addition, the employer was in breach of the obligation to protect workers from falls.<sup>68</sup> It was not necessary for the claimant to establish fault because a breach of these obligations was sufficient in the absence of evidence that the employee was in breach of an obligation imposed by the Labour Law.

The court held that the penalties for such breaches include a fine and/or custodial sentence<sup>69</sup> and, moreover, that these penalties should be imposed as the employer did not ensure that workers used the safety belts provided when working on the scaffolding and, therefore, the employer was liable for the death of the worker when the scaffolding collapsed.

In practice, a site accident triggers a police investigation, the results of which are transmitted to the relevant public prosecution department, which may undertake a further investigation prior to deciding whether to commence a prosecution. In addition, the public prosecutor takes into account any related evidence, with particular weight being attached to any report prepared by the concerned municipality or other statutory authority which usually conducts its own investigation.

### *Diya or blood money*

A successful prosecution is usually accompanied by an award of Diya, or blood money. As Diya is firmly rooted in the Qur'an<sup>70</sup> it draws on a rich seam of Islamic jurisprudence.<sup>71</sup>

Diya is payable by the person or persons responsible for causing a death or loss of essential faculties. Arsh refers to the apportionment of Diya in circumstances where the full Diya is not payable. Arsh is calculated as a proportion of Diya depending on the severity of the injury.<sup>72</sup>

In Qatar and the United Arab Emirates Diya is currently fixed at QAR 200,000<sup>73</sup> and AED 200,000 respectively, having increased in the United

<sup>66</sup> Federal Supreme Court No. 52/2000 dated 26 October 1999.

<sup>67</sup> UAE Labour Law, Articles 91 and 92.

<sup>68</sup> UAE Ministerial Order 32/1982, Article 19.

<sup>69</sup> UAE Labour Law, Article 181.

<sup>70</sup> Qur'an, chapter 4 (The Women), verse 92. See also, M. Jamil Ak Bik, 'Bodily Injury Liability', Al Tamimi Law Update, September 2006.

<sup>71</sup> See, for example, M. Jamil Ak Bik, 'Bodily Injury Liability', Al Tamimi Law Update, September 2006.

<sup>72</sup> For example, the Qatar Labour Law, Schedule 2, and the UAE Labour Law, Schedule 2, provides guidance on the operation of the scale.

<sup>73</sup> Qatar Law No. 19/2008.

Arab Emirates from AED 150,000 in 2003.<sup>74</sup> In Kuwait the Diya is fixed at 10,000 Kuwaiti dinars.<sup>75</sup>

Diya and Arsh, which are punitive<sup>76</sup> as well as compensatory, are generally awarded alongside a criminal conviction. A finding of fault is, thus, a necessary component of an award of Diya.<sup>77</sup>

The effect of the Diya on other forms of compensation is dealt with in the following terms:

The general provisions of the harmful act shall be applicable to the harm done to a person or property. Diya (Bloody money) and Arsh in addition to the expenses of necessary treatment shall be applicable concerning the compensation.<sup>78</sup>

It follows that Diya and Arsh are payable in addition to special damages. The position is broadly the same in Qatar<sup>79</sup> and Kuwait.<sup>80</sup>

The position in the United Arab Emirates is that Diya and Arsh are not payable in addition to general damages.<sup>81</sup> In a judgment of the Dubai Court of Cassation in 2004<sup>82</sup> following a fatal car accident, it was held that the reference to compensation in the context of the prohibition against combining Diya and general damages is to compensate for pain and suffering only and not for material losses, including loss of earnings. Accordingly, a claim for material losses, in addition to the Diya or Arsh, can be awarded<sup>83</sup> as in the rest of the Gulf.

When temporary supports gave way causing a roof which was under construction to collapse killing a worker the victim's dependants commenced proceedings against the owner of the building, the contractor and the consultant for Diya and compensatory damages. The claim against the owner

<sup>74</sup> UAE Federal Law No. 9/2003 amending UAE Federal Law No. 17/1991.

<sup>75</sup> Kuwait Civil Code, Article 251.

<sup>76</sup> UAE Penal Code, Article 66.

<sup>77</sup> Federal Supreme Court No. 310/22 dated 11 February 2001. In addition, a criminal conviction can form the basis for a claim for compensatory damages: UAE Federal Law No. 10/1973, Articles 54 and 55.

<sup>78</sup> Oman Civil Code, Article 186.

<sup>79</sup> Qatar Civil Code, Article 218.

<sup>80</sup> Also, Kuwait Civil Code, Article 259.

<sup>81</sup> UAE Civil Code, Article 299.

<sup>82</sup> Dubai Cassation No. 119/2004 dated 27 March 2005 and Dubai Cassation No. 163/1999 dated 19 June 1999. In Dubai Cassation No. 194/2007 dated 28 October 2007 the court held that liability for Diya did not preclude the heirs from claiming material damages (i.e. loss of financial support) and moral damages (i.e. grief).

<sup>83</sup> Other cases that allow a combination of Diya and compensation for delict include Dubai Cassation No. 219/2000 dated 10 December 2000 and Federal Supreme Court No. 276/16 dated 12 February 1995.

was dismissed by the Court of First Instance but continued on appeal to the Court of Cassation<sup>84</sup> against the contractor and consultant. The consultant, relying on its acquittal in the criminal proceedings and its limited role in the erection of the scaffolding challenged the finding of joint liability for Diya. Rejecting the consultant's defence that the scaffolding was within the scope and responsibility of the contractor only, the court found that the engineer was liable for failure to fulfil the duty to:

give instructions and control the performance of the contractor in full whether the works were permanent or temporary.

The Court of Cassation went on to find that the engineer was liable in the same way as if there had been negligence in the design of the permanent works and that the contractor, having failed to erect the scaffolding properly, was likewise jointly liable for Diya and compensatory damages.

### *Statutory compensation*

In addition to Diya or Arsh, an employer has a number of statutory obligations to compensate a worker injured or killed in an industrial or work related accident. These include an obligation to pay for medical treatment, whether in a government or private hospital, as well as any medicines and related costs.<sup>85</sup> If incapacitated, the worker is entitled to receive full pay for a period up to six months and half pay for a further six months thereafter or until sufficiently recovered to be able to return to work, whichever is the sooner.<sup>86</sup>

In Bahrain, Kuwait, Oman and Saudi Arabia the rights of an employee suffering a workplace injury are regulated by a combination of the applicable Social Insurance Law<sup>87</sup> and the applicable Labour Law. In Bahrain these stipulate that an employee has a right to six months' salary in the event of death<sup>88</sup> and in Saudi Arabia three years', subject to a minimum of SAR 54,000.<sup>89</sup>

In Qatar and the United Arab Emirates, statutory compensation is prescribed for workplace accidents resulting in permanent disability or death.<sup>90</sup> Compensation in the United Arab Emirates in the event of a fatality is equal to 24 months' basic salary, subject to a minimum of AED 18,000 and a

<sup>84</sup> Dubai Cassation No. 163/1999 dated 19 June 1999.

<sup>85</sup> Kuwait Labour Law, Article 91, KSA Labour Law, Article 133 and the UAE Labour Law, Article 144.

<sup>86</sup> Above, Article 145.

<sup>87</sup> Bahrain Law No. 24/1976, Kuwait Law No. 6/1976, Oman Law No. 72/1991 and Saudi Arabia Law No. M/22/1389.

<sup>88</sup> Bahrain Law No. 24/1976, Article 89 and Bahrain Labour Law, Article 95.

<sup>89</sup> KSA Labour Law, Article 138. Temporary incapacity is governed by KSA Labour Law, Article 137, as amended.

<sup>90</sup> Qatar Labour Law, Article 110 and the UAE Labour Law, Article 149.

maximum of AED 35,000.<sup>91</sup> In the case of a permanent disability, a worker is entitled to a proportion of the amount payable on death, as set out in the schedules applicable from time to time.<sup>92</sup> However, a worker or a worker's beneficiaries, forfeit any entitlement to compensation in the event that injury or death occurs due to a violation of safety instructions conspicuously displayed within the workplace, gross or deliberate misconduct or while the worker is under the influence of alcohol or drugs.<sup>93</sup>

The United Arab Emirates' courts have confirmed that liability for compensation under the Labour Law does not require fault.<sup>94</sup> In a case in which statutory compensation was refused due to a finding, reversed on appeal, that the worker had failed to erect scaffolding properly, leading to its collapse and his death, the Federal Supreme Court differentiated the statutory compensation payable pursuant to the UAE Labour Law from liability for *Diya*, in the following terms:

employment compensation ... is different in its range and the damage it covers from blood money, which requires fault to be established. Hence, employment compensation is payable under particular rules, that is the Labour Law, unless the injury or death has resulted from personal error on the part of the employee rendering him personally liable ... The legislator provided under Article 181 and the subsequent provisions that a party that breaches a mandatory provision of the law or the executive regulations shall be punished and holds the employer or his duly authorised representative liable for violating the rules of safety and occupational health.<sup>95</sup>

Statutory compensation, however, is a minimum level of compensation, which applies only to the extent that the employment contract does not provide a more favourable compensation mechanism.<sup>96</sup>

### *Civil damages*

Compensation is also available pursuant to a variety of other laws.<sup>97</sup> Although not aimed at health, safety and welfare, these can result in liability and

<sup>91</sup> UAE Labour Law, Article 149.

<sup>92</sup> Above, Schedule 2.

<sup>93</sup> Above, Article 153.

<sup>94</sup> Federal Supreme Court No. 52/20 dated 26 October 1999, Federal Supreme Court No. 310/22 dated 11 February 2001, Dubai Cassation No. 219/2000 dated 10 December 2000 and Dubai Cassation No. 194/2007 dated 28 October 2007.

<sup>95</sup> Federal Supreme Court No. 52/20 dated 26 October 1999.

<sup>96</sup> Federal Supreme Court No 607/18 dated 28 December 1997.

<sup>97</sup> A criminal conviction can form the basis for a claim for compensatory damages: for example, Oman Penal Code, Article 58, Qatar Penal Procedures Law, Articles 19 and 322 and the UAE Federal Supreme Court Law, Articles 54 and 55.

compensation, for injury or death sustained in the workplace. A contractor, for example, is liable for any loss or damage resulting from his act whether or not the act was wrongful provided that the loss could not have been prevented.<sup>98</sup>

By far the most common source of financial liability of both companies and individuals are liable for acts causing harm,<sup>99</sup> also referred to as delict, which is roughly analogous to torts at common law. Payment of compensation under the UAE Labour Law does not preclude a claim for damages in delict, though as damages are compensatory a court may reduce any award to take account of the compensation already paid.<sup>100</sup>

A civil claim for damages arising from events that form the basis for criminal proceedings may be lodged in those proceedings,<sup>101</sup> enabling the court to make and record any findings of fact that are relevant to the civil claim. Any findings of fact recorded in a final judgment in the criminal proceedings are treated in any subsequent civil proceedings as conclusive,<sup>102</sup> to facilitate which the civil proceedings are stayed pending a final judgment in the criminal proceedings.<sup>103</sup> A conviction serves as evidence of liability in delict of not only the individual convicted but also generally of that person's employer.<sup>104</sup> In consequence, intervention of victims in criminal proceedings is relatively common.

The assessment of compensatory damages is a matter for determination by the courts on a discretionary basis.<sup>105</sup> Some general guidance on the approach that the courts will adopt was provided by the Dubai Court of Cassation<sup>106</sup> when deciding a claim for compensation brought by the victim of a motor cycle accident. The Court of Cassation upheld the lower court's

<sup>98</sup> UAE Civil Code, Article 878.

<sup>99</sup> Bahrain Civil Code, Article 158, Kuwait Civil Code, Article 227, Oman Civil Code, Article 176, Qatar Civil Code, Article 199 and the UAE Civil Code, Article 282.

<sup>100</sup> Dubai Cassation Nos. 219/2000 dated 10 December 2000 and 194/2007 dated 28 October 2007.

<sup>101</sup> Qatar Penal Procedures Law, Article 19, Oman Penal Procedures Law, Article 4 and the UAE Penal Procedures Code, Article 22.

<sup>102</sup> UAE Law of Proof, Article 50, Qatar Penal Procedures Law, Article 319 and the UAE Penal Procedures Code, Article 269, the last as applied in Federal Supreme Court No. 34/20 dated 16 November 1999 and Dubai Cassation No. 50/2012 dated 14 October 2012. Acquittal does not operate as a binding rejection of the facts on which the charges were based: Dubai Cassation Nos. 113 and 142/2004 dated 20 February 2005. It follows that a decision by the public prosecution not to lay charges is also not binding in a subsequent civil case: Dubai Cassation Nos. 219/2000 dated 10 December 2000 and No. 288/1994.

<sup>103</sup> UAE Penal Procedures Code, Article 28.

<sup>104</sup> Pursuant to the UAE Civil Code, Article 313 (b) any person controlling, supervising or directing another in the performance of a duty is vicariously liable for acts causing harm committed by a subordinate.

<sup>105</sup> Chapter 19 [Damages].

<sup>106</sup> Dubai Cassation No. 359/2003 dated 17 October 2004.

award in relation to the costs and expenses incurred and, significantly, the award of AED 40,000 for pain and suffering stating that:

The Court of Merits cannot be criticised for not devising schedules of compensation for bodily injury or pain and suffering sustained by the victim. This is because there is no provision in the law specifying the criteria for determining the amount of compensation. The Court of Merits is empowered in that regard insofar as the Court states on sound grounds the elements of the damage and how the injured person is entitled to compensation therefore.

Although the victim was also entitled to be compensated for medical expenses, no evidence of such expenses was produced and, accordingly, this entitlement was assessed at zero.<sup>107</sup>

### *Administrative sanctions*

Criminal penalties and civil compensation apart, employers face a raft of administrative sanctions, the imposition of which results not from a judicial process but rather from the exercise of administrative powers by the supervising authorities. Although these powers are not directed exclusively or even primarily at health and safety violations, sanctions may be imposed in circumstances that include:

- failure to employ measures to protect employees against health and safety risks or otherwise to employ proper safety at work standards
- failure to report accidents at work
- failure to remedy violations to the applicable health and safety regulations.<sup>108</sup>

Sanctions available to the UAE Ministry of Labour for these violations include a moratorium on processing new work permits, transfers or labour cards and, ultimately, cancellation of the employer's commercial or trade licence.<sup>109</sup> With the exception of failures to report accidents at work, which attract criminal proceedings forthwith,<sup>110</sup> these measures are to be applied prior to any criminal sanctions,<sup>111</sup> meeting the Ministry's duty to use criminal

<sup>107</sup> The failure to adduce evidence may have been due to the fact that less than 12 months following the original accident, the unfortunate claimant was fatally injured in an unrelated traffic accident.

<sup>108</sup> UAE Ministerial Decision No. 851/2001.

<sup>109</sup> Above, Article 5.

<sup>110</sup> Above, Article 10.

<sup>111</sup> Above, Article 9.



proceedings only after exhausting other means of enforcement.<sup>112</sup> Reports prepared and submitted by the Labour Inspectorate identify violations attracting administrative sanctions.<sup>113</sup> Likewise, lifting of sanctions will be considered on the basis of a report prepared by the UAE Labour Inspectorate and following payment of the prescribed fees.<sup>114</sup>

<sup>112</sup> UAE Labour Law, Article 186.

<sup>113</sup> UAE Ministerial Resolution No. 589/2007.

<sup>114</sup> Above, Article 12.



# 7

## Design and Supervision

Liability for defective work is of considerable practical importance to employers, consultants and contractors alike, yet a variety of factors operate to obscure the legal issues that determine whether and when such liability arises. Some of these, such as the absence of a clear and natural delineation between design and workmanship, the imposition of contractual performance criteria or performance specifications and the incorporation into construction works of proprietary products requiring specialist technical knowledge are common to all jurisdictions. Others, such as imprecisely drafted defects liability provisions in the FIDIC Conditions and amendments commonly made to the standard design and workmanship obligations are a function of practices that have grown up in the local market. But a further category, which includes an assortment of statutory obligations, including strict decennial liability, onerous statutory provisions applicable to certain types of project and a different perspective on the allocation of risk are endemic to the Gulf. It is this last category on which the following discussion focuses.

While the less incremental nature of civil law naturally results in a less prescriptive approach to the scope of a party's obligations compared to that applicable in an equivalent common law jurisdiction, a consistent approach to the interpretation of many applicable statutory provisions can, nevertheless, be discerned from the theory and practice revealed in the available body of judgments.

## 7.1 Duty of care

Design liability in the Gulf states, as in common law jurisdictions, is first and foremost a matter of contract. But design liability is by no measure a matter of contract alone. Intervention in the form of the applicable laws including, in the case of the United Arab Emirates, laws enacted by individual emirates not only adds a further dimension but also adds to the regulatory burden imposed on designers. In addition, claims based in delict, either instead of or in addition to breach of contract, remain common. This is despite the prevailing view that a cause of action in delict is displaced by a contractual relationship.<sup>1</sup>

As a designer's responsibility is often defined by an express contractual term the existence or absence of liability for defective design is often a matter of applying the parties' agreement in accordance with its terms. It is well-established that for contractual liability to be proved three elements are required: fault, damage and a causal link between them.<sup>2</sup> Design liability, as a matter of contract, is no exception. Unfortunately, although the element of fault might be expected to serve as a critical gateway to a test of liability and, accordingly, to clarify the extent of a designer's obligations there is no statutory definition of fault either in a general sense or in the more specific context of design defects. Neither has this statutory lacuna been filled by the judiciary.

In practice, no discernible distinction is drawn between fault and breach.<sup>3</sup> Establishing fault, for the purpose of satisfying this limb of the test for contractual liability, requires proof that the contract has not been performed in accordance with its terms. Whether fault is potentially broader than breach, thus widening the scope of a designer's liability beyond the confines of an agreement, is not a point that seems to have merited consideration by the domestic courts to date. Nevertheless, breach of a contract, whether a duty of care or a stricter obligation is sufficient to constitute fault for the purpose of satisfying this limb of the test of contractual liability.

Whether, conversely, liability is confined by an agreement, particularly an agreement to define liability by reference to a duty of care, is less clear. As a contractual duty of care is a common feature of professional appointments used in the United Arab Emirates this issue is not merely of academic interest. Notably, a central role is allotted to the duty of care in the FIDIC Model

<sup>1</sup> Discussed at Chapter 2.3 [Construction law: Delict(tort)]. In the context of a defects claim see Abu Dhabi Cassation Nos. 43, 78 and 161/4 dated 31 March 2010.

<sup>2</sup> Dubai Cassation No. 253/2008 dated 19 January 2009 and Dubai Cassation No. 149/2006 dated 4 March 2007. This statement of principle can be found in other judgments too numerous usefully to identify.

<sup>3</sup> *The Concept of Fault in the Arab Law of Contract*, Adnan Amkhan, Arab Law Quarterly, Vol. 9, No. 2 (1994), p. 171. In contrast to the reluctance to isolate and define fault there are many judgments, particularly in the context of decennial liability, in which an exception to the necessity for fault is made.

Services Agreement, Fourth Edition, 2006, which expresses this in the following consultant-friendly terms:

Notwithstanding anything else in this Agreement or any legal requirement of the Country....the Consultant shall have no other responsibility than to exercise reasonable skill, care and diligence in the performance of his obligations under the Agreement.<sup>4</sup>

To the extent permitted by the applicable law, therefore, a consultant performing services pursuant to the FIDIC Model Services Agreement complies with the agreement by preparing the design and performing any other obligations with reasonable skill, care and diligence. A consultant's liability pursuant to the FIDIC Model Services Agreement is independent of the result achieved by the service provided.

Because a duty of care in a common law context is the yardstick against which a consultant's design is typically measured in the absence of a contrary agreement<sup>5</sup> there is no philosophical objection to an agreement that has the same or a similar effect. Moreover, the duty of care plays a pivotal role in defining the extent of design liability for a consultant and, almost as importantly, in defining the scope of insurance cover procured for design risk.<sup>6</sup> It is an approach that design professionals and their insurers are wisely keen not only to preserve but also to extend to all jurisdictions. In contrast, a contractor performing design and construction work generally has a fitness for purpose obligation<sup>7</sup> unless a lesser standard is agreed.<sup>8</sup> In Bahrain and Kuwait a contractor has a duty to warn of any design defects if these are apparent or obvious.<sup>9</sup>

<sup>4</sup> Sub-Clause 3.3.1 [Duty of Care and Exercise of Authority]. The Consultant's liability is restricted by Sub-Clause 6.1.1 [Liability and Compensation between Parties] to a breach of Sub-Clause 3.3.1.

<sup>5</sup> For example, under English law the Supply of Goods and Services Act 1982, section 13, provides for an implied term in a professional appointment that a service will be performed with reasonable skill and care. There is a parallel duty of care in tort, as eventually confirmed by the House of Lords in *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145 HL.

<sup>6</sup> Most professional indemnity policies define the cover by reference to negligent errors and omissions. Cover for all legal liabilities is broader but rarer.

<sup>7</sup> Atkin Chambers, 2011. *Hudson's Building and Engineering Contracts: Mainwork & Supplement*. 12th Revised Edition. Sweet & Maxwell. Paragraph 3-106, p. 496. Due to restrictions in the United Arab Emirates on combining design activities with general contracting activities on a commercial licence, contractors are not generally licensed to undertake design work, constraining the use of contractors in the design process. A contractor's liability for defects is, therefore, dealt with separately in the sections that follow.

<sup>8</sup> For an example of such an agreement see the UK industry standard JCT Design and Build Contract 2005 in which Sub-Clause 2.17.1 replaces the fitness for purpose obligation with an obligation that is the same as that of a consultant, i.e. reasonable skill and care. In contrast, the FIDIC Conditions, Sub-Clause 4.1 [Contractor's General Obligations], imposes a fitness for purpose obligation for design on the Contractor.

<sup>9</sup> Bahrain Civil Code, Article 617 and Kuwait Civil Code, Article 694.

The corresponding position under the laws applicable in the Gulf is that there is no prohibition on an agreement to limit the liability of a consultant to a duty of care or, similarly, to define a consultant's obligations by reference to such a duty. As illustrated by the Oman Civil Code the principle that performance may be measured by reference to criteria other than the outcome achieved is recognised:

If the debtor's obligation is the preservation of an object or the management thereof, or the exercise of care in the performance of his debt, he shall have discharged that debt if, in the performance thereof, he exercises all such care as the reasonable man would exercise, notwithstanding that the intended object is not achieved, unless there is an agreement or a provision of law to the contract.<sup>10</sup>

An obligation to exercise care will be discharged if the work or services are performed with 'all such care as the reasonable man would exercise, notwithstanding that the intended object is not achieved', subject to the significant exceptions that there is no agreement or statutory provision to the contrary. If applied to a contract for design or consultancy services that incorporates an express obligation to exercise care, this provision provides support for the recognition and application of a standard of care that, significantly, is independent of the achievement of the original objective. Even though this provision is not directed specifically at design services statutory recognition of a basis for establishing liability pursuant to which failure to achieve an intended object does not automatically result in liability offers conceptual support for an approach that is analogous to a duty of care under common law. A designer's contractual obligation to perform the design services with reasonable skill and care or to achieve a specified result should be applied accordingly.

## **7.2 Obligation of result**

But not all professional appointments define a consultant's obligation to perform the services, leaving it to the Court of Merits in these circumstances to decide on the appropriate measure to be applied. Unlike in common law jurisdictions, there is no certainty that a domestic court in the Gulf will, in the absence of specific provision, treat a contract for design or consultancy services as containing an obligation to exercise care. In particular, the statutory duty of care<sup>11</sup> applies where what is required is the exercise of care

<sup>10</sup> Oman Civil Code, Article 261. Also, Bahrain Civil Code, Article 214, Kuwait Civil Code, Article 290 and the UAE Civil Code, Article 383. These provisions mirror the French Civil Code, Article 1137.

<sup>11</sup> Oman Civil Code, Article 261. Also, Bahrain Civil Code, Article 214, Kuwait Civil Code, Article 290 and the UAE Civil Code, Article 383.

in the performance of an obligation, without elaborating on the circumstances to which this applies.

According to the UAE Ministry of Justice Commentary obligations that require a particular result, such as the repair of a machine, are beyond the contemplated scope of the statutory provision.<sup>12</sup> Notably, it is not relevant that the obligation is one that is connected with the provision of a service rather than the supply of a product. Regard is had, instead, to whether the obligation is one that is expected to produce a defined result. Picking up the theme that the purpose of a transaction is an element of its interpretation a distinction is drawn between an obligation to achieve a result and an obligation to exercise reasonable care.

Under French law, which via the Ottoman Majalla and the work of renowned Arabic legal scholars such as Al Sanhuri<sup>13</sup> influenced the content of the region's civil codes, there is a recognised distinction between an *obligation de moyens* (an obligation of means) and an *obligation de résultat* (an obligation to achieve a result).<sup>14</sup> An *obligation de moyens* applies to contracts involving the performance of services that by their nature have an uncertain outcome. Examples of a typical *obligation de moyens* include a doctor's treatment of a patient or a lawyer's representation of a client in a dispute.

Architects, engineers and other design professionals are not considered to be engaged in a similarly speculative discipline reflecting the role of designers in an era in which they are uniquely placed to deliver buildings and structures that are structurally sound.<sup>15</sup> On this basis preparing a design that avoids any serious defect is an *obligation de résultat* in the absence of any agreement to the contrary. Although not yet reduced to a well-established principle and not having any obvious source in the region's civil codes, this distinction has received some judicial recognition, specifically in the United Arab Emirates.<sup>16</sup> Nowhere is this more apparent than in the tendency to treat consultants as supervisors and thus responsible for construction

<sup>12</sup> UAE Ministry of Justice Commentary, page 262.

<sup>13</sup> 'Civil Codes of Arab Countries: The Sanhuri Codes', N. Saleh, ALQ, Vol. 8, No. 2 (1993), pp. 161–167.

<sup>14</sup> For a useful discussion of the general approach of French law see Barry Nicholas, 1992. *The French Law of Contract*. 2nd Edition. Oxford University Press (UK). pp. 50–56. Pursuant to the French Civil Code the obligation of result is defined by reference to three strands: a warranty of perfected completion, a warranty of good running and decennial liability.

<sup>15</sup> The explanation sometimes given for the less stringent standard imposed by common law is that this was seen as encouraging innovation in an era of major engineering and infrastructure development.

<sup>16</sup> Federal Supreme Court Nos. 336 and 470/21 dated 20 March 2001, previously Federal Supreme Court Nos. 101, 102 and 59/16 dated 28 June 1998, and Dubai Cassation No. 107/2005 dated 26 September 2005. Any agreement to the contrary is subject to the mandatory terms of the UAE Civil Code, Article 880.

defects. This responsibility arises as a primary obligation of a supervisory consultant, not as a liability for the actions of a third party.<sup>17</sup>

By way of illustration, in a case involving a claim against the engineer and the contractor following the construction of a villa that did not conform to the drawings and specification the Federal Supreme Court held the consultant liable as follows:

The consultant engineer, appointed by the employer in connection with the construction contract, acts for the employer in supervising the construction works' implementation and calculating the dues of the main contractor. The effects of the engineer's actions do not apply to the contractor, rather to the employer. Further, the liability of the contractor or the consultant engineer supervising the implementation is contractual liability established by law for every construction contract. If such building is demolished or a defect appears therein, their liability is fulfilled because their commitment to indemnify against the defect in the structures is a commitment to achieve a purpose and not to use care.<sup>18</sup>

The court relied on the finding contained in a report of the relevant local authority that the consultant had failed to perform its supervisory function properly. This amounted to a breach of the obligation to achieve a result, namely to avoid defects resulting from the contractor's failure to implement the design.

Likewise, following a worksite fatality caused by the collapse of formwork the Dubai Court of Cassation considered the claim brought by the heirs against the engineer.<sup>19</sup> The engineer's defence that the erection and maintenance of the formwork was the contractor's responsibility<sup>20</sup> was dismissed by the Court as follows:

The negligence of the appellant is established in the appealed judgment, which explained that the appellant was the consulting engineer for the project, whereas the contractor was simply required to execute the works as per recognised practice. Meanwhile, the role of the consulting engineer was to give instructions and control the contractor's performance in full whether the works were permanent or temporary. The appellant is

<sup>17</sup> Liability for the actions of a third party may arise pursuant, for example, to the UAE Civil Code, Article 313 but only, according the UAE Ministry of Justice Commentary, if the third party is under some type of incapacity. A corporate entity is liable for the errors and omissions of its employees: Dubai Cassation No. 163/1999 dated 19 June 1999.

<sup>18</sup> Abu Dhabi Cassation Nos. 43, 78 and 161/4 dated 31 March 2010.

<sup>19</sup> Dubai Cassation No. 163/1999 dated 19 June 1999.

<sup>20</sup> The defence also relied on the failure of a prosecution resulting from the incident.



responsible for [the temporary works] as he is also customarily liable for the permanent works in his capacity as the consulting engineer controlling performance.

This approach to allocating liability, including the liability of engineers, for serious defects in buildings derives in part from the Islamic Shari'ah through the admonition against causing harm to others.<sup>21</sup>

Although a flaw in the design or the incorporation of defective materials that results in a serious defect, in practice, often constitutes a breach of the common law duty of care, an *obligation de résultat* is an objective measure that is closer to the fitness for purpose obligation typically owed by a contractor.<sup>22</sup> If a design results in a serious defect or constitutes a breach of a regulatory obligation liability follows, it is submitted, by reason of the *obligation de résultat*. Thus, the distinction that has been carefully preserved in common law jurisdictions between a consultant's duty of care and a contractor's fitness for purpose obligation is not one that applies in the United Arab Emirates or the other Gulf states.<sup>23</sup>

### 7.3 Standard of care

In the absence of a serious defect or a breach of a statutory obligation a consultant's performance is less readily capable of assessment by reference to an *obligation de résultat*. For example, a design that uses a greater than necessary quantity of steel reinforcement or that fails to maximise the lettable area of a commercial building can, in practice, be judged only by reference to the contract or by comparison with alternative designs prepared by other competent designers.

The standard to be used to measure performance in such circumstances is not prescribed in the absence of agreement. As the parties' agreement remains the primary source of a designer's obligations and as there is no clear guidance in the applicable civil codes or in any decisions of the domestic courts

<sup>21</sup> Federal Supreme Court No. 59/16 dated 28 June 1998. Claims involving death or personal injury tend, in practice, to result in a finding of liability against a party having the ability to pay compensation.

<sup>22</sup> Conditions of Contract Plant and Design-Build, First Edition, published by FIDIC, Sub-Clause 4.1(c) [Contractor's General Obligations], which imposes an obligation on the Contractor that to the extent designed by the Contractor the Works shall be fit for the intended purposes as defined in the Contract.

<sup>23</sup> The closer alignment of professional design liability with contractor's design liability is possibly one reason for continental European contractors being generally more comfortable with taking design risk and their possession of greater in-house design capacity than their Anglo-Saxon counterparts.

as to the approach to take it is for the Court of Merits to interpret and apply the parties' agreement in accordance with first principles.<sup>24</sup> Although it is for the Court of Merits to assess the performance of a designer this is a task that is commonly delegated to a court appointed expert.<sup>25</sup> Such assessment is likely, in the absence of judicial guidance,<sup>26</sup> to stray beyond technical issues into the realm of the parties' obligations and, therefore, the interpretation of the contract is a matter over which a court appointed expert, in practice, often exerts considerable influence. This, in turn, introduces a pragmatic element to an assessment that makes it difficult to extract any guiding principles regarding the standard of care to be applied beyond the absence of any strict adherence to the application of absolute obligations or the application of a common law style duty of care.

Despite this uncertainty, if an expert proceeds to assess a consultant's performance on the basis of a duty of care this will generally be done by reference to a standard derived from the expert's own professional experience and personal judgment, thus introducing an element of subjectivity to the determination.<sup>27</sup> In consequence, a stricter or a more lenient standard than that of a competent member of the design professions exercising reasonable skill and care may be applied from case to case.

## 7.4 Defences

Exposure to the risk of an *obligation de résultat* is mitigated to some extent by a variety of factors. A valid defence to an absolute obligation is, for example, available on the basis of the third limb of the test for contractual liability, namely the causal link between fault and damage. Specifically, failure to achieve the required outcome will not result in liability if the damage is the result of an external cause (*cause étrangère*), such as:

- a natural disaster
- an unavoidable accident
- force majeure
- an act of a third party, or
- an act of the person suffering loss.<sup>28</sup>

<sup>24</sup> Chapter 4 [Interpretation].

<sup>25</sup> For further discussion of the role and conduct of court appointed experts refer to Chapter 20 [Evidence].

<sup>26</sup> A preliminary judgment assigning a case to an expert defines the scope of the brief and may offer some indication of the test to be applied to the performance of a consultant's services.

<sup>27</sup> A party may offer a court appointed expert testimony from a party appointed expert in an effort, for example, to demonstrate that the standard of care was attained.

<sup>28</sup> UAE Civil Code, Article 287. Also Bahrain Civil Code, Article 165, Kuwait Civil Code, Article 233, Qatar Civil Code, Article 204 and the Oman Civil Code, Article 177.

A consultant has the burden of proving that a failure to perform an absolute obligation is due to an external cause.

## 7.5 Statutory duties

Liability for breach of an *obligation de résultat* triggered by a breach of the regulations applicable to the design professions poses an additional risk for a designer.

Such regulations take a variety of forms, from standard specifications to rules governing the engineering profession. It is consistent with the regulation of a number of professions by specific laws, including medicine, law, auditing, journalism and translation that engineering is singled out for similar treatment in Bahrain, Qatar, Saudi Arabia and some of the emirates within the United Arab Emirates.<sup>29</sup> The last in particular contain a number of provisions that in certain circumstances determine the existence and extent of design liability.

- In Abu Dhabi, local law provides that the engineer shall monitor the works for compliance with the approved drawings.<sup>30</sup> Liability is imposed for any design errors or instructions given while supervising the works that affect the safety of a building. Further, for ten years after completion:

The engineering consultant shall be responsible for any damage that affects the safety of a building as a result of mistakes in its design or as a result of instructions given whilst monitoring the execution of the works.<sup>31</sup>

A consultant is potentially liable pursuant to this provision not merely for mistakes made during preparation of the design, but also while administering the works. The scope of the responsibility imposed aligns with that applied by virtue of the UAE Civil Code<sup>32</sup> and reflects the focus on structural integrity and safety that underpins the approach of the courts to a designer's obligations. The statutory provisions do not impose blanket liability on a designer for all building defects.

<sup>29</sup> Bahrain Law No. 51/2014 on Regulating the Engineering Professions, Qatar Law No. 19/2005 Regulating the Practice of Engineering Professions, Saudi Arabia Ministerial Order No. 264 of 16.9.1402 AH and No. 702 dated 11.6.1416 AH Organising the Practice of the Profession of Engineering Consultancy. A local order in Dubai regulates the engineering profession: Local Order 89/1994 Regulating the Practice of the Engineering Profession.

<sup>30</sup> Abu Dhabi Law No. 4/1983 (amended by Law No. 16/2009), Article 10.

<sup>31</sup> Above, Article 11.

<sup>32</sup> Article 880.

- The Department of Municipal Affairs in Abu Dhabi has responsibility for setting building standards in Abu Dhabi<sup>33</sup> and has introduced a consolidated set of building codes.<sup>34</sup> These six new building codes<sup>35</sup> – comprising the Abu Dhabi International Building Code, the Abu Dhabi International Mechanical Code, the Abu Dhabi International Fuel Gas Code, the Abu Dhabi International Private Sewerage Disposal Code, the Abu Dhabi International Property Maintenance Code and the Abu Dhabi International Energy Conservation Code – are based closely on the suite of codes published by the US-headquartered International Code Council.
- In Dubai, a consultant must abide by the laws, regulations and resolutions issued by the committee for registration and licensing of engineering consultants within Dubai Municipality and behave in ‘an impartial, virtuous and honest’ manner.<sup>36</sup>
- A consultant engaged on projects in Dubai is responsible, jointly with a contractor, for seeing that buildings are in a sound condition during and after the works<sup>37</sup> and that the works comply with the Dubai Municipality standard specifications.<sup>38</sup> Liability extends to the health and safety of construction workers, passers-by and adjacent property.<sup>39</sup>
- Dubai Municipality Building Regulations<sup>40</sup> impose a requirement to comply with the applicable building codes and for designs of buildings and structures to be prepared by a consultant licensed by the Municipality.
- In addition, regulations applicable to Federal Government construction projects require a consultant to ensure, at the end of the project, ‘that the contractor has fulfilled all his obligations under the contract’.<sup>41</sup>

These statutory provisions will be sufficient to address many of the scenarios in which design defects occur. A defect that would have been avoided but for a failure to adhere to such provisions results in liability, it is submitted, in the absence of a valid agreement to the contrary. Any such agreement would

<sup>33</sup> Abu Dhabi Law No. 9/2007, Article 2(1).

<sup>34</sup> The Abu Dhabi Department of Municipal Affairs announced on 30 September 2013 that these codes had been formally adopted by the Abu Dhabi Executive Council and that compliance would be compulsory for government projects in the Emirate of Abu Dhabi with effect from 1 October 2014. It is widely anticipated that the Executive Council will formally adopt the building codes for all projects in Abu Dhabi, in which case a formal record of this should appear in the Abu Dhabi Official Gazette.

<sup>35</sup> Accompanied by the Abu Dhabi International Accessibility Standards.

<sup>36</sup> Dubai Local Order 89/1994, Article 36.

<sup>37</sup> Dubai Local Order 3/1999, Article 19.

<sup>38</sup> Above, Article 15.

<sup>39</sup> Above, Article 16.

<sup>40</sup> Dubai Administrative Decision 125/2001.

<sup>41</sup> Ministerial Decision 20/2000, Article 122.

face the difficulty that a contract is void to the extent that it conflicts with public order<sup>42</sup> or a mandatory provision of applicable law.

## **7.6 Compensation**

The remedy for a breach of contract, whether a duty of care or a strict obligation, or for an act causing harm (delict) is compensatory damages, assessed by the Court of Merits on the basis of the loss suffered.<sup>43</sup> Such damages may be awarded for monetary loss, referred to as material damages, or for non-monetary loss, such as reputational damage, referred to as moral damages and can include loss of revenue and loss of profit subject, of course, to the burden of proof. It is, accordingly, common for a designer to seek to limit the scope of the potential losses for which liability arises and the amount of compensation payable towards such losses.<sup>44</sup> Subject to several exceptions and general contractual principles, an agreement excluding or limiting a party's liability is effective.<sup>45</sup>

## **7.7 Joint liability**

Common law in general imposes liability on a consultant or contractor jointly and severally irrespective of the proportionate contribution to that damage by another. Damages are awarded in full against a consultant for a design error irrespective of the proportionate contribution to that damage by a third party, usually another consultant or a contractor. However, in the Gulf states damages for defects are not necessarily payable on a joint and several basis where both a designer and a third party are independently liable for the same defect.

The perceived unfairness of making a party, such as a designer, liable in full for a loss to which such designer has contributed with others has led some common law jurisdictions, notably in Australia and most of the states in the United States of America, to move away from joint and several liability to proportionate liability. Other common law jurisdictions, such as England

<sup>42</sup> UAE Code of Commercial Practice, Article 2(3) and the UAE Civil Code, Article 205(2).

<sup>43</sup> For commentary on the principles applicable to compensatory damages see Chapter 19 [Damages].

<sup>44</sup> For example, FIDIC Model Services Agreement, Fourth Edition, 2006, Sub-Clauses 6.1.3 [Liability and Compensation between Parties] and 6.3 [Limit of Compensation].

<sup>45</sup> Dubai Cassation No. 195/2003 dated 22 June 2003 in which the court upheld the Court of Merits' decision to apply an exclusion of liability to some repairs (which subsequently failed) to a ship turbine and Dubai Cassation No. 153/2007 dated 6 November 2007.

& Wales and New Zealand have considered but rejected a move away from joint and several liability.<sup>46</sup>

Similarly, the position in the Gulf states is marked by a lack of consistency. The United Arab Emirates favours a proportionate approach in preference to joint and several liability, entrusting the apportionment of loss to the Court of Merits:

If a number of persons are responsible for a harmful act, each of them shall be liable in proportion to his share in it, and the judge may make an order against them in equal shares or by way of joint or several liability.<sup>47</sup>

As the provisions of the UAE Civil Code which set the measure of damages for breach of contract and damages in delict<sup>48</sup> are used interchangeably,<sup>49</sup> the power of apportionment of liability in delict likewise applies, it is submitted, to the assessment of contractual liability. On this basis, contractual liability for a design defect is ordinarily apportioned at the court's discretion<sup>50</sup> but may also be allocated jointly and severally. This is also consistent with the latitude given to the Court of Merits to assess compensatory damages. The position in Oman is broadly the same.<sup>51</sup>

The Bahrain Civil Code and the Kuwait Civil Code, in contrast, make each party liable for the entirety of the damage while permitting the Court of Merits discretion to apportion liability:

Each one of the several persons whose fault has caused the harm shall be liable to the party who suffered the harm for reparation of all the harm suffered.

<sup>46</sup> Following a campaign fought mainly by the accountancy profession and despite support in the Latham report, the UK's Law Commission ultimately recommended retaining joint and several liability for joint tortfeasors in 'Feasibility Investigation of Joint and Several Liability' (DTI Consultation Paper, 1996).

<sup>47</sup> UAE Civil Code, Article 291. Similarly, the court may, pursuant to the UAE Civil Code, Article 290, adjust the damages to reflect any contribution of the claimant to the loss. An equivalent power is vested in the courts under English law by the Law Reform (Contributory Negligence) Act 1945.

<sup>48</sup> UAE Civil Code, Articles 389 and 292 respectively.

<sup>49</sup> Dubai Cassation No. 46/2006 dated 8 May 2006, an agency dispute and Dubai Cassation No. 431/2004 dated 4 June 2005, a banking dispute, in both of which the court relied on Article 292. In Dubai Cassation No. 252/1993 dated 26 December 1993 the court cited both Article 292 and Article 389 without distinction. Cf. Dubai Cassation No. 56/2004 in which the Court of Cassation held that the delict and contractual provisions should be kept separate, albeit for the purposes of establishing liability.

<sup>50</sup> In Abu Dhabi Cassation No. 339/2009 dated 18 June 2009 the court applied the UAE Civil Code, Article 291 to a defects claim and allocated liability equally between the consultant and the contractor.

<sup>51</sup> Oman Civil Code, Article 180.

The liability shall be apportioned to the several defaults each according to the role of his fault that contributed to the harm; if it is impossible to determine such role the liability shall be apportioned equally.<sup>52</sup>

A claimant can seek damages from each contributing party in proportion to their contribution to the damage or may seek the full amount from some of them only. However, in the latter case a respondent may join other parties to the proceedings<sup>53</sup> for the purpose of applying for an apportionment at the discretion of the Court of Merits.

The Model Services Agreement, Fourth Edition, 2006, FIDIC deals with this issue expressly by stipulating that:

If either Party is considered to be liable jointly with third parties to the other, the proportion of compensation payable by that Party shall be limited to that proportion of liability which is attributable to his breach.<sup>54</sup>

Commonly known as a net contribution clause, this provision is subject to the same conditions as apply to any other limitation or exclusion of a party's liability, namely that it shall be ineffective to the extent that it is applied to liability in delict, liability arising from a mandatory provision and liability for fraud or gross mistake.<sup>55</sup>

A designer can also procure an indemnity for any damages arising from a design defect in the form of professional indemnity insurance, which is widely available from domestic insurers.<sup>56</sup> In the absence of any consistency between Gulf states on an obligation to procure professional indemnity cover<sup>57</sup> it is commonplace for an employer under a construction contract to impose a contractual obligation on a designer to do so.<sup>58</sup> However, as

<sup>52</sup> Kuwait Civil Code, Article 228. Also, Bahrain Civil Code, Article 160.

<sup>53</sup> UAE Civil Procedure Code, Article 94 and 95.

<sup>54</sup> Sub-Clause 6.1.3(c).

<sup>55</sup> See Chapter 19 [Damages].

<sup>56</sup> Pursuant to UAE Federal Law No. 6/2007, Article 26, insurance of domestic risk is reserved exclusively for domestic insurers, though, in practice, international consultants often have a worldwide scheme with territorial extensions placed in one of the major insurance centres. Also, Bahrain Law No. 64/2006, Article 40, Oman Law No. 12/1979, Article 57, Qatar Law No. 1/1966, Article 22 and Saudi Arabia Law No. 3955 dated 23rd Jumada Thani 1424 Hijri.

<sup>57</sup> Even within the United Arab Emirates Federal law imposes no obligation on designers to procure professional indemnity insurance whereas Abu Dhabi Administrative Resolution No. 58/2010, Article 15, mandates project specific professional indemnity cover, albeit without specifying the limit of indemnity or any other details.

<sup>58</sup> See, for example, the Model Services Agreement, Fourth Edition, 2006, Sub-Clause 7.1(a) [Insurance for Liability and Indemnity]. Many consultants do not routinely maintain professional indemnity insurance. Of those that do, limits of cover of AED 5 million or AED 10 million are fairly common for designers and other consultants, even those undertaking large commercial projects.

the indemnity in a typical professional indemnity policy is given in respect of negligent errors and omissions there is a potential mismatch with any liability for an *obligation de résultat* or any other strict liability, notably decennial liability,<sup>59</sup> if this is not accompanied by a breach of a duty of care.

<sup>59</sup> Chapter 4.3 [Warranties and liability without fault].



# 8

## Defects

Liability for defective materials and workmanship as with liability for design is, first and foremost, a matter of contract. Agreements containing obligations to supply materials and execute work are binding and are applied in accordance with their express terms. But while agreements have primacy they do not govern liability for defective materials and workmanship exclusively. Consideration must be given to the overlapping and, in some cases, overriding, aspects of applicable laws, including decennial liability and other forms of strict liability.

### 8.1 Materials

The key statutory provision of local law on the quality of materials in the United Arab Emirates provides that:

If the client requires that the contractor should provide the materials for the work, either in whole or in part, the contractor shall be liable for the quality thereof in accordance with the conditions of the contract, if any, or in accordance with the current practice.<sup>1</sup>

Similar provisions are found in Oman and Qatar.

If the contract is silent, the quality of materials must comply with current practice. This is broadly consistent with the default position that applies by virtue of the statutory hierarchy of sources of obligations.

<sup>1</sup> UAE Civil Code, Article 875. Also, Oman Civil Code, Article 629 and the Qatar Civil Code, Article 684.

In Bahrain and Kuwait<sup>2</sup> the consequence of a failure to agree on the quality of materials is that they must be fit for their intended purpose and be free of latent defects. Notwithstanding this difference, statutory recognition and force is given in each jurisdiction to the terms of the contract in determining a contractor's obligations as to the quality of materials.

In a dispute that reached the Federal Supreme Court in 2001,<sup>3</sup> the Court considered liability for defects in the context of a dispute between a main contractor and subcontractor. The subcontractor for mechanical, electrical and plumbing work withdrew from the site claiming that the main contractor had failed to pay for the work performed. The main contractor issued a notice of termination alleging, among other things, defects in the works and appointed a replacement subcontractor, commencing parallel proceedings for the recovery of the additional costs to complete.

In the Court of Appeal, the subcontractor was awarded AED 971,373,000 in respect of the work performed up to the date of termination and the main contractor was awarded AED 1,181,754 as the additional cost of completing the works following termination of the subcontractor's employment.

Reversing both judgments under appeal and remitting the case back to the Court of Appeal for reconsideration, the Federal Supreme Court provided the following guidance on the assessment of the main contractor's allegations of defective work:

the subcontractor is under an obligation to perform the work entrusted to him by the main contractor and must perform the work in such manner as may be agreed upon and is contained in the subcontract. In the absence of agreed terms, custom, especially common practice shall prevail based on the work to be performed by the subcontractor ... If the Contractor has failed to perform the work, or to comply with the requirements and specifications agreed upon, or to follow common practice, or has proven to be technically incapable, or has chosen unsuitable materials, or has not duly performed his obligations as the ordinary person would perform, or has unjustifiably delayed the performance of the work, liability shall be established.

The Federal Supreme Court held that the expert's report on which the lower court's decision was based did not sufficiently consider the subcontractor's defence that switchboards and other materials were incorrectly rejected as having failed to conform to the relevant specifications. The expert relied, instead, on letters from the Engineer and the Employer criticising elements of

<sup>2</sup> Bahrain Civil Code, Article 586 and Kuwait Civil Code 663.

<sup>3</sup> Federal Supreme Court Nos. 446 and 541/21 dated 15 May 2001.

the works and rejecting materials such as the switchboards. In consequence, the court was not satisfied that the appealed judgment could be supported on the expert's evidence.

## 8.2 Workmanship

Unlike in common law jurisdictions, there is no tradition of imposing a contractual test of quality by implying terms into the contract to this effect or of seeking this in the unexpressed intentions of the parties.<sup>4</sup> There is no need to do so because, in the absence of express agreement, recourse shall be had to custom and practice.<sup>5</sup> In consequence, it cannot be taken for granted that warranties that materials shall be fit for their intended purpose and of satisfactory quality<sup>6</sup> or that the work shall be performed in a 'good and workmanlike'<sup>7</sup> manner, are implied in the absence of explicit agreement to this effect. Phrases that have a well-established meaning elsewhere, such as 'fitness for purpose', 'satisfactory quality' and 'good and workmanlike', have no particular meaning in the Gulf states.

It is for the Court of Merits to ascertain whether an obligation has been performed, a task that is usually delegated, without significant statutory or judicial guidance, to an expert appointed by the court. Whether an expert is required to apply an agreement that specifies the standard of workmanship or to determine the standard to be met in the absence of agreement the resulting report is invariably highly influential on a subsequent judgment. The process of investigation and analysis generally owes more to the technical experience and capability of each expert than to a literal interpretation of the agreement or a forensic analysis of the applicable law. In consequence, custom and practice, as applied by court appointed experts, plays a major role in determining liability for workmanship resulting in a more flexible and pragmatic test than that which applies under common law.

A departure from the conventional approach to defects liability adopted in some standard form contracts is required in order to adapt to this legal framework. For example, the FIDIC Conditions, 4th Edition simply provides that materials and workmanship should be of 'the respective kinds described in the Contract and in accordance with the Engineer's instructions'. This formula

<sup>4</sup> For a discussion of implied terms see Chapter 5.6 [Characteristics of a contract: Related obligations].

<sup>5</sup> UAE Civil Code, Article 875 and the UAE Code of Commercial Practice, Article 2. Also, Qatar Civil Code, Article 169. Also, Bahrain Civil Code, Article 125, Kuwait Civil Code, Article 193 and the Oman Civil Code, Article 165.

<sup>6</sup> Supply of Goods and Services Act 1982, section 4.

<sup>7</sup> *Duncan v Blundell* (1820) 171 ER 749 and now captured in the Supply of Goods and Services Act 1982, section 13, albeit as duty to exercise reasonable skill and care.

is frequently incorporated, in identical or similar terms, into construction contracts in the Gulf. But the formula, the source of which is standard form contracts drafted for use with English law, relies for its effectiveness on its original legal environment. Crucially, it relies on the warranties, implied into construction contracts by the courts and laws of England and Wales. As similar warranties are not automatically imported into contracts governed by local law this form of words falls short of clearly defining the parties' rights and liabilities in relation to the quality of materials and workmanship in the Gulf.

This issue has been addressed in part in the FIDIC Conditions by the addition of a provision requiring the execution of the works to be undertaken 'in a proper workmanlike and careful manner, in accordance with good practice',<sup>8</sup> bringing the express obligation for workmanship more into line with those applicable at law.<sup>9</sup> But the FIDIC Conditions remain strangely silent on the quality of materials, omitting any generic test in favour of a testing and inspection regime which appears more suited to engineering than building works.<sup>10</sup>

### 8.3 Statutory duties

Other pertinent provisions include those set out below.

- Supply-only contracts are governed by the following:

A sale shall be deemed to have been concluded on the basis that the goods sold are free of any defects, save such as are within customary tolerances.<sup>11</sup>

Imperfections are allowed, it seems, provided that these are within customary tolerances.

- A purchaser of materials has certain remedies including the right of rejection if the goods 'differ in quantity or in kind from the goods agreed, or are defective'<sup>12</sup> but the purchaser is not entitled to reject the materials unless the defects result in the materials being unfit for their intended purpose. Subject to the terms of the contract between the parties, the domestic courts may instead award compensation to reflect the difference in value between the materials required pursuant to the contract and those actually supplied.<sup>13</sup>

<sup>8</sup> General Condition 7.1 [Plant, Materials and Workmanship].

<sup>9</sup> Chapter 4 [Interpretation] and Federal Supreme Court Nos. 446 and 541/21 dated 15 May 2001.

<sup>10</sup> A fuller discussion is set out in the commentary on the FIDIC Conditions, Sub-Clause 7.1 [Manner of Execution].

<sup>11</sup> UAE Civil Code, Article 543(1).

<sup>12</sup> UAE Code of Commercial Practice, Article 110 and the Civil Code, Article 237.

<sup>13</sup> UAE Civil Code, Article 242.

- Deceit in relation to the number, quantity, dimension, weight, capacity, standard or specification of goods and materials supplied in the local market, as well as their origin and their performance characteristics is a criminal offence,<sup>14</sup> and may confer on the victim a consequential civil cause of action.
- In relation to building works in Abu Dhabi, a contractor is liable 'for a ten year period after the preliminary hand over date for any defect appearing in the critical parts of the building (for example the foundations, load bearing walls or concrete structure) as a result of the contractor's deceit or neglect and for any damage resulting from such a defect'.<sup>15</sup> The penalties prescribed for a breach of this requirement include the imposition of licence restrictions and remediation costs, a fine and imprisonment.
- The Abu Dhabi Building Codes, which are based on the suite of codes published by the International Code Council, apply to Government projects in the Emirate.<sup>16</sup>
- In Dubai, the Municipality has published numerous standard specifications, in addition to a standard building code<sup>17</sup> which, while primarily aimed at design, establish technical standards for construction within the Emirate. The enabling legislation imposes an obligation on a contractor to supply materials that conform with the requisite standards as follows:

The specifications of material used for construction works shall conform with the standard specifications required for the material and approved by the Municipality.<sup>18</sup>

This will be sufficient to create an obligation to comply with the standard specifications in contracts that include a requirement that the works be performed in accordance with the applicable law in Dubai.<sup>19</sup>

- Developers in Dubai are liable<sup>20</sup> for defects in the structural elements of the whole of the building where such defects are notified to it by the

<sup>14</sup> UAE Law No. 4/1979, Article 1.

<sup>15</sup> Abu Dhabi Law No. 4/1983 (amended), Article 13. This provision should not be confused with decennial liability created by the UAE Civil Code, Article 880. Also, Article 12(1) requiring that a contractor 'shall guarantee and maintain the contract works, along with the excellent performance thereof for one year after the preliminary acceptance of the whole of the works'.

<sup>16</sup> The Department of Municipal Affairs announced on 30 September 2013 that these codes had been formally adopted by the Abu Dhabi Executive Council and that compliance would be compulsory for government projects in the Emirate of Abu Dhabi with effect from 1 October 2014. The instrument by which the building codes have been adopted has not been identified by the Department of Municipal Affairs. It is widely anticipated that the Executive Council will formally adopt the building codes for all projects in Abu Dhabi.

<sup>17</sup> Dubai Administrative Decision 125/2001 adopting the List of Building Standards and Conditions.

<sup>18</sup> Dubai Local Order 3/1999, Article 15. Also, Article 19 requiring the contractor and consultant to ensure that the works comply with building regulations.

<sup>19</sup> For example, FIDIC Conditions, Sub-Clause 1.13 [Communications].

<sup>20</sup> Dubai Law No. 27/2007, Article 26.

owners' association or the owner of any unit for ten years from the date of obtaining the completion certificate<sup>21</sup> for the development and for defective installations, including mechanical and electrical works, sanitary and plumbing installations, in the whole of the building for one year from the date of obtaining the completion certificate for the development.

- The Qatar Construction Specifications 2014, which establish minimum standards for materials and workmanship by means of a series of individual specifications, have been brought into force.<sup>22</sup> All 'competent authorities' in Qatar are required to implement and enforce the Qatar Construction Specifications.<sup>23</sup>
- A suite of standard building codes has been published by the Gulf Cooperation Council.<sup>24</sup>

As the trend towards greater regulation of the construction industry looks set to continue, standard specifications and other statutory codes are likely to proliferate further and exert increasing influence over the quality of materials and workmanship required.

## 8.4 Remedies

The remedies for a failure to perform the work properly are not restricted to damages for breach. In keeping with the civil law tradition the remedies and rules governing their application are prescribed by law:

The contractor must complete the work in accordance with the conditions of the contract. If it appears that [the contractor] is carrying out what he has undertaken to do in a defective manner or in a manner in breach of the agreed conditions, the employer may require that the contract be terminated immediately if it is impossible to make good the work but, if it is possible to make good the work, it shall be permissible for the employer to require the contractor to abide by the conditions of the contract and to repair the work within a reasonable period. If such period expires without the repair being performed the employer may apply to the judge for the

<sup>21</sup> There is no explanation in the Law of what constitutes the 'completion certificate' (i.e. is it the completion certificate from the relevant authority confirming that construction is complete or the completion certificate issued by the Engineer to the Contractor at the end of the defects liability period?).

<sup>22</sup> Qatar Ministerial Decision No. 210/2014 issuing the Qatar Construction Specifications 2014, which came into force on 29 March 2015.

<sup>23</sup> Above, Article 3.

<sup>24</sup> The disciplines covered are: architectural, construction, fire, green buildings, renewable energy, building maintenance, mechanical and electrical.

cancellation of the contract or for leave to himself to engage another contractor to complete the work at the expense of the original contractor.<sup>25</sup>

An employer is, therefore, entitled to require a contractor to correct work being carried out in a defective manner or, with the consent of the court, to terminate a contractor's employment if rectification within a reasonable period is not possible. A main contractor has the same rights against a subcontractor.<sup>26</sup>

The requirement to obtain a court order for termination presents the difficulty that, in practice, delay is likely to compound any loss, and significant delay will deprive the measure of its utility altogether. Unsurprisingly, therefore, the courts have had to consider cases where the right has been exercised summarily with an order sought subsequently.

Dubai's highest court, in a case involving a main contractor and a cladding subcontractor, concluded that the Engineer's warnings of defects and delay attributable to the subcontractor constituted a sufficient basis for the court to permit termination retrospectively:

Although the rule is that the employer must refer to the concerned judge for permission to vest in another contractor the completion of the work at the expense of the first contractor, the case where it becomes necessary for the employer to perform the work without such permission is an exception to the said rule.<sup>27</sup>

Necessity may for this purpose be synonymous with impossibility. Citing several of the provisions of the UAE Civil Code that address termination,<sup>28</sup> the Federal Supreme Court in a judgment in 2009,<sup>29</sup> concluded that:

All such provisions indicate that if the contractor fails to perform the works assigned to him under the construction contract, or his work fails

<sup>25</sup> UAE Civil Code, Article 877. Also, Bahrain Civil Code, Article 590, Kuwait Civil Code, Article 667 and the Qatar Civil Code, Article 688. The Oman Civil Code does not include an equivalent provision.

<sup>26</sup> Dubai Cassation No. 353/1999 dated 15 January 2000, in which a main contractor's termination of the works of the cladding subcontractor was held to be permitted pursuant to the UAE Civil Code, Article 877 and Federal Supreme Court Nos. 446 and 541/21 dated 15 May 2001. It does not follow that all provisions applicable to an employer and contractor apply equally between a contractor and subcontractor (Federal Supreme Court No. 573/2008 dated 18 December 2008).

<sup>27</sup> Dubai Cassation No. 353/1999 dated 15 January 2000 and Abu Dhabi Cassation No. 293/2009 dated 27 May 2009.

<sup>28</sup> UAE Civil Code, Articles 272, 381 and 877.

<sup>29</sup> Abu Dhabi Cassation No. 293/3 dated 27 May 2009.

to meet the conditions and specifications agreed on, the employer may request termination of the contract immediately if the repair work is impossible.

In such cases it appears that termination affects neither the accrued rights of the parties, including a contractor's right to be paid for the work performed up to termination, nor an employer's entitlement to damages for breach, including damages for defective work.<sup>30</sup>

<sup>30</sup> As above in which damages were awarded in lieu of remedial work. In contrast, in Federal Supreme Court No. 78/2010 it was held that 'After termination the contract cannot be used as a basis to claim damages'.



# 9

## Decennial Liability

Any analysis of defects liability is, first and foremost, a matter of contract. But it is also a defining characteristic of civil law that it comprises a comprehensive set of rules governing commercial and personal activities some of which are not regulated exclusively by the will of the parties.<sup>1</sup> One such activity is the design and construction buildings and other structures, liability for which is governed by a number of additional statutory provisions the distinguishing feature of which is that they impose liability without the necessity for fault or proof of causation. They safeguard the interests of owners and occupiers, at the expense of designers and contractors, when issues involving the structural integrity or safety of buildings arise.

It is, of course, in the public interest that structures should be structurally sound. Further, the consultant and contractor are better placed than most owners to deliver an outcome consistent with this objective. In consequence, each of the applicable civil codes of the Gulf states allocates the risk of serious structural defects to the consultant and contractor jointly and severally. This marks a notable departure from the corresponding position at common law which does not single out liability for structural failure from liability for defects in general<sup>2</sup> but is consistent with an approach that imposes risk on

<sup>1</sup> For a discussion of mandatory provisions see Chapter 5.2 [Contractual principles: Mandatory obligations].

<sup>2</sup> A notable exception under English law is the Defective Premises Act 1972, pursuant to which a dwelling must be fit for habitation upon completion. Pursuant to the Occupiers' Liability Act 1957 and the Occupiers' Liability Act 1984, the owner or tenant of a property owes a duty of care to visitors, including trespassers. However, there is no specific legislative obligation on a contractor or a consultant to avoid serious structural defects or a collapse of a building.

those that possess a special skill or technical knowledge. Thus, it is consistent with the imposition of an *obligation de résultat* on a designer.<sup>3</sup>

## 9.1 Statutory sources

In the United Arab Emirates the risk of structural failure is imposed on a consultant and contractor in the following terms:

- (1) If the subject matter of the contract is the construction of buildings or other fixed installations, the plans for which are made by an architect, to be carried out by the contractor under his supervision, they shall both be jointly liable for a period of ten years to make compensation to the employer for any total or partial collapse of the building they have constructed or installation they have erected, and for any defect which threatens the stability or safety of the building, unless the contract specifies a longer period. The above shall apply unless the contracting parties intend that such installations should remain in place for a period of less than ten years.
- (2) The said obligation to make compensation shall remain notwithstanding that the defect or collapse arises out of a defect in the land itself or that the employer consented to the construction of the defective buildings or installations.
- (3) The period of ten years shall commence as from the time of delivery of the work.<sup>4</sup>

Thus, on projects in the United Arab Emirates, liability for the cost of rectifying a structural defect appearing in a building or installation within ten years of handover<sup>5</sup> is imposed jointly and severally on the project's main contractor and design consultant regardless of fault or breach of contract. Corresponding provisions are found in each of the other Gulf states.<sup>6</sup>

This form of liability is commonly referred to by virtue of its duration as 'decennial' liability, a misnomer in the case of Bahrain where the period of liability is five years.<sup>7</sup>

<sup>3</sup> Chapter 7 [Design and supervision].

<sup>4</sup> UAE Civil Code, Article 880.

<sup>5</sup> Federal Supreme Court No. 293/2009 dated 27 May 2009 in which the court rejected a claim pursuant to Article 880 as, due to the employer's termination, the villas that were said to be defective were incomplete at the time of the claim.

<sup>6</sup> Kuwait Civil Code, Article 692, Oman Civil Code, Article 634, Qatar Civil Code, Article 711 and, to some extent, Saudi Arabia Government Tenders and Procurement Law, Article 76.

<sup>7</sup> Bahrain Civil Code, Article 615. This piece of good news for a contractor is largely negated by the Bahrain Civil Code, Article 596, which effectively imposes a fitness for purpose obligation, albeit one that does not appear to be mandatory.

A consultant that has not administered the construction contract is liable only for design errors, not for defective workmanship.<sup>8</sup> Overseeing the construction phase causes a consultant to be liable jointly with a contractor for both design and workmanship.

The trigger events for decennial liability – ‘partial or total structural collapse’ and ‘defects threatening the stability or safety of a structure’ – are not defined in the applicable laws and have received no significant judicial consideration beyond confirmation that not all defects trigger decennial liability, only those threatening the stability and safety of a structure.<sup>9</sup> Neither has the identity of the consultant for the purpose of decennial liability received any significant judicial consideration, an issue that arises wherever responsibility for design or supervision is divided between more than one consultant, a frequent occurrence. These are likely to be treated as matters of fact, to be determined by the Court of Merits.

The modern source of decennial liability is generally acknowledged to be the French Civil Code. The corresponding provision of the French Civil Code, in fact, comprises three elements:

- warranty of perfected completion<sup>10</sup>
- warranty of good running<sup>11</sup>
- decennial liability<sup>12</sup>

The first of these applies to all defects for a period of one year following handover, with the exception of wear and tear. The warranty of good running extends to equipment incorporated within the structure for two years.

The key provision in the context of liability for serious structural defects provides that:

Every builder of a structure is legally responsible to the owner or those deriving title from him for any damage (including damage resulting from sub-soil conditions) which imperils the integrity of the structural or which by affecting one of its component elements or one of the equipment elements, renders the structure unfit for its intended purpose.

<sup>8</sup> Federal Supreme Court No. 2/21 dated 1 April 2001. The judgment suggests that this was a design-build contract and that, as the defect was in the workmanship, the contractor was liable for the awarded compensation in full, failing in an attempt to have liability shared with the consultant.

<sup>9</sup> Abu Dhabi Cassation No. 293/2009 dated 27 May 2009.

<sup>10</sup> French Civil Code, Article 1792(2) and 1792(6).

<sup>11</sup> Above, Article 1792(3).

<sup>12</sup> Above, Articles 1792 and 2270.

Such responsibility will not be imposed where the builder demonstrates that the said damage results from causation outside his authority and control.<sup>13</sup>

These provisions are accompanied by a mandatory insurance scheme comprising decennial liability insurance taken out by a contractor and latent defects insurance taken out by the owner.<sup>14</sup>

Although, a comparative study of the French Civil Code is instructive, there are a number of crucial differences between the two liability regimes. In particular, pursuant to the region's civil codes a contractor's strict liability is limited to structural defects to the exclusion of a warranty of perfected completion or good running for plant and equipment. Neither does the regime include a mandatory obligation to insure this risk. Further, in France, the obligation expressly passes through to subsequent owners of the property. In these respects, the French version of decennial liability is broader than the corresponding version that applies by virtue of the region's civil codes.

## 9.2 Strict liability

In a case that came before the Federal Supreme Court for a second time,<sup>15</sup> the Union's highest Federal Court provided some useful analysis of the nature of decennial liability. The proceedings arose from a project to increase the height of a building in Abu Dhabi from five to twelve floors. The consultant certified that the structure was capable of carrying the additional load and, accordingly, a contractor was engaged for the execution of the extension works. Several years after the works were completed and handed over defects were observed resulting in an investigation. A report by Abu Dhabi Municipality condemned the buildings as unfit for occupation and recommended demolition. The defects were attributed to the use of building materials that were not in accordance with the specifications and the original structure not being fit to carry the additional floors. The Court of Appeal rendered a judgment ordering the consultant and the contractor to pay AED

<sup>13</sup> Above, Article 1792. Similar provisions are also contained in the Egyptian Civil Code, a primary source for the region's civil codes, at Articles 651–654. A noteworthy difference is the explicit exclusion of subcontractors from the rigours of decennial liability under the Egyptian Civil Code.

<sup>14</sup> 'Liability and insurance regimes in the construction sector: national schemes and guidelines to stimulate innovation and sustainability', published in the Official Journal of the European Union dated 02/12/2008.

<sup>15</sup> Federal Supreme Court No. 336 and 470/21 dated 20 March 2001, previously Federal Supreme Court Nos. 101, 102 and 59/16 dated 28 June 1998.

7,066,800 jointly and equally to the employer and ordered the owner of the consulting firm to pay AED 2,011,464.50 to the heirs of the building owner.

Rejecting the consultant's and contractor's defence that the defects were attributable to defects in the existing part of the structure, the Federal Supreme Court held:

The above argument is not correct because it is held by this court that the draftsmen of Article 880 and the subsequent articles of the Civil Code set out the contract in accordance with the court laws, comparative jurisprudence and provisions of Islamic statutes. The law prescribes the rules applicable to the engineer on the basis that his work is to prepare the designs and drawings and to control performance. Liability for the safety and collapse of a building applies to the engineer and contractor and places them on an equal footing unless the performance of the engineer was confined to preparing the design, in which case he shall only be responsible for defects and damage arising from such design. Therefore, the liability of the engineer is based on a contract entered into between him and the employer under which the engineer is responsible for errors in the design or for defects in the execution of the works. In fact, such liability is contractual and is provided for by law in each contract whether or not it is stated. Such responsibility is considered an obligation leading to a result ... the breach of the obligation is established whenever the result has not been attained without the need to prove any wrongdoing.

The Federal Supreme Court upheld the Court of Appeal's judgment on the basis that it was the responsibility of both the consultant and the contractor to ensure that the existing structure was capable of carrying additional floors without any requirement for proof of wrongdoing.

### 9.3 Contractual status

In characterising decennial liability as a contractual obligation<sup>16</sup> and 'an obligation leading to a result'<sup>17</sup> the Federal Supreme Court clarified both the nature and extent of the obligation imposed on consultants and contractors.<sup>18</sup>

<sup>16</sup> This is a consistent theme in decennial liability judgments: Dubai Cassation No. 476/2003 dated 20 June 2004, Dubai Cassation No. 107/2005 dated 26 September 2005, Federal Supreme Court No. 43/2010 dated 31 March 2010, Federal Supreme Court No. 293/2009 dated 27 May 2009 and Federal Supreme Court No. 722/21 dated 9 October 2001.

<sup>17</sup> Abu Dhabi Cassation Nos. 43, 78 and 161/4 dated 31 March 2010 in which the court likewise held that a contractor's and consultant's obligation is 'to achieve the purpose not to use diligence'.

<sup>18</sup> For additional commentary on the distinction between an *obligation de résultat* and an *obligation de moyens* see Chapter 7.2 [Design and Supervision: Obligation of Result].

Significantly, failure to achieve the result, while giving rise to a presumption of liability, is excusable if the failure is attributable to an external cause (*cause étrangère*).

The Federal Supreme Court, in 2001, considered the liability of a consultant and contractor for cracks that appeared in a development of commercial buildings which put the buildings at risk of collapse.<sup>19</sup> Accepting the consultant's and contractor's appeal from the Court of Appeal judgment holding them liable for the costs of repair and reconstruction of the defective buildings, the Federal Supreme Court concluded that the lower court had failed to take sufficient account of the consultant's and contractor's defence that the cracks were caused by adjacent trenching and tunnelling works constituting an external cause. The Federal Supreme Court explained this conclusion as follows:

Existence of the fault or building collapse shall, itself, constitute the error. The contractor or engineer shall not be able to avoid liability for compensation in damages except by establishing the existence of an external reason. When the contractor or engineer raises the plea of external cause, they are not denying the existence of the error but seeking to invalidate the causal relationship between the error and the damage sustained.

This limited defence to a decennial liability claim is consistent not only with the application of contractual principles but also with the caveat to the French Civil Code, Article 1792, that responsibility will not be imposed if the contractor demonstrates that the damage arises from an external cause. Nevertheless, it is the consultant or contractor that must demonstrate the existence of an intervening cause absent which liability for the defects is imposed.<sup>20</sup>

The contractual nature of decennial liability is also significant for the position of third parties. Notably, third parties do not enjoy the benefit of the rights conferred by contracts to which they are not privy without agreement. Thus, an insurer seeking a recovery on a subrogated basis for water damage to the insured's property failed due to the absence of a contract between either the insurer or the insured and the contractor that supplied and installed the water pipes that were the source of the damage.<sup>21</sup> Holding that decennial liability is contractual the Dubai Court of Cassation concluded that:

Such liability may not be alleged by a third party that has no contractual relationship with any of them.

<sup>19</sup> Federal Supreme Court Nos. 722 and 735/22 dated 9 October 2001.

<sup>20</sup> Dubai Cassation No. 107/2005 dated 26 September 2005

<sup>21</sup> Dubai Cassation No. 150/2007 dated 7 October 2007.

Subsequent owners will also have an interest in the rights conferred on an employer but although encouragement can be drawn from the French Civil Code,<sup>22</sup> which extends the entitlement to assert decennial liability to those deriving title from the owner, it would appear, in the absence of any corresponding provision in the region's civil codes, that the contractual nature of the right displaces any such possibility, unless there is an assignment or equivalent form of agreement.<sup>23</sup> Likewise, subcontractors, it is submitted, do not incur decennial liability as contractual obligations do not bind third parties in the absence of agreement. This is certainly the position pursuant to the corresponding decennial liability provision contained in the Egyptian Civil Code which expressly exempts subcontractors from its application.<sup>24</sup>

## 9.4 Compensation

A further consequence of the contractual nature of decennial liability is that the compensation to be paid in respect of any qualifying defect will be calculated on the same basis as damages for breach.<sup>25</sup> Although liability is joint and several,<sup>26</sup> a court has discretion to allocate liability between multiple obligors.<sup>27</sup>

Presented with a claim against a consultant and a contractor the Federal Supreme court held in a judgment in 2001 that liability was to be apportioned on the following basis:

If there is cogent evidence that the collapse or defect is attributable to a fault of both the consultant and contractor, they shall share the liability for same pro rata to their respective contribution to the occurrence of damage, taking into due consideration the gravity of such a fault, whether each party thereof has committed a fault that is separate from the fault committed by the other party or if both parties have committed a joint fault. Thus, the liability shall be shared by both consultant and contractor if there is good evidence that the damage resulted from a

<sup>22</sup> French Civil Code, Article 1792.

<sup>23</sup> In 'Decennial Liability and Insurance under Egyptian Law', 1 Arab Law Quarterly 504, at p. 507, Dr Naim G. Attia expresses the contrary view that liability will transfer to a new landlord without any need for this to be expressed in the consultancy agreement or construction contract.

<sup>24</sup> Also, Qatar Civil Code, Article 711(3). Cf. Dubai Cassation No. 353/1999 dated 15 January 2000 in which the Civil Code, Article 877, was found to be stepped down to the cladding subcontractor.

<sup>25</sup> Chapter 19 [Damages].

<sup>26</sup> Bahrain Civil Code, Article 615(1) and the UAE Civil Code, Article 880(1).

<sup>27</sup> Abu Dhabi Cassation No. 339/2009 dated 18 June 2009.

fault of both the architect and contractor for failure to ensure the soundness and durability of the foundations and columns of the building and to ensure the soundness of the main structures of the building and foundations thereof.<sup>28</sup>

Apportionment between a contractor and a designer in this way does not affect an employer's right to claim the full amount from either party but identifies the entitlement of each of them to claim an indemnity from the other if payment is made by one of them in full.<sup>29</sup> The domestic courts can be expected to adopt a pragmatic approach to apportionment and to joint obligations.

**Key points: decennial liability**

- Trigger events are total or partial collapse of the building and/or a defect threatening the stability or safety of the structure.
- Liability lasts for ten years following hand over, except for structures designed with a shorter lifespan.
- No fault is necessary in order for liability to arise.
- Contractors and consultants are jointly liable.
- Compensation is payable to the employer.
- Liability attaches notwithstanding that the collapse or defect is caused by subsurface conditions or that the employer approved the defective work.
- Claims for compensation must be commenced within three years of the collapse or discovery of the defect.
- Agreements purporting to exclude or limit decennial liability are void.
- Liability can be avoided by proving that the defects or collapse are attributable to an external cause.

## 9.5 Mitigating decennial liability

As decennial liability is afforded the status of a mandatory provision this cannot readily be avoided or limited. Specifically, the UAE Civil Code provides:

Any agreement the effect of which is to exempt the contractor or the consultant from liability, or to limit such liability, shall be void.<sup>30</sup>

<sup>28</sup> Federal Supreme Court Nos. 336 and 407/21 dated 20 March 2001.

<sup>29</sup> For the applicable provisions on joint, common and indivisible rights see UAE Civil Code, Articles 450–467.

<sup>30</sup> UAE Civil Code, Article 882.



A similar restriction on contracting out of decennial liability applies in Bahrain, Kuwait, Oman and Qatar.<sup>31</sup> In the last it is explicitly provided that decennial liability is not passed down to a subcontractor.<sup>32</sup>

It is, nevertheless, feasible to mitigate the risk by means of indemnities and, in particular, indemnities in the form of insurance. Indeed, in France and Egypt, which are a source of the decennial liability provisions, procuring insurance is mandatory.<sup>33</sup> Unlike in France and Egypt, however, decennial liability insurance is not mandated pursuant to the region's civil codes or otherwise.

Standard forms of liability insurance covering construction activities, such as contractor's all risks, professional indemnity and latent or inherent defects policies, are not written to provide decennial liability cover and do not, in general, do so. There is, nevertheless, a risk that these products can be confused with decennial liability insurance, especially if they are marketed as having some of the characteristics of decennial liability cover, or a 'decennial' label is attached.

As inherent defects insurance is typically procured on behalf of a building owner only and permits subrogation against a consultant and a contractor it is not a suitable form of cover for protecting a consultant or a contractor from decennial liability. Even if a consultant and contractor are joint insureds and rights of subrogation are waived inherent defects cover is often limited in terms of the types and causes of defects to which it applies. Most such policies exclude, for example, damage caused by ground conditions, a risk explicitly falling within the scope of decennial liability. Inherent defects insurance is, anyway, rare in the Gulf.

Professional indemnity insurance typically provides cover for a consultant against negligent errors and omissions, not for all liabilities imposed by law. A defining characteristic of decennial liability is that no evidence of negligence or breach of duty by a consultant is required, so professional indemnity cover falls short of protecting an insured from this risk. For the same reason, although a ten-year reporting extension on a standard project professional indemnity policy extends the duration of cover to match that applicable by law it still falls short of protecting an insured from the scope of the underlying decennial liability risk imposed by the region's civil codes. A decennial liability endorsement on a contractor's all risk insurance, likewise does not typically extend cover to include the applicable statutory decennial liability risk.

<sup>31</sup> Bahrain Civil Code, Article 620, Kuwait Civil Code, Article 697, Oman Civil Code, Article 636 and the Qatar Civil Code, Article 715.

<sup>32</sup> Qatar Civil Code, Article 711(3).

<sup>33</sup> In France, pursuant to the 'Spinetta Law' dated 4 January 1978 and in Egypt, pursuant to Building Law No. 119/2008.

Whether genuine decennial liability insurance is available in the Gulf remains unclear. Certainly there is no standard product available that is routinely purchased to cover the region's projects. A bespoke product, even one that is a derivative of an inherent defects cover, is likely to find a limited pool of reinsurers willing to accept this risk. This limits the commercial viability of such cover to the largest and most complex projects or the most determined and well funded insureds.<sup>34</sup>

In consequence, the residual risk is, in practice, mostly retained by consultants and contractors, a situation that will most likely continue well into the future. The cost and complexity of any insurance product, which requires a robust monitoring and approval process throughout design and construction and the lack of historical data on building defects deters all but the most specialised underwriters from covering this risk. Making a compelling case to an employer that a hefty premium should be incurred to cover a risk that is otherwise borne by a consultant or a contractor without any obvious cost is also not likely to be easy. Further, consultants and contractors appear not to be demanding such insurance, possibly due a perception that the risk of serious structural failure is low and, in the case of consultants, that professional indemnity insurance will cover all but the most unusual cases in which decennial liability eventuates. It is no coincidence, perhaps, that in countries with an active decennial liability insurance market this is mandated and regulated by law.

## 9.6 Public projects

The quality of materials and the standard of workmanship procured by government departments and ministries across the region are potentially subject to additional regulation.

For Federal Government projects in the United Arab Emirates, the applicable provisions include the following:

The contractor, in his capacity as a manufacturer or producer, shall take into consideration that the design and specification are approved and are adequate to ensure safe and satisfactory operation in all respects, even if the contract omits to provide conditions or terms that are necessary for the proper completion of the works or even if those terms are shown on the drawings but are not referred to in the specification or are referred to in the specification but are not shown on the drawings.<sup>35</sup>

<sup>34</sup> It is understood that some underwriting capacity for decennial liability risk in the Gulf has emerged recently but that this is confined to bespoke insurance schemes on large projects.

<sup>35</sup> Federal Ministerial Decision No. 20/2000, Article 80.

At its broadest and most onerous this provision might impose an obligation on a contractor to ensure that the works are fit for their intended purpose or, more particularly, for 'safe and satisfactory operation'. But the provision is open to a narrower interpretation that a contractor must include in the contract price for all items of work that are necessary for the delivery of an operational facility, irrespective of any inadvertent omissions from the drawings, specification or pricing documents, an obligation that is roughly analogous to that imposed by the FIDIC Conditions<sup>36</sup> and the 'inclusive price' principle which stems from a series of judgments in the English courts.<sup>37</sup>

Mirroring the warranty of perfected completion<sup>38</sup> and/or the Defects Notification Period pursuant to the FIDIC Conditions, works procured by the Federal Government benefit from a one-year warranty commencing from the preliminary taking-over of the works for the duration of which:

The contractor shall be fully liable for the work and its maintenance ... and shall undertake to repair any fault or damage during this period at its own expense.<sup>39</sup>

Such works also benefit from a warranty that overlaps with that provided by the mandatory terms of the UAE Civil Code,<sup>40</sup> for ten years from the preliminary taking-over of the works against major defects arising from 'cheating or poor workmanship'.<sup>41</sup> A consultant is said not to be released from responsibility for the same ten-year period.

In Bahrain a contractor must guarantee the performance of the works for the period, if any, stated in the contract<sup>42</sup> but, in general, the public procurement laws of the Gulf states tend not to impose additional materials and workmanship obligations.

The following provision that applies to projects procured by the government of Dubai is similar to that applicable to Federal Government projects:

In all cases, the contractor shall make sure of the soundness and validity of the approved specifications, drawings, designs and quantities and shall inform the department or the consultant of his comments on them.<sup>43</sup>

<sup>36</sup> Sub-Clause 4.11 [Sufficiency of the Accepted Contract Amount].

<sup>37</sup> *Patman & Fotheringham v Pilditch* (1904) HBC (4th Ed) Vol. 2 324 CA, *Gold v Patman & Fotheringham* [1958] 2 All ER 497, *Farr v Ministry of Transport* (1965) 5 BLR 97 and *Barry D. Trentham Ltd v McNeil* 1996 S.L.T. 202.

<sup>38</sup> Chapter 9.1 [Decennial liability: Statutory sources].

<sup>39</sup> Federal Ministerial Decision No. 20/2000, Article 120.

<sup>40</sup> Article 880.

<sup>41</sup> Federal Ministerial Decision No. 20/2000, Article 120.

<sup>42</sup> Bahrain Law No. 37/2002 Issuing the Implementing Regulations for the Tenders and Purchase Law, Article 84.

<sup>43</sup> Dubai Law No. 6/1997, Article 61.

Again, the effect of this provision is unclear. In particular, it is unclear whether it imposes liability on a contractor for the soundness and validity of the design without reference to fault or a less onerous obligation merely to notify the relevant department of any observations the contractor has on the soundness and validity of the design. Neither is it clear whether a contractor must undertake a specific design check or whether a tender review is sufficient. In the absence of clear words imposing strict liability it is the less onerous interpretation, it is submitted, that prevails. Neither, it is submitted, does this provision relieve the Government of the obligation, imposed by the same law, to prepare 'clear and complete' technical specifications.<sup>44</sup> Corresponding provisions apply to Federal Government projects.<sup>45</sup> In Abu Dhabi the regulations, despite being less prescriptive, impose on each procuring authority responsibility for preparing detailed and complete specifications.<sup>46</sup>

Projects procured by the Government of Dubai are also subject to the following provision:

The contractor shall remain responsible for guaranteeing and maintaining the contract subject works for one year from the date of the preliminary taking over and shall undertake to repair any damage occurring as a result of poor execution.

He shall also remain responsible for a period of ten years for every major defect occurring to the construction as a result of poor execution without revoking responsibility of the supervising consultant for the said defects.<sup>47</sup>

For a period of one year from the preliminary taking-over a contractor must rectify any defects arising from poor execution. What constitutes poor execution for the purpose of this provision is not specified, though the imposition of any standard higher than that contained in the contract would have to be reconciled with the UAE Civil Code.<sup>48</sup>

Projects procured by the Government of Abu Dhabi are subject to provisions similar to those that apply to projects undertaken by the Federal Government and the Dubai Government. Thus, a contractor is required to remedy any defects that appear within a year following substantial completion that are attributable to faulty execution and to remedy any serious defect appearing within ten years, likewise, arising due to faulty execution of the works.<sup>49</sup>

<sup>44</sup> Above, Article 15(1).

<sup>45</sup> Federal Ministerial Decision No. 20/2000, Article 13.

<sup>46</sup> Purchases, Tenders, Bids and Warehouses manual, paragraph 5(5).

<sup>47</sup> Dubai Law No. 6/1997, Article 69.

<sup>48</sup> UAE Civil Code, Article 875.

<sup>49</sup> Abu Dhabi Law No. 6/2008 and the Purchases, Tenders, Bids and Warehouses manual, paragraph 55.

# 10

## Physical Damage and Personal Injury

In addition to liability for defects in the works themselves liability arises for damages to property and personal injury caused by or during construction work.

### 10.1 Delict

The acts causing harm doctrine<sup>1</sup> – broadly equivalent to the common law tort of negligence and referred to in the civil law context as ‘delict’ – obligates a person who causes harm to another to make it good, whether or not there is a contractual relationship between them.

While qualified and clarified in subsequent provisions of the Civil Code and judgments of the domestic courts, delict is far reaching and, as with torts in common law jurisdictions, imposes liability for physical injury and property damage.

The source for this liability is contained in an almost identical form in the civil code of each Gulf state:

Any harm done to another shall render the actor, even though not a person of discretion, liable to make good the harm.<sup>2</sup>

<sup>1</sup> Chapter 2.3 [Construction law: Delict (tort)] for the relationship between delict and contractual obligations.

<sup>2</sup> Bahrain Civil Code, Article 158, Kuwait Civil Code, Article 227, Oman Civil Code, Article 176, Qatar Civil Code, Article 199 and the UAE Civil Code, Article 282.

A person is vicariously liable for acts causing such harm by those under that person's supervision or control<sup>3</sup> provided that there is actual control and supervision and that the act is performed in the course of a servant and master or agency relationship.<sup>4</sup>

Three elements must be present for liability to be established in delict: an act, harm and a causal relationship between the act and the harm.<sup>5</sup> Crucially, the doctrine does not require fault.<sup>6</sup> Instead, it is for the court to determine the limits of the acts qualifying for liability and the presence of any of the grounds for relieving a party of liability.<sup>7</sup> As any agreement to exclude liability in delict is void<sup>8</sup> any attempt, such as that contained in the FIDIC Conditions,<sup>9</sup> to re-allocate liability for physical damage or injury must overcome an objection based on this mandatory prohibition.

In addition to delict, there are a number of specific statutory provisions rendering parties liable for physical damage and personal injury that are of particular application in the construction context.

## 10.2 Criminal damage

It is a criminal offence in the United Arab Emirates, punishable by a period of imprisonment of one year and a maximum fine of AED 10,000 for any person to damage, destroy or put out of use any fixed or moveable property belonging to a third party. It is further provided that:

<sup>3</sup> Bahrain Civil Code, Article 172, Kuwait Civil Code, Article 240, Oman Civil Code, Article 196(1)(b), Qatar Civil Code, Article 209 and the UAE Civil Code, Article 313(1).

<sup>4</sup> In Dubai Cassation Nos. 130/2003 dated 1 June 2003 and No. 311/2008 dated 5 April 2009 the court held that an employer is vicariously liable for an employee for harm caused as part of an employment relationship notwithstanding the absence of actual control.

<sup>5</sup> Explanatory notes accompanying the UAE Civil Code. These specify that an 'act' includes an act of omission which is consistent the subsequent commentary that states that Article 282 includes a positive duty of care.

<sup>6</sup> 'The Concept of Fault in the Arab Law of Contract', Adnan Amkhan, *Arab Law Quarterly*, Vol. 9, No. 2 (1994), p. 171, though there is a distinction between harm caused directly or indirectly, the latter requiring an element of wrongdoing per UAE Civil Code, Article 283. Amkhan notes that Islamic law traditionally bases liability on damage rather than fault. Cf. Dubai Cassation No. 243/1994 dated 27 May 1995. Also, Dubai Cassation No. 334/1995 dated 13 April 1996.

<sup>7</sup> Dubai Cassation No. 290/1990 dated 3 August 1991.

<sup>8</sup> Bahrain Civil Code, Article 181, Kuwait Civil Code, Article 254, Oman Civil Code, Article 183, Qatar Civil Code, Article 259(3) and the UAE Civil Code, Article 296.

<sup>9</sup> The FIDIC Conditions, Sub-Clauses 17.1–17.3, provide that the Contractor bears the risk of damage to the Works unless the cause is one of those identified as an Employer's Risk. The scope of Employer's Risks is limited. This can have the effect of making the Contractor liable for damage to the Works caused by acts of the Employer. If such acts give rise to a cause of action in delict the mandatory prohibition on excluding such liability becomes relevant.

The punishment shall be imprisonment if the crime results in the disruption of any public utility or any institution for the public benefit and use or, if as a result thereof, life, safety or health is exposed to danger.<sup>10</sup>

On the basis of this and other similar provisions construction workers, including supervisory staff, are from time to time convicted and sentenced to both fines and imprisonment for causing damage to third party property, including overhead and underground service lines. The maximum sentence in the United Arab Emirates increases to a prison term not exceeding ten years for 'any person who wilfully causes the breaking or destruction of any pipes or special equipment belonging to the gas, water, petrol and electricity utilities'.<sup>11</sup> Physical injury or death arising as a result of construction works is treated as matter for criminal investigation and usually results in a prosecution<sup>12</sup> which, in addition to carrying the potential for criminal sanctions, permits any party suffering loss to lodge an application for damages as part of the criminal proceedings.<sup>13</sup>

### **10.3 Presumed liability for property damage**

In the United Arab Emirates and Oman a contractor is liable for any loss or damage caused by its act or work, whether an act of commission or omission, unless arising out of an unavoidable event.<sup>14</sup> This provision is not mirrored in the civil codes of Bahrain, Kuwait or Qatar.

This form of liability was applied in a case decided by Dubai's highest Court, the Court of Cassation, in 1999.<sup>15</sup> The case arose out of the installation of a central air-conditioning system that was completed by the defendant contractor on 1 June, 1996. On 23 July 1996 a cooling pipe burst, causing damage to electrical equipment forming part of the building's lifts. The owner's insurers bore the repair costs and brought a subrogated recovery claim against the contractor.

Relying on the Civil Code, Article 878, the Court of Cassation held the contractor:

liable for damages regardless of whether or not any breach or negligence is established, provided that the damage or loss is not the result of an unavoidable incident.

<sup>10</sup> UAE Penal Code, Article 424. See also Bahrain Penal Code, Articles 155 and 409.

<sup>11</sup> UAE Penal Code, Article 301.

<sup>12</sup> Chapter 6.6 [Health, Safety and Welfare: Sanctions and penalties].

<sup>13</sup> Qatar Penal Procedures Law, Article 19, Oman Penal Procedures Law, Article 4 and the UAE Penal Procedures Code, Article 22.

<sup>14</sup> UAE Civil Code, Article 878 and Oman Civil Code, Article 632.

<sup>15</sup> Dubai Cassation No. 22/1999 dated 18 April 1999.

Drawing parallels with decennial liability the Court of Cassation held that the lower courts had misapplied this provision by requiring the insurer to prove that the damage had been caused by the contractor's breach of contract or negligence. The correct test was whether or not the contractor had shown that the damage had been caused by an intervening event (for example misuse) or *force majeure*.<sup>16</sup> As there was no indication that the cooling pipe had burst due to an intervening event or *force majeure* the contractor was liable for the damage irrespective of whether any breach of contract or negligence could be established.

As with decennial liability, the obligations imposed by the UAE Civil Code, Article 878 are treated as contractual, which has consequences for third parties. Notably, third parties do not enjoy the benefit of the rights conferred by contracts to which they are not privy without agreement. Thus, an insurer seeking a recovery on a subrogated basis for water damage to the insured's property failed due to the absence of a contract between either the insurer or the insured and the contractor that supplied and installed the water pipes that were the source of the damage.<sup>17</sup>

#### **10.4 Inherent danger (nuisance)**

A similar presumption of liability arises in cases involving damage caused by the collapse of a building<sup>18</sup> or by mechanical equipment or other things 'which require special care in order to prevent their causing damage'.<sup>19</sup> To avoid being liable the person in control<sup>20</sup> must prove that there was no wrongdoing in the case of a building collapse or that the damage could not

<sup>16</sup> In Dubai Cassation No. 511/2002 dated 5 April 2003 the court allowed an appeal against a judgment applying Article 878, on the grounds that the lower court had failed to consider a defence that damage to a vessel's engine had been caused by the vessel owner's subsequent modifications aimed at increasing the vessel's speed. In Dubai Cassations Nos. 93, 132 and 188 of 2004 dated 15 May 2005 the Civil Code, Article 878 was applied to the same effect in an insurance case involving the theft of a vehicle from a car wash. The theft was not sufficient in that case to constitute an intervening event.

<sup>17</sup> Dubai Cassation No. 150/2007 dated 7 October 2007. The Court of Cassation found that the elements required for the contractor or consultant to be liable to a third party in delict were not proved.

<sup>18</sup> UAE Civil Code, Article 315(1). Also, Oman Civil Code, Article 174, Kuwait Civil Code, Article 242, Oman Civil Code, Article 198(1) and the Qatar Civil Code, Article 212(2).

<sup>19</sup> UAE Civil Code, Article 316. Also Bahrain Civil Code, Article 175, Kuwait Civil Code, Article 243, Oman Civil Code, Article 199 and the Qatar Civil Code, Article 212(1). This heightened responsibility for the creation of risk has some similarity with the common law tort of nuisance.

<sup>20</sup> In Dubai Cassation Nos. 168 & 174/2006 dated 24 January 2007 the contractor and consultant successfully resisted liability under Article 316 for flooding caused by a burst pipe as the works had been finished at the time of the incident.



have been prevented in the case of mechanical equipment. A building occupier is entitled to apply to the court to take measures at the owner's expense to prevent such harm if the owner fails to do so itself.<sup>21</sup>

In a case brought by the owner of a factory in Dubai for compensation for damage caused by a fire that spread from an adjacent property, the Dubai Court of Cassation considered the principles applicable to these provisions. The Court of Cassation drew a distinction between delict and liability in the special circumstances identified in the Civil Code as follows:

The liability for things concept whose provisions the Appellant establishment seeks to apply with respect to the damages they claim is essentially different from the concept of liability for personal acts which the appealed decision examined and concluded was not present given that the requirement for fault was not established. The first type of liability, as mentioned earlier, attaches the moment damage occurs to a third party due to a thing which requires special care to guard against its potential hazards. There is no need to establish wrongdoing or negligence on the part of the guardian of the thing. The second type of liability attaches only by proof of wrongdoing or negligence on the part of the person who caused the damage.<sup>22</sup>

In the words of the Dubai Court of Cassation, a party that has been entrusted with something inherently dangerous must rely on established special defences:

To that end he would seek to establish that he took all the necessary precautions to prevent the thing causing damage to third parties or that the damage could not have been prevented on the basis that one could only have done what was in his means or seek to rely on the general rules by establishing that the damage did not result from the thing but resulted from a foreign cause in which he had no hand.

The burden of establishing one of the special defences is imposed on the defendant.

Similar statutory provisions applicable to projects for the Federal Government and the Government of Abu Dhabi impose liability for any damage caused to public property or personnel as well as requiring a contractor to protect labourers and third parties from injury.<sup>23</sup> The corresponding

<sup>21</sup> UAE Civil Code, Article 315(2). Also, Oman Civil Code, Article 198(2).

<sup>22</sup> Dubai Cassation No. 243/1994 dated 27 May 1995. Also, Dubai Cassation No. 334/1995 dated 13 April 1996.

<sup>23</sup> Federal Ministerial Decision 20/2000, Article 79 and Abu Dhabi Law No. 6/2008, Article 50.

provisions applicable to projects in Dubai require a contractor to take all necessary precautions to ensure the safety of passers-by and surrounding properties.<sup>24</sup> Furthermore, a contractor's and consultant's joint responsibility for the execution of the construction works extends to adjacent buildings and public utilities.<sup>25</sup>

## 10.5 Service lines and public utilities

Perhaps due to the frequency with which electricity, water, gas, oil and telephone lines are damaged these receive special treatment under the local laws of Abu Dhabi and Dubai. Local laws in Abu Dhabi prohibit any person from causing any damage to overhead or underground electricity cables, telephone lines and water, sewage and oil or gas pipelines.<sup>26</sup> Information on the location of service lines must be obtained, pursuant to other applicable local laws, from the Abu Dhabi Department of Municipality and Town Planning prior to the commencement of any works.<sup>27</sup>

Subject to applicable Federal laws, the penalty applicable to the person most directly connected with any contravention of the prohibition of damage to electricity cables in Abu Dhabi is a minimum prison term of two months and a maximum prison term of six months.<sup>28</sup> The sentence may be doubled if the relevant electricity authority is not promptly informed following the occurrence of the damage. In the case of other service lines a fine of between AED 5000 and AED 25,000 replaces the prison term.<sup>29</sup>

Statutory compensation, calculated by reference to schedules appended to the applicable laws, is payable in addition to any prison term or fine. In lieu of statutory compensation the owner of a damaged service line (other than electricity cables) may require the offending person to undertake any necessary repairs at the repairer's expense subject to a surcharge payable to the employer equal to ten per cent of the statutory compensation. As the applicable Abu Dhabi local laws do not provide that the statutory remedies are exclusive, an owner of a damaged service line may be entitled to additional compensation,<sup>30</sup> including compensation for any indirect or consequential loss.

<sup>24</sup> Dubai Law No. 3/1999, Article 16 and, for Government projects, Dubai Law No. 6/1997, Article 60.

<sup>25</sup> Above, Article 19.

<sup>26</sup> Abu Dhabi Law No. 10/1976, Article 4 and Abu Dhabi Law No. 12/1978, Article 4.

<sup>27</sup> Abu Dhabi Law No. 4/1983, Article 9.

<sup>28</sup> Abu Dhabi Law No. 10/1976, Article 6.

<sup>29</sup> Abu Dhabi Law No. 4/1980, Article 1 amending Abu Dhabi Law No. 12/1978.

<sup>30</sup> Chapter 19 [Damages].

In Dubai, local law requires any person, prior to undertaking work in the vicinity of electricity cables or water pipelines to obtain a no objection letter from the Dubai Electricity and Water Authority and to adhere to any terms and conditions imposed in any such letter.<sup>31</sup> As in Abu Dhabi, any damage to these service lines must be notified immediately to the relevant authority.

The penalties for any breach of the prohibition on causing damage to service lines include a maximum prison term of three months and a fine of between AED 5000 and AED 50,000.<sup>32</sup> Statutory compensation is payable in accordance with a schedule appended to the applicable law. In addition, an order may be made for the confiscation of any machinery or equipment used in the course of any breach of the applicable law. As the applicable Dubai local laws do not provide that the statutory remedies are exclusive, an owner of a damaged service line may be entitled to additional compensation,<sup>33</sup> including compensation for any indirect or consequential loss.

<sup>31</sup> Dubai Law No. 2/1994, Article 3.

<sup>32</sup> Above, Article 6.

<sup>33</sup> Chapter 19 [Damages].



# 11

## Time for Completion

Time and progress obligations are a central feature of construction contracts including, of course, the FIDIC Conditions. As the domestic courts of the Gulf states are required to apply the terms of an agreement – subject to public order objections that are unlikely to arise in relation to time and progress obligations<sup>1</sup> – these are the predominant factor in determining how delay is treated in the domestic courts.

Notwithstanding the significance of contractual terms the applicable law and practice continue to exert both direct and indirect influence over time and progress obligations and the treatment of delay, including on public sector projects. These topics, therefore, are the focus of this chapter.

### 11.1 Agreement

Agreement on the time for completion is recognised as a fundamental requirement for a construction contract<sup>2</sup> and it follows that if the parties are unable to fix a time for completion by agreement this provides grounds for a finding that a valid contract has not been brought into existence.

If the time for completion has been agreed, for example, in the manner provided for in the FIDIC Conditions,<sup>3</sup> this will be applied in accordance

<sup>1</sup> Chapter 3 [Contract formation].

<sup>2</sup> UAE Civil Code, Article 874.

<sup>3</sup> FIDIC Conditions, Sub-Clause 8.2 [Time for Completion].

with the principles governing contracts, including the importance of mutual intentions and any mandatory provisions of law. But there are some variances between the civil codes of the Gulf states in the treatment of a failure by the parties to agree the time for completion or to agree this expressly.

In Bahrain, Kuwait, Oman and Qatar failure to agree or to record an agreement is addressed directly by reference to custom and practice, reflecting the general approach to the interpretation of contracts. By way of illustration, the Oman Civil Code provides that:

The contractor shall complete the work in accordance with the conditions of the contract and within the period agreed. If there were no conditions or no agreement was made with respect to the completion period, he shall complete the work according to the commonly accepted practices and within such reasonable period as is required by the nature of the work.<sup>4</sup>

The time for completion shall, therefore, be a reasonable period determined by reference to the nature of the works and to industry custom and practice.

In contrast, the UAE Civil Code does not directly address the important issue of the time for completion of construction works. An obligation to complete the works within a specified time may, nevertheless, arise by virtue of the applicable principles of contractual interpretation. Specifically, it is recognised that the parties' obligations pursuant to a contract extend beyond the strict confines of the express terms of their contract.<sup>5</sup> The domestic courts may extend those obligations where it is considered that such an extension is justified by the law, custom or nature of the transaction.<sup>6</sup> As a result, if time related obligations are not fixed, whether clearly or at all, there is scope for these to be extracted from the type and nature of the contract, commercial custom and the relevant circumstances.

Relying on the principle that obligations embrace that which is appurtenant to an explicit obligation the Abu Dhabi Court of Cassation held in a real estate case in 2010<sup>7</sup> that the time for completion and delivery of an

<sup>4</sup> Oman Civil Code, Article 631. Also, Bahrain Civil Code, Article 589, Kuwait Civil Code, Article 666 and the Qatar Civil Code, Article 687.

<sup>5</sup> Civil Code, Article 246(2) and Chapter 5.6 [Contractual principles: Related obligations].

<sup>6</sup> Abu Dhabi Cassation No. 859/2010 dated 17 April 2011. The UAE Civil Code, Article 877, allows an employer to issue an ultimatum to a contractor requiring defective work to be remedied within a reasonable period, providing some further support to the capacity and likely approach of the courts to fixing time.

<sup>7</sup> Abu Dhabi Cassation No. 501/4 dated 19 September 2010.

apartment was not open ended despite the absence of a clear contractual completion date:

Furthermore, the Appellant company may not argue that the agreement did not provide for a period of performance or a time limit for handing over the residential units because the requirements of good faith are not restricted to an obligation upon the contracting party to do that which is (expressly) contained in it, but will also embrace that which is appurtenant to it by virtue of the law, custom, and the nature of the transaction.

In the absence of any evidence of significant progress or any likelihood that the property would be completed within a reasonable time the developer was ordered to return the purchase price. Likewise, if a contractor and subcontractor reach an agreement that is not reduced to writing, the terms may be found to include an obligation to perform the work within a reasonable time taking account of the nature and quantity of the work.<sup>8</sup>

## **11.2 Extension of time**

Extension of time provisions of the type commonly incorporated in construction contracts serve a variety of purposes which include:

- maintaining the integrity of the programme as a means of planning and measuring progress
- permitting an employer to cause delay without jeopardising the time and programme elements of the contractual framework
- protecting a contractor from any remedies – specifically a penalty or delay damages – that would otherwise flow from late completion.

## **11.3 Assessment of entitlement**

Although these reasons for an extension of time apply as much to projects in the Gulf as elsewhere, the applicable civil codes do not confer on a contractor performing private sector works<sup>9</sup> any statutory extension of time entitlement nor do they include any statutory extension of time

<sup>8</sup> Federal Supreme Court Nos. 446 and 541/2001 dated 15 May 2001.

<sup>9</sup> In contrast, public procurement laws commonly include a mechanism for extending time and providing relief from delay penalties.

machinery, whether for an innominate commercial contract or a *muqawala*.<sup>10</sup> In consequence, a contractor must rely on its contractual rights and on the application of those rights by the Court of Merits, usually assisted by a court appointed expert.<sup>11</sup> The extent to which a consistent approach to common aspects of such disputes can be discerned from such cases is limited.

Despite the absence of specific statutory guidance provisions to which recourse may be had in circumstances giving rise to a possible extension of time entitlement or a challenge to the imposition of delay penalties are potentially wide ranging.<sup>12</sup> They include the power of the courts to adjust unfair contract terms contained in contracts of adhesion,<sup>13</sup> the prohibition on the abuse of rights,<sup>14</sup> the mutual nature of obligations,<sup>15</sup> the discretionary nature of damages,<sup>16</sup> the power to vary any agreement on compensation,<sup>17</sup> the power to extend time for performance<sup>18</sup> and the overarching duty of good faith.<sup>19</sup> With the exception of the power to vary an agreement on compensation there is no specific authority to support the deployment of these provisions in the field of time related construction claims. Nevertheless, it is a feature of the domestic legal framework that the courts possess significant supervisory powers and that these are meant to be used. Among the most relevant is the following:

- (1) An obligation must be discharged as soon as it becomes final and binding as against the obligor, in the absence of an agreement or provision of law to the contrary.

<sup>10</sup> For an explanation of these terms see Chapter 2.1 [Construction law: Muqawala]. The Bahrain Civil Code, Article 594 and the Kuwait Civil Code, Article 671 permit a contractor to put an employer on notice of any act of prevention and to seek a termination if the act of prevention is not removed.

<sup>11</sup> Dubai Cassation No. 183/2011 dated 8 January 2012.

<sup>12</sup> For a search for analogous provisions see '*Common Law 'Time at Large' Arguments in a Civil Law Context*', John Bellhouse and Paul Cowan, White & Case LLP in which the authors conclude that the legal formulation of the arguments may well differ but that '*Civil Law codes often contain broad equitably-based powers and discretions which can be used in order to provide relief to the contractor where this is appropriate*' and '*Time at Large in Canada*', O'Connor, Laudan, 2011 JCCCL 71, in which it is noted that the absence of a duty of good faith in common law means that no analogy can be drawn between time at large in common law and a civil law remedy based on the duty of good faith.

<sup>13</sup> Chapter 5.8 [Contractual principles: Unfair contract terms].

<sup>14</sup> Chapter 5.7 [Contractual principles: Abuse of rights].

<sup>15</sup> Chapters 16 [Suspension] and 17 [Termination].

<sup>16</sup> Chapter 19 [Damages].

<sup>17</sup> Chapter 12 [Delay damages and other remedies].

<sup>18</sup> UAE Civil Code, Articles 272(2) and 359. Also Oman Civil Code, Article 238.

<sup>19</sup> Chapter 5.5 [Contractual principles: Good faith].



- (2) Provided that a judge may, in exceptional circumstances and if not prevented by any provision in the law, grant a reasonable period or periods to the obligor for the performance of his obligations if his circumstances so warrant, and provided that such granting of time does not cause serious loss to the obligee.<sup>20</sup>

This power, as with all such powers is, of course, discretionary and must be reconciled with the principle that a contract is the law of the parties. The guiding principle remains that a contract represents the law of the parties<sup>21</sup> and any discretion is, in consequence, likely to be exercised sparingly. However, the point of note is that the domestic courts have the necessary powers to resolve a problem presented by time and delay damages provisions in such a manner as they consider fit and to avoid obvious injustice.

Perhaps of greater practical significance is that a dispute involving a delay falls to be assessed by the Court of Merits, usually assisted by a court appointed expert.<sup>22</sup> Courts do not generally engage in a detailed analysis of the statutory and contractual framework or attempt to reconcile this framework with the allocation of responsibility for delay because the task of assessing the merits will be delegated to a court appointed expert. The resulting legal principles are not analogous to those applicable under common law.

By way of illustration, a contractor commenced proceedings against an employer for the balance of the contract price for the construction of eight villas in Dubai pursuant to a contract entered into in 1994. The employer alleged that the works were completed eight months late and that the delay penalty extinguished and exceeded the amount claimed, an argument that was rejected by the expert appointed by the court who found that the delay was caused by one of the subcontractors. The Dubai Court of Cassation rejected the appeal relying on the conclusions reached by the court appointed expert, including the expert's rejection of the engineer's certification of sixty days of delay as attributable to the contractor. The Dubai Court of Cassation concluded as follows:

The expert noted in the minutes that the [employer] commissioned some subcontractors to perform the project. Had the subcontractors collaborated with the [contractor] in performing the work and pursued

<sup>20</sup> UAE Civil Code, Article 359. Cf. the UAE Code of Commercial Practice, Article 86, which curtails the courts' power to grant additional time for payment of a debt to exceptional circumstances.

<sup>21</sup> Chapter 4.1 [Interpretation: Statutory maxims].

<sup>22</sup> Chapter 20.5 [Evidence: Court appointed experts].

together the prescribed course of work at similar rates of production as performed by the Respondent [contractor], the work could have been performed on time. However, all the subcontractors started their respective works beyond the prescribed times, in addition to the lack of co-ordination between them and the [contractor]. This certainly caused confusion and delay to the work. Consequently, it is clearly evident that the delay to the work was to a large extent caused by the subcontractors commissioned by the [employer] to perform the project and by the subcontractors who started their respective works after the prescribed time and by the lack of co-ordination that should have existed between them and the [contractor] all of which led to disruption and delay to the works. On the above grounds, the [contractor] did not delay the completion of the project beyond the time agreed upon. In summary, the subcontractors commissioned by the [employer] to undertake the project caused the delay.<sup>23</sup>

The judgment does not set out either the provisions of the contract relating to subcontracting or any detailed facts.<sup>24</sup> Accordingly, it is not possible to be certain from the judgment that the subcontractors concerned were nominated subcontractors, not independent contractors appointed directly by the employer.<sup>25</sup> The judgment, nevertheless, illustrates the influence of court appointed experts<sup>26</sup> and the absence of an approach much constrained by principles or precedent.

A similar conclusion was reached by the Dubai Court of Cassation in a dispute arising from a contract awarded in 2003 for the construction of a tower comprising a basement, ground floor and seven floors pursuant to which the works were scheduled to be completed within one year. The employer commenced proceedings seeking delay damages following the contractor's failure to hand over the works within a year and compensation for the contractor's failure to perform its obligations during the defects liability period. The contractor counterclaimed for payment of the balance of

<sup>23</sup> Dubai Cassation No. 340/1999 dated 16 January 2000.

<sup>24</sup> Reference is made to the owner's reliance on a clause prohibiting the appointment of subcontractors without prior written approval and the contractor's responsibility for delays caused by subcontractors, but the clause is not quoted in the judgement.

<sup>25</sup> However, the courts appear reluctant to hold a main contractor liable for delay caused by a nominated subcontractor: Dubai Cassation No. 266/2008 dated 17 March 2009.

<sup>26</sup> For a successful challenge to a judgment based on a court appointed expert's findings see Federal Supreme Court No. 541/21 dated 15 May 2001. The Federal Supreme Court found that the expert had failed to assess an MEP subcontractors' delay against the main contract programme or to deal with the MEP subcontractor's assertion that its delays were attributable to other subcontractors and/or late payment by the main contractor.

the contract price. Rejecting both parties' appeals, the Court of Cassation held as follows:

as per the rulings of this Court the main contractor assumes liability for breaches arising from the subcontractor's defective execution of the work, if the main contractor entrusted the latter with all or some of this work, pursuant to Article 890 of the Civil Code. However, where the project owner or its consultant entrust the subcontractor with the work, any defects in execution or late completion of work beyond the agreed period shall be the liability of the parties that appointed the subcontractor rather than of the main contractor.<sup>27</sup>

The Court of Cassation attributed responsibility for the delays to the owner on the basis that the owner and the consultant were late in selecting, approving and supplying the necessary finishing materials and 'in appointing the subcontractors imposed by them' on the main contractor. It appears that the subcontractors accused of causing delay were nominated, though the applicable provisions of the contract were, again, not quoted in the judgment, the court relying instead on the expert's report.

The UAE Civil Code, Article 890,<sup>28</sup> states that:

A contractor may entrust the performance of the whole or part of the work to another contractor, unless he is prevented from so doing by a condition of the contract, or unless the nature of the work requires that he do it in person.

The first contractor shall remain liable as towards the employer.

Although, therefore, no distinction is drawn between domestic and nominated subcontractors the above cases suggest that a difference between them may be recognised and that an employer is generally liable for delay caused by the latter. As an example of the occasional divergence between common law and civil law as to the application of construction contracts and the flexibility of civil law, a clear expression of intent is probably required to alter this allocation of liability.

## **11.4 Time at large**

A similarly flexible approach can be seen, in contrast to the precedent driven approach of common law, in the response to other aspects of project delay.

<sup>27</sup> Dubai Cassation No. 213/2008 dated 19 January 2009.

<sup>28</sup> Bahrain Civil Code, Article 604, Kuwait Civil Code, Article 681 and Oman Civil Code, Article 644.

Thus, in common law jurisdictions it is well-established that courts will, in some circumstances, consider the time and delay damages provisions commonly found in construction contracts to be unenforceable and, therefore, unconstrained by the contract (i.e. 'at large'), with the result that a contractor will ordinarily have an obligation to complete within a reasonable time and will be liable for general damages for any breach of this obligation instead of any pre-agreed delay damages. These circumstances include the omission of an express contractual entitlement to an extension of time, failure of the certifier to operate the extension of time machinery properly or at all<sup>29</sup> and acts of prevention by an employer. In these scenarios an employer may, on a literal application of a contract, have a right to delay damages as a result of a contractor's failure to complete on time, despite the absence of any contractual default or, worse still, due to the employer's or the employer's representative's acts of prevention. Any such result would offend principles of equity.

Faced with this predicament, common law courts decline to introduce or modify an extension of time mechanism preferring, instead, to declare the time and delay damages provisions unenforceable, in consequence rendering time 'at large'. This approach is founded on a combination of equitable and strict contractual principles as well as the largely historic distaste of common law courts for liquidated damages provisions.

Crucially, the approach that civil law takes, at least in the United Arab Emirates, is not to dispense with the faulty mechanics of the contract putting time at large but instead to find a solution derived from principles of contractual interpretation and the overall supervisory powers of the domestic courts. This is likely to result in the preservation of any contractual framework governing the time for completion and delay penalties by the application of principles of contractual interpretation to resolve ambiguity or conflict or by the exercise of supervisory powers to relieve a party of an obviously unjust result.

## 11.5 Concurrent delay

A separate but related area of potential divergence between common law and civil law is the perennial issue of concurrent delay. Precisely what is meant by 'concurrent' delay under English law is not finally settled but

<sup>29</sup> FIDIC (2000) FIDIC Contracts Guide, First edn., Geneva: FIDIC, p. 174, posits that a failure of the Engineer to determine an extension of time puts time at large.

some consensus has tentatively formed around the adoption of the following definition:

A period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency.<sup>30</sup>

It has been observed by some commentators that it is relatively rare for more than one event of 'approximately equal potency' to cause overlapping delay. This is because a court or tribunal will, in the first instance, review the facts and arrive at findings that isolate events as causative of individual periods of delay. Well-developed principles of causation resolve competing causes of delay in all but a limited category of circumstances.

But this definition of concurrency has not been adopted or been recognised by civil law or by the domestic courts of the Gulf. Absent a similarly well-developed body of law on causation it is the broader issue of allocating liability for delay with competing causes, including concurrent delay as defined under English law, which requires consideration. It is in this broader sense that concurrent delay is often, in practice, used and for which it is used in the following analysis.

It is widely recognised that the consequences of concurrent delay, particularly on delay damages and prolongation costs, are capable of resolution by agreement. Parties are free in principle, to provide by agreement for the manner in which concurrent delay will be dealt with including whether a contractor will be entitled to an extension of the time for completion. There is no objection, on grounds of public order or otherwise, to the parties addressing concurrent delay in the Gulf. In practice, however, this rarely occurs, the FIDIC Conditions being no exception.

In common with the JCT forms of contract, from which the English law position has mostly been derived, the FIDIC Conditions do not address concurrent delay explicitly. A contractor is entitled to an extension of time 'if and to the extent that completion ... is or will be delayed'<sup>31</sup> by any of the specified events, leaving questions of causation unresolved. Guidance, if any, is restricted to a requirement for fairness, a component of the extension of time provisions in the FIDIC Conditions.<sup>32</sup>

<sup>30</sup> 'Concurrent Delay', John Marrin QC, SCL Paper 100 (February 2002) and 'Concurrent Delay Revisited', John Marrin QC, SCL Paper 179 (February 2013). This definition includes delay that is caused by events that occur at different times but which result in a period of delay that overlaps. It is also not necessary that the causes should be of exactly equal effect, such that they are indistinguishable but only that they should be of approximately equal strength.

<sup>31</sup> Sub-Clause 8.4 [Extension of Time for Completion].

<sup>32</sup> Sub-Clause 8.4 [Extension of Time for Completion] does not include a reference to fairness but the Contractor is entitled to a fair determination of the entitlement pursuant to Sub-Clause 3.5 [Determinations].

As neither the laws of the Gulf nor English law offer much, if any, statutory guidance on concurrent delay the issue must be resolved on the basis of first principles, whether under local law or English law. The position that has been reached under English law on dealing with concurrent delay, has been summarised as follows:

It is now generally accepted that under the Standard Form of Building Contract and similar contracts a contractor is entitled to an extension of time where delay is caused by matters falling within the clause notwithstanding the matter relied upon by the contractor is not the dominant cause of delay, provided only that it has at least equal 'causative potency' with all other matters causing delay. The rationale for such an approach is that where the parties have expressly provided in their contract for an extension of time caused by certain events, the parties must be taken to have contemplated that there could be more than one effective cause of delay (one of which would not qualify for an extension of time) but nevertheless by their express words agreed that in such circumstances the contractor is entitled to an extension of time for an effective cause of delay falling within the relevant contractual provisions.<sup>33</sup>

In cases of delay arising from causes of approximately equal causative strength or 'potency' a contractor under English law receives an extension of the Time for Completion for the full period of delay. Parties are assumed, unless there is an agreement to the contrary, to have agreed to give precedence to any effective cause for which an entitlement exists.

Unsurprisingly, there are some important differences between English law and local law.<sup>34</sup> Notably, there is no prevention principle,<sup>35</sup> no but-for test of causation and no suggestion that concurrent delay is resolved by reference to dominant cause,<sup>36</sup> all important ingredients of English law. In contrast, although a distinction between direct and indirect causation is recognised in the context of delict,<sup>37</sup> the civil codes and other laws applicable in the Gulf, devote scant attention to the topic of causation, which is reflected, in turn,

<sup>33</sup> Vivian Ramsey, QC Stephen Furst QC (2013) *Keating on Construction Contracts*, Sweet & Maxwell, paragraph 8-026.

<sup>34</sup> It has been acknowledged that English law does not necessarily represent the position under civil law: 'Water Lilly: Guidance on English law from the Mansion Madness case', David Thomas QC, *Construction Law International*, Vol. 7, Iss. 4 (January 2013).

<sup>35</sup> The prevention principle describes the need to avoid a result whereby acts of an employer that delay a contractor (i.e. acts of prevention) result in the employer receiving a benefit such as delay damages due to the absence of an entitlement to an extension of time. An extension of time for the full period of concurrent delay is required in order to avoid a breach of the prevention principle in such circumstances.

<sup>36</sup> Cf. Causation in Construction Law: the Demise of the 'Dominant Cause' Test? V. Moran QC, SCL Paper 190 (November 2014).

<sup>37</sup> UAE Civil Code, Article 284 and the Explanatory Commentary.

in the amount of attention given to the topic by the domestic courts. This reflects the status of causation as a topic for legal analysis in some other parts of the civil law world, notably France:

French jurists have never really had quite the same taste for theorizing about causation as their German counterparts. This means that, while they sometimes note different theories of causation, they are usually happy to conclude that French courts proceed 'empirically', not formally adopting any one approach, though in practice adopting the so-called 'adequate cause' approach.<sup>38</sup>

The starting point for the domestic courts is that uncertainty as to the effect of a contract in general and the effect of an extension of time mechanism specifically, falls to be resolved by reference to 'intentions and meanings' and the applicable authorities on the interpretation and application of contracts.<sup>39</sup> In the absence of any contractual guidance as to the resolution of concurrent delay, recourse shall be had to the mutual intentions of the parties as deduced from the agreement and other sources such as contemporary correspondence and commercial custom and practice.

Because the interpretation of an extension of time mechanism in the relevant judgments of the English courts relies on the parties' intentions it can be squared with the foregoing domestic law approach. Furthermore, judgments of the English courts featuring the prevention principle can plausibly be repackaged as an application of the intention of the parties and custom and practice. In other words, the parties cannot have intended that an employer receives compensation for delay caused by its own acts of prevention and, in consequence, an interpretation giving rise to an entitlement to an extension for any and all periods of non-culpable delay is appropriate. That the parties instead intended fairness to result in a full extension of time for concurrent delay rather than an apportionment of that delay is more doubtful.

A persuasive case can be made for apportionment on the basis of the underlying principles of civil law as applied in the Gulf. Apportionment allows liability for concurrent delay to be shared in equal or other proportions between the parties rather than being attributed to the employer alone. Although this lacks the analytical tidiness of the current English law approach it chimes with the less prescriptive, more discretionary, nature of civil law.<sup>40</sup> Notably, apportionment has received some support from

<sup>38</sup> John Bell, 2008. *Principles of French Law*. 2nd Edition. Oxford University Press. p. 410. The Gulf's domestic courts appear to share Gallic tastes in this regard.

<sup>39</sup> Chapter 4 [Interpretation].

<sup>40</sup> By way of illustration, the UAE Civil Code, Article 390, contains a discretionary power to adjust delay damages, contrasting with English law that provides only a choice between enforcing delay damages or rendering the provision void.

judgments in Canada<sup>41</sup> and in Scotland.<sup>42</sup> It has also been suggested that apportionment looks set to be adopted as the favoured approach in other jurisdictions, notably Hong Kong and Australia.<sup>43</sup>

Absent a prevention principle under the civil codes of the Gulf or any provision of law corresponding directly thereto there is no compelling objection to an apportionment approach. While it is not suggested that a party is allowed to prevent performance and claim damages for the resulting breach, the approximately corresponding broad concepts of abuse of rights<sup>44</sup> and good faith<sup>45</sup> are no substitute for the weight given to the prevention principle under English law. Provided apportionment balances the competing interests of the parties, not only is this consistent with the allocation of liability for contributory negligence, which is recognised by the applicable civil codes,<sup>46</sup> it is also consistent with the contractual requirement pursuant to the FIDIC Conditions that a determination should be fair.<sup>47</sup>

An objection sometimes raised to apportionment is that in the absence of any express wording in the contract there is no source from which to derive the applicable proportions of delay.<sup>48</sup> This objection reflects a common law preference for a formula that can be applied consistently from case to case to

<sup>41</sup> 'Evaluating Concurrent Delay: Unscrambling the Egg', Glen Grenier (2010) 26 *Construction Law Letter*, Number 6.

<sup>42</sup> *John Doyle Construction Limited v Laing Management (Scotland) Limited* [2004] BLR 295 and *City Inn Limited v Shepherd Construction Limited* [2008] BLR 269 (Court of Session, Outer House), [2010] BLR 473 (Court of Session, Inner House).

<sup>43</sup> 'Concurrent and Sequential Causes of Delay', Paul Tobin (2007) 24 *ICLR* 142. It has also been suggested that apportionment is increasingly finding acceptance in decisions of the English courts: I. Pennicott QC, [http://www.keatingchambers.co.uk/resources/publications/2006/ip\\_global\\_claims\\_scl\\_newcastle.aspx](http://www.keatingchambers.co.uk/resources/publications/2006/ip_global_claims_scl_newcastle.aspx). Thus, there may be some convergence between civil and common law on the use of apportionment to resolve problems such as concurrent delay. However, in *Mainteck Services Pty Ltd v Stein Heurtey SA* [2014] NSWCA 184, the New South Wales Court of Appeal indicated, albeit in the context of a global claim and in obiter dicta, that the cases in other jurisdictions on apportionment do not reflect the current state of the law in Australia.

<sup>44</sup> Bahrain Civil Code, Article 28, Kuwait Civil Code, Article 30, Oman Civil Code, Article 59, Qatar Civil Code, Article 63 and the UAE Civil Code, Article 106.

<sup>45</sup> Bahrain Civil Code, Article 229, Kuwait Civil Code, Article 197, Qatar Civil Code, Article 172 and the UAE Civil Code, Article 246.

<sup>46</sup> Bahrain Civil Code, Article 166, Kuwait Civil Code, Article 234, Qatar Civil Code, Article 204 and the UAE Civil Code, Article 290. Acts causing harm or delict result in liability for damage to third parties in a manner roughly analogous to the tort of negligence. Although such liability most likely does not overlap with contractual liability (see Dubai Cassation No. 198/97 dated 20 December 1997) the courts do not, in practice, confine the application of the provisions that appear in the delict portion of the Civil Code to delict claims only.

<sup>47</sup> Neither, it is submitted, does apportionment necessarily produce a breach of the prevention principle. Only if the employer has caused the full period of delay is the prevention principle breached. Once the delay is apportioned the contractor is only liable for delay damages for that part of the delay that the contractor is found to have caused. Any other conclusion presupposes that the employer has caused the full period of delay, the very issue that has to be resolved.

<sup>48</sup> 'Concurrent Delay Revisited', John Marrin QC, *SCL Paper* 179 (February 2013), p. 10.



a recurring and seemingly intractable problem. While carefully formulated tests are, as a consequence, a notable feature of common law jurisdictions, similar tests are a rarity in civil law jurisdictions and rarer still in the Gulf.

The English law approach of awarding an extension of time for the entire period of concurrent delay avoids placing a judge or arbitrator in a position of having to exercise a judgment over the relative portions of that period to be attributed to each party, a subjective and unpredictable task. In contrast, determining apportionment on a basis that is fair and consistent with commercial custom and practice presents a domestic court in the Gulf, assisted by a court appointed expert, with no philosophical difficulty. Indeed, this is entirely in keeping with the less prescriptive approach of civil law. Thus, provided the parties' agreement permits apportionment this, it is submitted, is consistent with the applicable law.

## 11.6 Prolongation costs

An extension of time entitlement is often accompanied by a contractual entitlement to additional payment in respect of associated costs. This entitlement does not, however, arise automatically and its existence cannot be safely assumed. By way of illustration, the FIDIC Conditions notably do not explicitly link an entitlement to an extension of time to an entitlement to additional payment for time related costs. An extension of time entitlement will not necessarily result in a corresponding contractual entitlement to recover any associated costs.<sup>49</sup> In the absence of agreement, there is no statutory recognition of an entitlement to additional payment. Indeed, there is a general predisposition against claims for additional payment.<sup>50</sup> However, in the case of an extension of time entitlement that also constitutes a breach of contract, such as a 'delay, impediment or prevention caused or attributable to the Employer'<sup>51</sup> a remedy for additional costs for delay and disruption lies in an entitlement to damages for breach of contract. The assessment of damages is a matter for the Court of Merits, which has a wide discretion to determine the composition of such damages.<sup>52</sup> In consequence, subject to the burden of proof being satisfied, time related costs are, in principle, recoverable as a component of a damages claim.

<sup>49</sup> Exceptionally adverse climatic conditions are an example of a cause giving rise to an entitlement to an extension of time, pursuant to the FIDIC Conditions, Sub-Clause 8.4(c), for which there is no corresponding entitlement to financial compensation pursuant to or for breach of the contract. For an analysis of each of the grounds for an extension of the Time for Completion see the commentary on the FIDIC Conditions, Sub-Clause 8.4 [Extension of Time for Completion].

<sup>50</sup> See Chapter 13.6 [Price: Variations] and Abu Dhabi Cassation No. 573/2 dated 18 December 2008.

<sup>51</sup> FIDIC Conditions, Sub-Clause 8.4(e).

<sup>52</sup> Under English law, the 'but for' test is the cornerstone of this assessment.



# 12

## Delay Damages and Other Remedies

Project participants, whether public or private, usually provide contractually for the consequences of delay and, in particular, failure to complete by a pre-agreed date. Contractual devices commonly employed for dealing with delay include those entitling a employer to remove elements of a contractor's scope, to order a contractor to increase resources, to deploy additional resources at a contractor's expense or most drastically to terminate a contractor's employment.<sup>1</sup>

### 12.1 Termination for delay

Failure by a contractor to comply with a contractual obligation to make proper progress with the works or to meet a contractual completion date may give an employer certain statutory rights, including the right to dismiss the contractor and to complete the work at the contractor's expense. Dubai's highest court, the Court of Cassation, held in a judgment delivered in 2000 that an employer would ordinarily have to apply to the domestic courts for

<sup>1</sup> The FIDIC Conditions incorporate provision for the latter at Sub-Clause 15.2(c)(i) [Termination by Employer]. At Sub-Clause 8.6 [Rate of Progress] provision is made for the Engineer to require the Contractor to submit and implement an acceleration programme but only to the extent that the delay to be recovered is not attributable to any of the causes that entitle the contractor to an extension of time. There is no express right to introduce resources on the Contractor's behalf or remove scope. Indeed, the latter is prohibited by Sub-Clause 13.1(d) [Right to Vary] with the limited exception of remedying defects pursuant to Sub-Clause 11.4 [Failure to Remedy Defects].

permission to exercise this right unless 'compelled by necessity to proceed without obtaining that permission'.<sup>2</sup>

In Bahrain and Qatar this right of termination receives statutory recognition. For example, the Qatar Civil Code provides that:

If the contractor delays in starting the execution of the work or in its completion such that the delay gives no expectation at all that he will be able to perform the work as he should within the period agreed upon, or if he has adopted a process that indicates his intention not to execute his obligation, or has performed some act that makes the execution of this obligation impossible, the employer for the work may apply for annulment of the contract without waiting for the deadline for handover to arrive.<sup>3</sup>

As in the United Arab Emirates, therefore, consent or a court order may be required as a condition for exercising this statutory right.

## 12.2 Reducing delay damages

But the most common source of controversy is the contractual device that entitles an employer to levy liquidated<sup>4</sup> or delay damages against a contractor.<sup>5</sup> The level of financial liability is calculated by reference to a pre-agreed formula, in which the principal variable is the duration of the delay. Delay damages provisions serve the dual functions of discouraging late completion by explicitly recording the cost to a contractor of failing to complete on time and compensating an employer for damage caused by delay. In the absence of agreement, local law imposes no predetermined or fixed financial penalty on a contractor for late completion of private sector works.<sup>6</sup>

In some jurisdictions the underlying nature of a delay damages provision determines whether it is enforceable. Specifically, if the underlying nature is that of a penalty the provision is unenforceable at common law. A penalty provision differs from a delay damages provision in that whereas the

<sup>2</sup> Dubai Cassation No. 353/1999 dated 15 January 2000.

<sup>3</sup> Qatar Civil Code, Article 689. Also, Bahrain Civil Code, Article 591 and Kuwait Civil Code, Article 668. Suspension and termination are discussed further in Chapters 16 [Suspension] and 17 [Termination].

<sup>4</sup> Liquidated in this context means 'crystallised' or fixed. Often such clauses are referred to as liquidated and ascertained damages (LAD) clauses.

<sup>5</sup> 'Making and Defending Claims for Liquidated Damages in the United Arab Emirates', a paper presented to the Society of Construction Law (UAE) by Richard Harding, May 2006, contains a useful review of this topic.

<sup>6</sup> For public sector works see below.

primary purpose of the former is to incentivise a contractor to complete on time by way of a punitive financial consequence of failure, the primary purpose of the latter is to compensate for loss. A delay damages provision should, at common law, represent a genuine pre-estimate of loss if the provision is to be categorised as a delay damages clause rather than a penalty. As common law courts decline to enforce a penalty (being incompatible with the role of the civil courts to compensate not to punish) the distinction is significant. Although the Gulf's courts share common law's compensatory philosophy there is no corresponding tradition of rendering penalty provisions void.<sup>7</sup>

Reflecting the pragmatic nature of civil law the Gulf's domestic courts instead have an overarching power to adjust an award in a manner consistent with the compensatory philosophy that underpins the assessment and award of damages. In the United Arab Emirates this power has a specific statutory source in the following provision of Federal law:

- (1) The contracting parties may fix the amount of compensation in advance by making a provision therefor in the contract or in a subsequent agreement, subject to the provisions of the law.
- (2) The judge may, in all cases, upon the application of either of the parties, vary such agreement so as to make the compensation equal to the loss, and any agreement to the contrary shall be void.<sup>8</sup>

The inclusion of the final phrase ensures that the provision is mandatory and therefore overrides the agreement of the parties. Similar mandatory provisions appear in the civil codes of Bahrain, Kuwait, Oman and Qatar.<sup>9</sup>

The power of adjustment conferred on the courts by this provision applies to agreements to fix the amount of '*compensation*', raising the possibility that an agreement to fix the amount of a penalty rather than compensatory damages, is not susceptible to the power. Although the language used is consistent with this proposition it is inconsistent with the purpose and application of the mandatory power and, therefore, the courts would almost certainly reject this literal approach. Further, the courts have emphasised that provisions in construction contracts possessing the characteristics of an agreement as to the amount of delay damages are subject to judicial scrutiny. No distinction is drawn or recognised between a damages and a penalty clause for this or any other purpose.

<sup>7</sup> As a delay damages provision is a subsidiary obligation it will lapse if the principal provision is void or ineffective for any reason: Federal Supreme Court No. 302/21 dated 17 June 2001.

<sup>8</sup> UAE Civil Code, Article 390.

<sup>9</sup> Bahrain Civil Code, Article 226, Kuwait Civil Code, Article 303, Qatar Civil Code, Article 266 and the Oman Civil Code, Article 267.

The power to adjust an agreement on damages is discretionary and, thus, this is a matter for the Court of Merits. In Bahrain, Kuwait and Qatar, however, a party seeking relief from an agreement is required to establish that the amount due is 'grossly exaggerated' or that the obligation from which liability arises has been partially performed.<sup>10</sup>

In practice, the Court of Merits can be expected to assert the unfettered nature of the power while having some limited regard to considerations of principle. By way of illustration, in a dispute between a main contractor and subcontractor engaged on a project for the Federal Ministry of Public Works the Federal Supreme Court held that:

It is established that delay fines in construction contracts are a financial penalty that project owners resort to when the contractor is in breach of its obligations in executing the work on time. However, these penalties are subject to control by law to protect a party from any unjustified actions and from any contravention of the law.<sup>11</sup>

The court accepted the subcontractor's submission that all aspects of levying a penalty are subject to scrutiny by the courts and their overriding power to intervene to prevent injustice.

In a decision in 1994 arising from a subcontract dispute the Dubai Court of Cassation affirmed the courts' power to adjust any pre-agreed compensation to reflect the actual loss suffered.<sup>12</sup> The court explained that the burden falls on the party challenging the pre-agreed damages to establish that there was no loss or that the agreed damages exceed the actual loss. A party requesting a court to invoke this power must therefore prove a disparity between the agreed damages and the actual loss such that it would be inequitable to apply the terms of the agreement.<sup>13</sup>

In contrast, the Federal Supreme Court, in a decision in 2004, found that the court must be satisfied of the existence of the components of any contractual compensation claim, namely, fault, damage and the amount of the loss:

Article 390 of the Civil Code, as applied by this Court, provides that a delay penalty may only be applied if the obligor is proved to have been at

<sup>10</sup> Bahrain Civil Code, Article 226. Also, Kuwait Civil Code, Article 303 and Qatar Civil Code, Article 266.

<sup>11</sup> Federal Supreme Court No. 595/18 dated 26 April 1998.

<sup>12</sup> Dubai Cassation No. 138/1994 dated 13 November 1994.

<sup>13</sup> Dubai Cassation No. 494/2003 dated 24 April 2004, Dubai Cassation No. 48/2005 dated 29 May 2005, Federal Supreme Court No. 356/23 dated 19 October 2004 and Dubai Cassation No. 177/1998 dated 12 July 1998. The first of these cases, which arose from the supply of snooker tables, and the last case, which arose from the sale and purchase of cables, serve as a reminder that the UAE Civil Code, Article 390, is not applicable exclusively to construction contracts but is of universal application.

fault but also that the obligee should also be proved to have sustained damage. If the obligor disproves damage on part of the obligee, the penalty clause shall be inapplicable. The judge may reduce a delay penalty provided by contracts if he finds that it is not pro rata to the damage because damage should be proportionate to the compensation.<sup>14</sup>

Applying these principles, the Federal Supreme Court allowed the appeal as the lower court had applied the delay damages based solely on the existence of delay in completion without considering whether the employer had incurred any loss nor the amount thereof.<sup>15</sup> A party seeking to recover delay damages in the Federal Supreme Court must be prepared to adduce evidence not only of delay for which no entitlement to an extension of time exists but also fault and the amount of loss. Although the assessment of damages for this purpose is a discretionary matter for the Court of Merits<sup>16</sup> the judgment should set out the computation of the damages, including the individual heads of loss.<sup>17</sup>

In a subcontract context it is not an effective defence to delay damages for a subcontractor to prove that the main contractor suffered no corresponding delay damages under the main contract as the obligations of the subcontractor are governed by the subcontract.<sup>18</sup> The loss must be assessed independently from the main contractor's liability to the employer.<sup>19</sup> However, it does not necessarily follow that an employer's entitlement to delay damages is independent of the role of the employer in the selection and appointment of a subcontractor. Absent an agreement to the contrary, a main contractor is not liable for delay damages attributable to delay caused by a nominated

<sup>14</sup> Federal Supreme Court No. 103/24 dated 21 March 2004. Also, Federal Supreme Court No. 742/23 dated 16 May 2004.

<sup>15</sup> See also Federal Supreme Court No. 690/21 dated 27 June 2001 and Federal Supreme Court No. 26/24 dated 1 June 2004. Accordingly, it is possible to discern a difference of approach as between the Federal Supreme Court and the Dubai Court of Cassation. Also Federal Supreme Court No. 18/25 dated 19 June 2004 in which the Supreme Court tied the requirements not only to the law but to the Islamic Shari'ah.

<sup>16</sup> Federal Supreme Court No. 40/11 dated 20 June 1989 in which the Court of Merits' decision to award delay damages equal to the amount deducted by the main contractor from the subcontractor during the project, was upheld, notwithstanding the main contractor's attempt to levy the full amount based on the subcontract delay damages provision. The court may, therefore, rely on the conduct of the parties when assessing delay damages. Also Dubai Cassation No. 64/2005 dated 29 May 2005 and Dubai Cassation No. 333/99 dated 26 December 1999.

<sup>17</sup> Federal Supreme Court No. 782/22 and 787/22 dated 7 April 2002 and Federal Supreme Court No. 65/22 dated 8 January 2002.

<sup>18</sup> Federal Supreme Court No. 742/23 dated 16 May 2004.

<sup>19</sup> Federal Supreme Court No. 462/18 dated 17 February 1998.

subcontractor.<sup>20</sup> The Dubai Court of Cassation, dismissing an employer's claim for delay damages, has held that:

This appeal is dismissed because it is established by the jurisprudence of this court that the basis for the liability of the main contractor shall be for the delay caused by the subcontractors that the original contractor has selected or appointed; however, if they have been selected by the employer or his consultant, then any delay in completion caused by them shall be the liability of the employer and not the main contractor who shall not be liable for the delay fine if the contractor can prove that his failure towards his obligation in delivering the building on the date specified by the contract is due to causes beyond his control.<sup>21</sup>

The judgment does not set out either the provisions of the contract relating to subcontracting or any detailed facts.

### 12.3 Increasing delay damages

Contractors and subcontractors facing pre-agreed compensation for delay that significantly exceeds the loss caused are the principal beneficiaries of this provision. But the application for adjustment may be made by 'either of the parties', and an employer can, in principle therefore, obtain an upward adjustment to the pre-agreed level of compensation to ensure that this is equal to the loss. There do not appear to be any reported cases in which the UAE courts have reached this conclusion or addressed this issue.

In Bahrain, Kuwait and Qatar, an increase in any pre-agreed damages is addressed explicitly as follows:

When the loss exceeds the amount fixed by the contract, the creditor cannot claim an increased sum unless he is able to prove that the debtor has been guilty of fraud or gross negligence.<sup>22</sup>

One common scenario in which the employer might consider the amount of pre-agreed delay damages to be insufficient is where the aggregate amount of such damages is capped by agreement<sup>23</sup> and the cap is triggered.

<sup>20</sup> Dubai Cassation No. 266/2008 dated 17 March 2009 and Dubai Cassation No. 340/1999 dated 16 January 2000. For the liability of a main contractor for delay caused by a nominated subcontractor refer to Chapter 11.2 [Time of completion: Extension of time] and the commentary on the FIDIC Conditions, Sub-Clause 4.4 [Subcontractors].

<sup>21</sup> Dubai Cassation No. 266/2008 dated 17 March 2009.

<sup>22</sup> Bahrain Civil Code, Article 227. Also, Kuwait Civil Code, Article 304 and Qatar Civil Code, Article 267.

<sup>23</sup> As per, for example, the FIDIC Conditions, Sub-Clause 8.7 [Delay Damages].



So prevalent is the local practice of capping delay damages at ten per cent of the contract value that its status was tested in a dispute between a contractor and a subcontractor that reached Dubai's highest court, the Court of Cassation, in 1994.<sup>24</sup> At issue was a contractor's right to enforce against a subcontractor an uncapped penalty, the aggregate amount of which exceeded ten per cent of the contract value. The lower court decided that the penalty was limited to ten per cent of the contract value by virtue of local custom and usage. The Court of Cassation reversed the decision. As the parties had agreed in advance on the amount of the penalty without imposing any limit, the agreement of the parties was to be applied, not local custom and usage.

## **12.4 Administrative contracts**

In the case of contracts with government entities some specific statutory provisions supplement these general rights. Although the status of these statutory provisions is unclear they have the potential to subject administrative contracts – those that serve the public interest – to a modified legal regime. Although clear principles of administrative law are difficult to discern there is some indication that a differentiation applies in the case of delay damages on the basis that the purpose of administrative contracts is to deliver public or non-revenue generating works, whereas the purpose of the mandatory power to adjust pre-agreed damages is to apportion compensation fairly between commercial entities.<sup>25</sup>

In a case between a main contractor and a subcontractor arising on a public works project the Federal Supreme Court drew a distinction between the treatment of delay damages under administrative contracts and under civil contracts as follows:

Such amount is essentially a kind of financial penalty inflicted by the administrative body on the contractor in case of any default or negligence on the part of the latter regardless of whether or not such default or damage results in any damage. Such penalty needs no reasoning since in administrative contracts damage is considered to have occurred upon any delay by the contractor as an administrative contract is based on the concept of public benefit. Therefore, a financial penalty in a contract between an administrative body and a contractor is different from one in a contract between normal or juridical persons and neither of them shall be considered to be dependent on the other.<sup>26</sup>

<sup>24</sup> Dubai Cassation No. 138/1994 dated 13 November 1994.

<sup>25</sup> Federal Supreme Court No. 353/20 dated 26 November 2000.

<sup>26</sup> Federal Supreme Court No. 462/18 dated 17 February 1998.

It follows that in the context of administrative contracts evidence of delay is sufficient on its own to trigger the agreed damages, whereas in the context of commercial transactions, at least in the Federal Supreme Court, evidence of breach, loss and causation may be required.<sup>27</sup> Notwithstanding that the main contract is an administrative contract, the subcontract arrangements are governed by the principles applicable to commercial transactions.<sup>28</sup>

The application of principles of administrative law to delay damages is supplemented by provisions found in the public procurement laws of a number of the Gulf states.

- In Kuwait it is provided that: The Government authority concerned, prior to letting a public tender for the supply of a commodity or for the execution of works, shall draft a detailed specification about each and every article or work, giving the necessary instruction to the contractors, complete detail drawings, accurate detailed bills of quantities showing unit items, the procedure to be followed in carrying out the contract and the penalties liable to be imposed in the event of a violation of the provisions of the contract and/or in the event of delay in execution, as well as the form of tender and the general conditions of contract.<sup>29</sup>
- In Qatar, a delay penalty may be levied up to ten per cent of the contract value.<sup>30</sup>
- In Saudi Arabia it is provided that delay shall result in a delay fine of up to ten per cent of the contract value and liability for the supervision costs during any period of delay.<sup>31</sup> In addition, a public authority may terminate the works for delay if a contractor fails to remedy the delay within fifteen days of receiving notice to do so.<sup>32</sup>
- A Federal ministry in the United Arab Emirates may take over and complete the works itself, employ another contractor to complete the works or re-tender the entire project if a contractor fails to start work on time, fails to make proper progress with the works such that it becomes apparent that the contractual completion date is not going to be met, suspends work for a continuous period of more than fifteen days, or abandons the works altogether.<sup>33</sup> If this right is exercised, a contractor is liable for any

<sup>27</sup> Federal Supreme Court Nos. 436 and 440/24 dated 11 October 2005 and Federal Supreme Court No. 690/21 dated 27 June 2001.

<sup>28</sup> Federal Supreme Court Nos. 742/23 and 690/21 dated 16 May 2004.

<sup>29</sup> Kuwait Law No. 37/1964 pertaining to Public Tenders, Article 14.

<sup>30</sup> Qatar Law No. 26/2005 issuing the Tenders and Bids Regulations Law, Article 56.

<sup>31</sup> Saudi Arabia Royal Decree No. M/58/4 Ramadan 1427H/27 September 2006 Government Tenders and Procurement Law, Articles 48 and 50 and its implementing regulations, Articles 84 and 88.

<sup>32</sup> Above, Article 53(b).

<sup>33</sup> UAE Ministerial Decision No. 20/2000, Article 86.

damage suffered and a penalty of ten per cent of the value of the incomplete works to cover administration costs.

- Failure to complete the works by the date or dates specified in the contract may also entitle a Federal ministry to levy a fine or penalty.<sup>34</sup> If a Federal ministry benefits from the works despite the delay, the fine or penalty is calculated as a percentage of the value of the unfinished portion of the works only, or as a percentage of the out-turn contract price if it does not. The fine starts at one per cent for the first week of delay and rises to a maximum of five per cent for each month after the sixth week. There is no statutory cap on the cumulative amount of the fine but a contractor 'may be exempted from the delay fine if he presents supporting documents to the effect that the delay period or part thereof occurred due to compelling circumstances over which he had no control'<sup>35</sup>.
- There is no statutory remedy for delay on projects procured by the Government of Abu Dhabi<sup>36</sup> but the procurement guidance issued by the Department of Finance<sup>37</sup> provides that delay damages shall be imposed without proof of loss, capped at ten per cent of the total contract value.<sup>38</sup> A contractor has fifteen days to apply for an extension of time and relief from delay damages failing which such right is forfeited.
- If a contractor fails to commence work promptly, falls behind the rate of progress necessary to complete on time, suspends work for more than fifteen days or abandons the works the Government of Dubai may take over and complete the works itself, employ another contractor to complete the works or re-tender the entire project.<sup>39</sup> If this right is exercised, a contractor is liable for any damage sustained by the Government and for a penalty of ten per cent of the value of the incomplete works to cover administration costs.
- Failure to complete the works by the date or dates specified in the contract may also entitle the Government of Dubai to levy a 'delay fine'. The amount of the delay fine is not specified but its cumulative amount is capped at ten per cent of the contract value.<sup>40</sup> Any additional consultants' fees incurred by virtue of the delay period are recoverable from the contractor even if this causes the delay fine to exceed ten per cent. If the period of delay is such that the delay fine would, but for the application of the cap, exceed ten per cent, the Government of Dubai may take over and

<sup>34</sup> Above, Article 91.

<sup>35</sup> Above, Article 92.

<sup>36</sup> Abu Dhabi Law No. 4/1977, which previously governed public procurement in the Emirate of Abu Dhabi, was repealed by Abu Dhabi Law No. 6/2008, Article 14. The law and the accompanying manual do not cover contracts and purchases made by the Abu Dhabi police.

<sup>37</sup> The guidance is issued pursuant to Abu Dhabi Law No. 6/2008.

<sup>38</sup> Above, Article 41.

<sup>39</sup> Dubai Law No. 6/1997, Article 63.

<sup>40</sup> Above, Article 65.

complete the works itself, employ another contractor to complete the works or re-tender the entire project. A contractor may submit an application for exemption from penalties and fines for late completion 'if such delay occurs due to unforeseen circumstances or force majeure or for reasons pertaining to the department'. The application must be submitted within thirty days of the occurrence, failing which the exemption right is forfeited.<sup>41</sup>

In Bahrain, in contrast, it is provided only that delay shall be dealt with in accordance with any contract.<sup>42</sup>

<sup>41</sup> Above, Article 49.

<sup>42</sup> Bahrain Law No. 37/2002 Issuing the Implementing Regulations for the Tenders and Purchase Law, Article 83.

# 13

## Price

From letters of intent to conditional payment clauses the local construction industry embraces the full range of potential price and payment controversies. The response of the applicable laws to these problems and the options available for recovery of monies owed are examined in this chapter.

### 13.1 Formation of a contract

In the formation of construction contracts, agreement of the price is a key component.<sup>1</sup> The requirements for establishing the existence of a contract have been described in the following terms:

The offer and acceptance should clearly indicate the intention of the contracting parties, such that each party is aware of the terms the other has proposed regarding the subject, type, qualities, method of performance, duration and price of the contract, as well as all key elements and material aspects of the contract and all the legal terms which the parties consider essential<sup>2</sup>

It follows that evidence that negotiations regarding the price have not been concluded or that the parties have failed to agree on a price supports a finding

<sup>1</sup> Oman Civil Code, Article 628 and the UAE Civil Code, Article 874.

<sup>2</sup> Federal Supreme Court No. 525/19 dated 13 June 1999.

that no contract has been concluded.<sup>3</sup> A party may, nevertheless, have an entitlement to payment, for example, for work attached to land provided that this was performed with the owner's consent<sup>4</sup> or on principles of unjust enrichment<sup>5</sup> but this depends on the exercise by the Court of Merits of a discretionary power.

Notwithstanding that the price is an essential element of a valid contract there is limited statutory or judicial guidance on the proper approach to determining whether an agreement on the price has been reached. The UAE Civil Code defines 'price' in the context of goods as follows:

'Price' means that which the parties have agreed in consideration of the sale, whether it is greater or less than the value, and 'value' means the (true) value of the goods, neither more nor less.<sup>6</sup>

There is no corresponding definition provided for a construction contract, though the price is not necessarily the amount an item is worth but rather the consideration agreed between the parties.<sup>7</sup> It follows that courts apply the parties' agreement on price without considering the commercial wisdom of the bargain reached.<sup>8</sup>

In a manner consistent with general principles of contract the courts can also be expected to apply an agreement on a method for determining the price. An entitlement to payment of the type often contained in a letter of intent may, therefore, be sufficient to satisfy the requirement for agreement on a price provided that any uncertainty can be resolved by reference to the applicable principles of contractual interpretation.

## 13.2 Fair remuneration: Contractor

If the parties proceed beyond the point at which there can be any doubt as to their intention to be contractually bound<sup>9</sup> without reaching agreement on the price or on any means for determining the price the UAE Civil Code offers the following guidance:

<sup>3</sup> Chapter 3 [Contract formation].

<sup>4</sup> Bahrain Civil Code, Article 852, Kuwait Civil Code, Article 883, Qatar Civil Code, Article 910 and the UAE Civil Code, Article 1271. Dubai Cassation No. 45/2004 dated 16 April 2006.

<sup>5</sup> Bahrain Civil Code, Article 182–190, Kuwait Civil Code, Article 262–268, Oman Civil Code, Article 303, Qatar Civil Code, Article 220–228 and the UAE Civil Code, Articles 318–324.

<sup>6</sup> UAE Civil Code, Article 503.

<sup>7</sup> Federal Supreme Court No. 356/23 dated 19 October 2004.

<sup>8</sup> The UAE Civil Code does not contain any provision corresponding to the principle of *lésion* by which, under French law, the price of fixed property can be adjusted in certain circumstances. Cf. the Kuwait Civil Code, Articles 162–166.

<sup>9</sup> See Chapter 3 [Contract formation].

If the consideration for the work is not specified in a contract, the contractor shall be entitled to fair remuneration, together with the value of the materials he has provided as required by the work.<sup>10</sup>

Corresponding provisions in Bahrain, Kuwait and Qatar provide that the price shall be ascertained by reference to the value of the work and the costs incurred.<sup>11</sup>

It falls to the Court of Merits to assess and determine a fair remuneration and the value of the materials used, a task that the domestic courts can be expected to delegate to an expert.<sup>12</sup> Any such assessment should take into account the price of similar works as well as any defects or incomplete elements of the scope.<sup>13</sup>

In a case decided by the Dubai Court of Cassation in 2008,<sup>14</sup> a contractor sought payment for interior decoration work to a villa. The villa was one of four buildings – three villas and a majlis – on a compound owned by the defendant. Initially, the works included two of the villas and the majlis, not the third villa. The scope and price of the work was recorded in a written contract that included an arbitration agreement. Subsequently, the owner extended the work to include the remaining villa by way of a verbal instruction.<sup>15</sup> The court rejected the owner's argument that there was a verbal agreement that the price of the interior decoration works was a lump sum of AED 1,500,000, an amount that could not be exceeded.<sup>16</sup> Instead, the court upheld the lower court's assessment of the amount due based on an experts' finding that the 'market price' for the works was AED 1,905,236 and, accordingly, awarded the contractor the outstanding balance.

An alternative means by which a contractor may be entitled to obtain payment in the absence of any agreement on the price lies in the recognition

<sup>10</sup> UAE Civil Code, Article 888. Oman Civil Code, Article 642 is almost identical. When ascertaining the price in commercial sales the UAE Code of Commercial Practice, Articles 97 to 101 will be applicable.

<sup>11</sup> Bahrain Civil Code, Article 601, Kuwait Civil Code, Article 678 and the Qatar Civil Code, Article 699.

<sup>12</sup> See Chapter 20 [Evidence].

<sup>13</sup> Dubai Cassation No. 175/1997 dated 21 December 1997 reversing the appealed judgment due to the lower court's failure to assess the impact of the alleged defects on a fair remuneration.

<sup>14</sup> Dubai Cassation No. 44/2008 dated 22 April 2008.

<sup>15</sup> The court agreed with the contractor that the additional works formed part of a separate verbal contract and were, therefore, not covered by the arbitration clause in respect of the works to the original three buildings as this failed to satisfy the requirement that an arbitration agreement is recorded in writing.

<sup>16</sup> The court held that it is for the Court of Merits to decide whether the price is a lump sum as per the Civil Code, Article 887, or remeasurable as per Article 886, which in turn determines whether any increase or decrease of the price is permitted.

of a contractor's right to payment of the value of building work executed on land with the owner's agreement<sup>17</sup>. This right, roughly analogous to a quantum meruit entitlement under common law, arises at law independently of a contract.<sup>18</sup>

### 13.3 Fair remuneration: Consultant

A consultant is entitled to receive the agreed fee in accordance with the terms of an appointment.

In relation to design services the UAE Civil Code provides:

- (1) If the consultant who has designed the building and supervised the construction thereof has not agreed a fee, he shall be entitled to fair remuneration in accordance with custom.
- (2) If any unforeseen event occurs which prevents the completion of the performance of the work in accordance with the design, he shall be entitled to fair remuneration for the work undertaken.<sup>19</sup>

A dispute over the calculation of an agreed price in the case, for example, of partial performance is determined by the Court of Merits with the assistance of an expert.<sup>20</sup> If the price has not been agreed, a consultant is also entitled to a fair remuneration, to be determined by reference to custom and practice.<sup>21</sup>

This entitlement survives notwithstanding that the project does not come to fruition. In a case that reached the Federal Supreme Court in 2009<sup>22</sup> the court concluded that the joint venture partner of a consultant had prevented

<sup>17</sup> Bahrain Civil Code, Articles 852 and 853, Kuwait Civil Code, Article 883, Oman Civil Code, Article 897, Qatar Civil Code, Article 912 and the UAE Civil Code, Article 1271.

<sup>18</sup> 'Additional Works Performed with Owner's Knowledge but Without Formal Approval', Lalive, International Law Office, 14 April 2014, reporting on a judgment of the Swiss Supreme Court 4A-178/2013, 31 July 2013 in which the Swiss Civil Code, Article 672, was considered and applied. The provisions listed in the previous footnote are very similar to the Swiss Civil Code, Article 672.

<sup>19</sup> UAE Civil Code, Article 889. Also, Oman Civil Code, Article 643. In Dubai, consultants are required, by virtue of Local Order 89/94, Article 42, and Administrative Decision 51/98, Article 27, to have a written agreement that specifies the fees payable. However, this is not a mandatory requirement so either party may adduce evidence of any applicable custom and of fairness in support of an assessment of the fees, which may include the relevant provisions of the specimen standard engineering services contract appended to the Administrative Decision: Dubai Cassation No. 340/2009 dated 25 April 2010.

<sup>20</sup> Dubai Cassation No. 667/2013 dated 28 December 2014 in which the expert's assessment of the proportion of the design and supervision services executed and the corresponding fee was adopted by the Court of Merits and subsequently affirmed by the Court of Cassation.

<sup>21</sup> Federal Supreme Court No. 71/22 dated 21 April 2002.

<sup>22</sup> Federal Supreme Court No. 111/3 dated 8 April 2009.



completion of its co-venturer's scope and that, in consequence, the previously agreed fee had to be reassessed.<sup>23</sup> The Federal Supreme Court adopted the following approach to determining the consultant's remuneration:

The Court shall consider the value of work, the costs incurred by [the consultant] to accomplish such work, the time taken thereby, their qualifications and efficiency which all constitute practical matters falling under the evaluation of the trial court's judge without being supervised in this regard by the Court of Cassation, so long as its inference was admissible and derived from the facts and papers.

Assessment of a fair remuneration is, therefore, a matter for the Court of Merits with limited intervention from the Court of Cassation. The result, in practice, is that the determination of a fair remuneration is delegated to a court appointed expert on whose judgment a court places heavy reliance.

### **13.4 Supply contracts**

For supply-only contracts Federal law provides that in the absence of agreement the price shall be the same as that applicable to any previous transactions, or in the absence of previous transactions, the market price, unless some other price would be more appropriate.<sup>24</sup> As this mirrors the principles applicable to the interpretation of contracts in the region's civil codes it is reasonable to expect that the default position throughout the Gulf follows a similar philosophy, laying the emphasis on custom and practice against a backdrop of the specific transaction and an assumption that all transactions are entered into for mutual benefit.

### **13.5 Lump sum and remeasure contracts**

Claims for additional payment or an increase in the contract price are a common feature of construction disputes everywhere, the Gulf being no exception.

At its simplest, a dispute may arise over the payment of a fixed lump sum price. A contractor will, of course, only be entitled to such payment if the agreed scope of work is completed.

<sup>23</sup> The parties had agreed a profit share, which by reason of the act of prevention, could not be quantified. Ordinarily, the court would apply the parties' agreement on fees notwithstanding that the services have not been completed: Federal Supreme Court No. 82/21 dated 13 May 2001.

<sup>24</sup> UAE Code of Commercial Practice, Article 97.

In a case that reached the Federal Supreme Court in 2001,<sup>25</sup> a deduction from a lump sum price for mechanical and electrical works was upheld after rejecting the contractor's submission that it had completed all of the agreed works. The bill of quantities was found to include a line item for a generator which had not been supplied. Accordingly, rejecting the contractor's submission that the generator was not included in the scope because it had not signed the bill of quantities, the court concluded that a generator was included in the lump sum and deducted the amount allowed in the price for its supply.

In the case of a remeasurement contract, a contractor must notify an employer of any substantial increase in the anticipated quantities, failing which the right to recover any excess over the estimated quantity is lost.<sup>26</sup> On receiving notification, an employer may terminate the contract but must do so without delay and must reimburse a contractor the value of the work performed, to be assessed in accordance with the contract.

### **13.6 Variations**

But an assessment of the scope is not always as straightforward, and attempts to adjust the price on a variety of grounds are commonplace. The starting point for an analysis of these attempts is that the terms of a contract must be strictly observed by both parties. Crucially for the construction industry some exceptions to the sanctity of contracts are permitted.

It is consistent with the first of these exceptions that both in principle and in practice the design, method or conditions of construction may be varied by or on behalf of an employer pursuant to a pre-agreed variation mechanism. Although all standard construction contracts, including the FIDIC Conditions, make provision for the instruction of and payment for variations, Federal law may apply in the absence of express agreement or if for some other reason, there is no operative price adjustment mechanism.

In general, the opportunities for a contractor to secure an adjustment to a lump sum price are limited. Specifically, a contractor is not entitled to increase a lump sum price if the increase arises merely out of the execution of the original works.

The risk that the work proves more difficult than expected due, for example, to unforeseen ground conditions,<sup>27</sup> or more expensive due to price escalation,<sup>28</sup> is borne by a contractor. Although relief may be given from severe loss in

<sup>25</sup> Abu Dhabi Cassation No. 468/21 dated 13 June 2001.

<sup>26</sup> Bahrain Civil Code, Article 612, Kuwait Civil Code, Article 689, Qatar Civil Code, Article 708, Oman Civil Code, Article 640 and the UAE Civil Code, Article 886.

<sup>27</sup> Abu Dhabi Cassation No. 573/2 dated 18 December 2008.

<sup>28</sup> Bahrain Civil Code, Article 602, Kuwait Civil Code, Article 679 and the Qatar Civil Code, Article 700.

some circumstances this is a power that is exercised sparingly.<sup>29</sup> The rationale for this restrictive approach, it has been suggested, is a need to protect inexperienced employers from claims for additional payment.<sup>30</sup>

Although there is no explicit reference in any UAE Federal law or any law of the other Gulf states to the need to protect an employer from price adjustments some explicit protection is afforded to an employer in Kuwait, Oman, Qatar and the United Arab Emirates in following terms:

- (1) If a *muqawala* contract is made on the basis of an agreed plan in consideration of a lump sum payment, the contractor may not demand any increase over the lump sum as may arise out of the execution of such plan.
- (2) If any variation or addition is made to the plan with the consent of the employer, the existing agreement with the contractor must be observed in connection with such variation or addition.<sup>31</sup>

Any additional or varied work that is agreed is subject to the same conditions as the original scope.

### 13.7 Subcontracts

Subcontractors are not governed by the same restrictions on the recovery of additional payment but, instead, are entitled to additional payment for a variation provided only that the variation has been agreed, whether in writing or otherwise:<sup>32</sup>

However, if the contracting agreement is entered into between a main contractor and a subcontractor, the above provisions of Article (887) will not apply. Rather, the general rules shall apply in this case. The subcontractor may make an amendment to the design at the approval of the main contractor, even if implicit and unwritten, without the need to

<sup>29</sup> Chapter 5.9 [Contractual principles: Unforeseen circumstances].

<sup>30</sup> Abu Dhabi Cassation No. 573/2 dated 18 December 2008.

<sup>31</sup> UAE Civil Code, Article 887(1). Also, Kuwait Civil Code, Article 690, Qatar Civil Code, Article 709 and the Oman Civil Code, Article 641. This is analogous to the inclusive price principle applicable in common law jurisdictions whereby it is implied that the contractor's lump sum includes all elements of the work necessary to complete the work. See *Williams v Fitzmaurice* [1958] 157 ER 709 in which the specification for the construction of a dwelling omitted reference to floorboards. The contractor was denied a claim for additional payment for the supply and installation of floorboards. There is some overlap between the Civil Code, Article 246(2) and Article 887 in this regard.

<sup>32</sup> Abu Dhabi Cassation No. 573/2 dated 18 December 2008.

agree with him over the additional payment in respect of such amendment; the subcontractor may also have recourse against the main contractor concerning the additional payment depending on the significance of the change made and the costs of work incurred. Article (887) of the Civil Code is intended to protect the employer, who is typically non-technical and inexperienced. However, the wisdom behind the provision of Article (887) does not apply to the relationship between the main contractor and the subcontractor as they both enjoy an equal level of technical know-how and experience. Hence, it is sufficient that their relationship is governed by general principles.

In a manner that reflects the flexible nature of civil law, a main contractor seeking additional payment is generally, therefore, held to a higher standard of proof than a subcontractor and, by extension, other project participants.

### **13.8 Public procurement in the UAE**

Contracts with UAE Federal Ministries are subject to a provision in the following terms:

The Ministry may, within the limit of thirty per cent of the contracted quantity, amend the quantities by increasing or decreasing them at the same prices without compensating the supplier or the contractor.<sup>33</sup>

The law applicable to contracts with the Government of Dubai provides that construction contracts are not to be concluded on a lump sum basis unless it is impossible to measure and value the works.<sup>34</sup> In the latter case, provision should, wherever possible, be made for measurement of major items. Government departments may increase or decrease the quantities by a maximum of thirty per cent of the total contract value.<sup>35</sup> Both the Government of Dubai and Federal Ministries may exceed the upper limit provided that the contractor agrees not to increase the contractual rates and prices and provided that such rates and prices remain 'suitable' and in line with market prices.<sup>36</sup>

<sup>33</sup> UAE Ministerial Decision 20/2000, Article 76. The corresponding ceiling is 20% pursuant to Qatar Law No. 26/2005i issuing the Tenders and Bids Regulations Law in Qatar, Article 26.

<sup>34</sup> Dubai Law No. 6/1997, Article 72.

<sup>35</sup> Dubai Law No. 6/1997, Article 48(1).

<sup>36</sup> Ministerial Decision 20/2000, Article 76 and Dubai Law No. 6/1997, Article 48(2).

The procurement regulations applicable to Abu Dhabi government projects appear not to contemplate the use of remeasurement contracts.<sup>37</sup> Quantities are to be fixed but may be adjusted by a variation with the 'mutual consent of the parties'.<sup>38</sup>

These provisions purport to restrict the right of a contractor working on a public sector project to increase its rates or prices or to seek any other form of recompense in consequence of a change in the nature or quantity of the work, provided that the increase or decrease in the contract value or quantity is within the specified parameters.<sup>39</sup>

<sup>37</sup> Abu Dhabi Law No. 4/1977, which governed public procurement in the Emirate of Abu Dhabi before being repealed by Abu Dhabi Law No. 6/2008, included a provision similar to those applicable to Federal Government and Dubai government projects although the variance in quantities was capped at twenty per cent.

<sup>38</sup> Procurement, Tenders and Auctions Guidebook, Article 43, issued under Abu Dhabi Law No. 6/2008. It is unclear how this is reconciled with Abu Dhabi Law No. 21/2006 introducing approved forms of construction contract based on the FIDIC Conditions, which include the standard mechanism for measurement of the work.

<sup>39</sup> For a discussion of the status of these provisions see Chapter 2.4 [Construction law: Public procurement].



# 14

## Payment

Despite the importance of payment the FIDIC Conditions address this topic relatively briefly.<sup>1</sup> The applicable civil codes, likewise, afford the topic relatively little attention. It is likely to come as little surprise, however, that payment issues are a common feature of construction disputes or that in some respects these are resolved in a manner that differs from their treatment in common law jurisdictions.

### 14.1 Payment on delivery

Payment falls due upon delivery of the work unless there is an agreement or a custom to the contrary.<sup>2</sup> Although the courts are not permitted, in general, to grant a grace period for payment or to allow payment by instalments, this restriction can be relaxed in exceptional circumstances.<sup>3</sup>

As an employer must take delivery at the latest 'when a contractor has completed the work and placed it at his disposal'<sup>4</sup> payment ordinarily

<sup>1</sup> FIDIC Conditions, Sub-Clause 14.7 [Payment].

<sup>2</sup> Bahrain Civil Code, Article 599, Kuwait Civil Code, Article 676, Oman Civil Code, Article 639, Qatar Civil Code, Article 697 and the UAE Civil Code, Article 885. Federal Supreme Court No. 201/20 dated 3 July 2000 and Dubai Cassation No. 19/2000 dated 28 March 2010.

<sup>3</sup> Kuwait Commerce Law, Article 109, Qatar Commerce Law, Article 79 and the UAE Code of Commercial Practice, Article 86. The exception does not appear to have been operated and is certainly not commonly used in practice.

<sup>4</sup> Bahrain Civil Code, Article 595, Kuwait Civil Code, Article 672, Oman Civil Code, Article 638, Qatar Civil, Article 693 and the UAE Civil Code, Article 884.

falls due on delivery or handover. Although the *muqawala* provisions of the applicable civil codes offer no support for recognising interim payments evidence of custom in the construction industry should provide an alternative to delivery as a basis for determining when payment falls due in the event of any ambiguity. Indeed, in the case of Federal Government projects it is provided that interim payments shall be made up to a maximum of ninety per cent of the contract value.<sup>5</sup> These interim payments may include a proportion of the value of project materials delivered to site. Similar provisions apply to Dubai government projects.<sup>6</sup> The procurement guidance covering government projects in Abu Dhabi likewise provides for interim payment up to ninety per cent of the value of the works and payment on account for materials delivered to site.<sup>7</sup>

If a contract is annulled the parties are required to return any part performance received, which includes any part of the price.<sup>8</sup> If it is not possible to restore the parties to their respective positions compensation,<sup>9</sup> including loss of profit,<sup>10</sup> may be awarded in lieu.<sup>11</sup> Under French law a distinction is made between *résolution* and *résiliation*, the former being closer to annulment and the latter to rescission, though the courts in practice mix and match the remedies flowing from each.<sup>12</sup>

It has also been held that as a construction contract is a continuing contract termination does not affect the parties' accrued rights, including the right to be paid for work performed, which are not extinguished on termination.<sup>13</sup> French law, likewise, recognises contracts involving ongoing performance as a special case.<sup>14</sup>

<sup>5</sup> UAE Ministerial Decision 20/2000, Article 88.

<sup>6</sup> Dubai Law No. 6/1997, Article 64.

<sup>7</sup> Procurement, Tenders and Auctions Guidebook, Article 54 issued under Abu Dhabi Law No. 6/2008.

<sup>8</sup> Bahrain Civil Code, Article 119, Kuwait Civil Code, Article 187, Oman Civil Code, Article 173, Qatar Civil Code, Article 185 and the UAE Civil Code, Article 275. See Chapter 16 [Suspension] and 17 [Termination].

<sup>9</sup> Federal Supreme Court No. 93/23 dated 30 December 2001.

<sup>10</sup> Dubai Cassation Nos. 218/2005 dated 20 February 2006 and 248/2005 dated 20 February 2006 in which the court upheld an assessment of the contractor's entitlement to be paid an amount based on the benefit produced rather than the agreed rates and prices.

<sup>11</sup> Bahrain Civil Code, Article 119, Kuwait Civil Code, Article 187, Oman Civil Code, Article 173, Qatar Civil Code, Article 185 and the UAE Civil Code, Articles 272(2) and 274.

<sup>12</sup> John Bell, 2008. *Principles of French Law*. 2nd Edition. Oxford University Press, pp. 357–359.

<sup>13</sup> Abu Dhabi Cassation No. 293/3 dated 27 May 2009, Dubai Cassation No. 50/2008 dated 27 May 2008 and Federal Supreme Court No. 213/23 dated 8 June 2003. Cf. Dubai Cassation No. 248/2005 dated 20 February 2006 in which the court upheld an assessment of the contractor's entitlement based on the benefit produced rather than the agreed rates and prices.

<sup>14</sup> John Bell, 2008. *Principles of French Law*. 2nd Edition. Oxford University Press, p. 448.



## 14.2 Payment certificates

Ordinarily a claimant has the burden of proving the existence of a debt and thereafter the burden shifts to a defendant to prove that the debt has been discharged.<sup>15</sup> However, there is a presumption that payment is due in respect of an amount included in a payment certificate issued by a consultant.<sup>16</sup> In a case heard by the Dubai Court of Cassation in 1999 an employer, a UAE national, resisted a claim by a contractor for AED 169,550, being the balance of an amount certified by the consultant for the construction of a villa and counterclaimed liquidated damages for delay.<sup>17</sup> The employer maintained that the consultant had sided with the contractor as a result of a disagreement over payment of his professional fees, and that, therefore, instead of relying on the certificate an independent expert should be appointed by the court to determine the amount payable.

The Court of Cassation rejected the employer's submission, giving judgment for the contractor for the balance due under the certificate and rejecting the counterclaim for liquidated damages. It was held that a consultant acts for and on behalf of his client. Consequently, unless fraud or collusion can be proved an employer is bound by a certificate issued by his consultant.<sup>18</sup>

## 14.3 Subcontracts

In the United Arab Emirates and Oman a subcontractor has no right to claim payment from an employer, unless there is an assignment of the corresponding right from the main contractor.<sup>19</sup> The requirements for a valid assignment were considered by the Federal Supreme Court in a claim arising from the completion by a subcontractor of some villas on behalf of the main contractor.<sup>20</sup> The main contractor assigned the right to collect amounts due for both villas that were complete and to collect payments falling due following completion of other villas by the subcontractor. Upholding the lower court's rejection of the claim, the Federal Supreme Court agreed that the

<sup>15</sup> Abu Dhabi Cassation No. 287/2 dated 18 September 2008.

<sup>16</sup> Dubai Cassation No. 167/1998 dated 6 June 1998.

<sup>17</sup> Dubai Cassation No. 333/99 dated 26 December 1999, Dubai Cassation No. 198/2009 dated 10 November 2009 and Abu Dhabi Cassation No. 793/3 dated 15 October 2009.

<sup>18</sup> Dubai Cassation Nos. 430/2001 dated 17 February 2002 and 793/2009 dated 15 October 2009. A contractor is not similarly bound by a consultant's certificate: Abu Dhabi Cassation Nos. 43, 78 and 161/4 dated 31 March 2010.

<sup>19</sup> UAE Civil Code, Article 891 and the Oman Civil Code, Article 645. Federal Supreme Court No. 273/19 dated 30 May 1999.

<sup>20</sup> Federal Supreme Court No. 33/15 dated 26 June 1994.

assignment lacked sufficient certainty due to the absence of any record of the status of the works for each villa, the amounts due or the names of the employers from whom collection was to be made. The Federal Supreme Court stated:

Accordingly, the evidence on which the Appellant [subcontractor] relies for the claim against the Respondent [the employer] is not sufficient due to the lack of any reliable transfer from the main contractor.

A high level of certainty, it would seem, is required in order to create an effective transfer.<sup>21</sup>

Notably, the position in Bahrain, Kuwait and Qatar differs from that in the United Arab Emirates and Oman. The position here not only follows the French Civil Code<sup>22</sup> which confers on labourers a claim directly against an employer but goes further, extending the right to a subcontractor as follows:

A subcontractor and workmen employed by a contractor in the execution of a contract have a direct right of action against the employer but only to the extent of such sums as are due by the employer to the main contractor on the date that action is commenced.<sup>23</sup>

A payment claim may be made by a subcontractor directly against an employer, therefore, provided that the amount being claimed is due to the contractor and is unpaid.

## 14.4 Conditional payment clauses

Conditional payment clauses or, as they are also known, 'pay when paid' clauses are a common feature of subcontractors' and subconsultants' payment terms in the United Arab Emirates and the Gulf.<sup>24</sup>

The ostensible purpose of a conditional payment clause is to guard against a cash flow crunch by making the downstream payment obligation conditional on receipt of payment from the upstream party. The effect, in principle, of such clauses is that any cash flow squeeze is passed down, in whole or part, to subcontractors and subconsultants thus ensuring that each party bears its

<sup>21</sup> Refer also to Chapter 5.4 [Contractual principles: Subcontractors].

<sup>22</sup> French Civil Code, Article 1798.

<sup>23</sup> Bahrain Civil Code, Article 605. Also Kuwait Civil Code, Article 682 and Qatar Civil Code, Article 702.

<sup>24</sup> For an example see the Conditions of Subcontract for Construction, published by FIDIC (2011), Sub-Clause 14.6(c) [Interim Subcontract Payments].

share of any payment problems on a project. In practice, the effect of a conditional payment clause depends on a combination of variable factors including its wording and the applicable law. Unlike in some jurisdictions,<sup>25</sup> there is no statutory regulation of conditional payment clauses in the Gulf.

In a decision in 1996 the Court of Cassation, Dubai's highest court, considered the effect of the applicable law on a conditional payment clause.<sup>26</sup> The claimant, a subcontractor for mechanical and electrical works, sought judgment against a main contractor for the balance of the subcontract price. The main contractor resisted the claim, relying on a term of the subcontract making payment under the subcontract conditional on payment by the employer. Although more than five years had elapsed since completion of the project the amount claimed had not been paid by the employer. The Court of Cassation had to decide whether the main contractor was entitled to postpone payment indefinitely or only until the occurrence of an unspecified payment triggering event.

The Court of Cassation prefaced its judgment with an affirmation that the conditional payment clause was subject to general principles of contract which require the courts to have regard to 'meaning and intention, not mere words' and to the 'common interest' of the parties and went on to conclude that:

There is no justification for subcontractors to be concerned with recovering the balance of their dues if they have completed their work and the main contractor has been paid the balance of his dues by the employer after completing the whole project and handing over the work to the employer. In this way, the subcontractor, having completed his work, would be safeguarded against damage due to any cause in which he has no hand. Again, the contract provisions have to be interpreted in such a way so as to achieve the common interests of the parties and not to give undue weight to the interest of one over the other, applying the rule that states that no harm shall be done nor harm done in return.

To require the subcontractor to wait for payment beyond the handover of the project or to be made to suffer for problems that it may not have caused would, the Court of Cassation held, be incompatible with these principles. As the terms of the governing contract were susceptible to an interpretation that was consistent with the 'common interest' of the parties, the Court of Cassation concluded that payment could not be withheld once the project had been handed over and, accordingly, the subcontractor prevailed.

<sup>25</sup> Notably in England, Wales and Scotland where most forms of conditional payment clauses in construction contracts are prohibited under the Housing Grants Construction and Regeneration Act 1996 (as amended).

<sup>26</sup> Dubai Cassation No. 281/95 dated 6 July 1996.

The Court of Cassation also declined to apply a conditional payment clause in a dispute between a subcontractor and a supplier<sup>27</sup> in which the subcontractor maintained that by reason of a back-to-back payment clause, payment fell due on the subcontractor receiving payment from the main contractor. Joining the main contractor into the proceedings, the subcontractor submitted that this claim and the supplier's claim were co-dependent. Disagreeing, the Court of Cassation found that by providing the supplier with a letter of credit the subcontractor had replaced the conditional payment terms with payment terms that were not conditional and that this was, by implication, a waiver of such terms. As payment falls due on handover in the absence of any agreement or custom to the contrary<sup>28</sup> and the supplier's works had been completed without complaint from the subcontractor, payment was due.

In contrast, in an appeal heard by the Dubai Court of Cassation in 2005 a main contractor successfully resisted a claim for payment by a supplier of doors and frames, the court determining that where payment is agreed to be conditional the burden of proof is on the claimant to establish that the conditions are met.<sup>29</sup>

Thus, with clear wording it remains possible to create a conditional payment obligation that survives beyond handover. Conversely, reliance on imprecise drafting or contractual shorthand is likely to be ineffective.

Certain refinements to a conditional payment clause can provide a measure of protection for the payee and balance the respective rights of the contracting parties. These include:

- imposing a positive obligation on the payer to take steps, including legal action if necessary, to obtain payment
- suspending the operation of the clause if non-payment occurs due the payer's default under the upstream contract
- imposing an obligation on the payer to provide information regarding payments applied for and received
- providing for apportionment of lump sum payments, the composition of which is not otherwise apparent as between main contract and subcontract works
- limiting the period during which payment can be withheld.

Such measures will be applied by the courts in a manner consistent with general principles of contract.

<sup>27</sup> Dubai Cassation No. 398/2003 dated 14 March 2004.

<sup>28</sup> UAE Civil Code, Article 885. Also, Bahrain Civil Code, Article 599, Kuwait Civil Code, Article 676, Oman Civil Code, Article 639 and the Qatar Civil Code, Article 697.

<sup>29</sup> Dubai Cassation No. 302/2004 dated 2 May 2005. This also appears to have been the result in the case reported in 'Dubai: Pay when paid clauses', Al Tamimi & Co newsletter, September 2013.

## 14.5 Bank guarantee

An alternative or additional solution to the risk of payment default is to take security, usually in the form of a parallel commitment from a third party. Security for payment is not a feature of the FIDIC Conditions, or of construction contracts in general in the Gulf, the former, for example, providing only that a contractor is entitled to request and receive:

reasonable evidence that financial arrangements have been made and are being maintained which will enable the Employer to pay the Contract Price<sup>30</sup>

But in circumstances where payment security can, in principle, be agreed there are a variety of options available, some more secure than others.

Both bank bonds and letters of credit substitute a bank as the primary obligor.<sup>31</sup> In the United Arab Emirates, banks are regulated by the Central Bank, which has warned the country's commercial banks that any attempt to avoid exposure under such an instrument poses a risk of damaging confidence in the financial system and, accordingly, will be met with 'appropriate action'.<sup>32</sup>

The scope for a bank to resist payment of a demand is also constrained elsewhere in the Gulf. Thus, for example, in Bahrain, Kuwait and Qatar a bank is not permitted to rely on any underlying issues arising from the relationship between itself and its customer or between its customer and the beneficiary.<sup>33</sup>

But the value of a bank bond will depend on its terms. A bond triggered on first written demand should provide greater comfort than one that is subject to conditions such as production of a copy of a final judgment or award. Local custom and practice is for bank guarantees to be unconditional as a result of which the burden of proof falls on the party seeking to establish otherwise.<sup>34</sup> A bank bond or letter of credit is, therefore, generally

<sup>30</sup> Sub-Clause 2.4 [Employer's Financial Arrangements]. The Conditions of Subcontract for Construction, published by FIDIC (2011) also provide no payment security for a subcontractor but entitle a subcontractor to the like rights as a main contractor, which most likely extends to confirmation of a main contractor's financial arrangements where applicable under the main contract.

<sup>31</sup> The bank's liability is governed by the terms of the bond, without regard to the underlying contractual relationship or liabilities: Dubai Cassation No. 148/1990 dated 9 March 1991.

<sup>32</sup> Central Bank letter dated 2 November 1998 issued to all banks in the United Arab Emirates.

<sup>33</sup> Bahrain Commerce Law, Article 334, Kuwait Commerce Law, Article 385 and the Qatar Commerce Law, Article 409.

<sup>34</sup> Dubai Cassation No. 411/2003 dated 4 April 2004.

an attractive option for a creditor. It is, nevertheless, possible to prevent payment in certain circumstances.<sup>35</sup>

The dramatic effect on the real estate sector of the onset of the global financial crisis in the Gulf, particularly in Dubai, due to the hyperactive property market in the latter part of 2008 caused a surge in the liquidation of bank bonds, a relatively rare event up until that time. In addition to a corresponding surge in attempts to halt payment a significant number of proceedings were initiated, particularly by contractors, in an effort to recover amounts wrongfully demanded and subsequently paid out by the issuing banks. As a contractor or any other principal is not a party to a bank bond a conceptual difficulty arises when identifying the source of a contractor's entitlement to make a recovery directly from a beneficiary.<sup>36</sup> There are several solutions the neatest of which derives from the nature of a bank bond itself.

On the basis that a bank bond is properly categorised as a form of guarantee<sup>37</sup> the obligation is in the nature of a suretyship and subject to the following:

Suretyship is the joining of the liability of a person called the surety with the liability of the obligor in the performance of his obligations<sup>38</sup>

This provision and general suretyship provisions of the applicable civil codes<sup>39</sup> link the underlying obligations of a principal and beneficiary with the rights of the same beneficiary under a bank bond, permitting, it is submitted, a direct recovery by a principal from a beneficiary.

In Bahrain this issue is addressed to some extent in the form of a statutory subrogation right as follows:

If the bank pays to the beneficiary the amount agreed in the letter of guarantee, it shall subrogate him for recourse against the applicant to the extent of the amount paid.<sup>40</sup>

<sup>35</sup> UAE Code of Commercial Practice, Article 417(2), Dubai Cassation No. 109/2001 dated 13 May 2001, Dubai Cassation No. 261/2009 dated 16 September 2009 in which the court lifted the attachment granted by the Court of First Instance and confirmed by the Court of Appeal but stated that an attachment is permitted in '*exceptional*' circumstances, Dubai Court of Appeal No. 44/2010 dated 28 July 2010 and Dubai Court of First Instance No. 733/2009 dated 18 April 2010. See also Chapter 22.6 [Litigation: Summary actions].

<sup>36</sup> The FIDIC Conditions, at Sub-Clause 4.2 [Performance Security], address this issue by providing a contractor with an indemnity from an employer for any wrongful demand and thus the necessary cause of action arises under this contractual indemnity.

<sup>37</sup> UAE Code of Commercial Practice, Articles 411–414.

<sup>38</sup> UAE Civil Code, Article 1056. Also Bahrain Civil Code, Article 742, Kuwait Civil Code, Article 745, Oman Civil Code, Article 736 and the Qatar Civil Code, Article 808.

<sup>39</sup> Bahrain Civil Code, Articles 742–768 and the UAE Civil Code, Article 1056 onwards. A commentary on the origin of these provisions can be found in 'The Influence of Classical Interpretation on the Law of Guarantees in the United Arab Emirates', Suhaimi Ab Rahman, ALQ 22 (2008) 335.

<sup>40</sup> Bahrain Commerce Law, Article 336.

Accordingly, in principle, a bank may pursue a recovery claim relying on the underlying rights of a contractor. In practice, most banks prefer to rely on a security package obtained from the contractor, leaving the contractor to pursue a recovery of any amount wrongfully demanded.

## 14.6 Cheque

Whereas a bank bond is a reliable but often expensive and credit-draining form of security, a post-dated cheque is a less reliable but cheap alternative. Despite practical constraints, such as the amount and date of payment for works generally not crystallising until the work is complete, post-dated cheques are a practical and convenient option in the case, for example, of supply-only contracts or relatively straightforward lump sum contracts.

The popularity of post-dated cheques as a form of security in the local market stems from the laws that make it a criminal offence to issue a cheque that is subsequently dishonoured.<sup>41</sup> The prospect of arrest, prosecution and conviction is a powerful incentive to ensure either that sufficient funds are available to clear post-dated cheques or that the signatory is not available to face the consequences. As a bearer of a dishonoured cheque is entitled as part of any prosecution to seek a judgment for the cheque amount as well as compensation there is a similarly strong incentive for a bearer to lodge a criminal complaint where circumstances allow. The drawer has a right to sue on a cheque, a right that exists independently from the underlying transaction.<sup>42</sup> The signatory of a cheque can also be personally liable for the amount of a dishonoured cheque issued on a company's bank account.<sup>43</sup>

Although official pronouncements in the United Arab Emirates in recent years have hinted that failure to honour a cheque is no longer a matter for the police<sup>44</sup> any such policy change has yet to take effect.<sup>45</sup> Until the necessary

<sup>41</sup> Bahrain Penal Code, Article 393, Kuwait Civil Code, Article 237, Oman Penal Code, Article 290, Qatar Penal Code, Article 357 and the UAE Penal Code, Articles 401 and 402 and the UAE Code of Commercial Practice, Articles 641 and 644.

<sup>42</sup> Cf. Dubai Cassation No. 26/2005 dated 21 November 2005 in which the Court of Cassation held that the claimant had failed to prove that the signatory (the general manager) of the acknowledgment of the debt for which the cheques were written was authorised to sign such acknowledgment.

<sup>43</sup> Dubai Cassation No. 348/2000 dated 15 January 2000.

<sup>44</sup> 'UAE Stops Jailing Expats for Bounced Cheques', *The Telegraph*, 1 January 2013.

<sup>45</sup> 'Bad Cheques are Still a Crime in the UAE', *Gulf News*, 15 January 2013 and 'Credit Bureau to Reform Borrowing and Bounced Cheques in the UAE', *The National*, 1 May 2013. In an effort to reduce the number of returned cheques the Central Bank circulated notice No. 2161/2003 dated 3 August 2003, pursuant to which, among other things, banks are required, if there are insufficient funds to meet a cheque amount in full, to offer the bearer an option to accept the funds that are available, if any, and a 'Partial Payment Certificate' for the balance in lieu of making a criminal complaint.

amendments are made to the criminal law dishonouring a cheque remains a criminal offence. The police can take action ranging from requesting attendance of the debtor at the local police station for questioning through to arrest, detention and referring the case to the public prosecutor.

Other options for security include credit risk insurance and the use of escrow agents, particularly in real estate transactions. A sound regime for monitoring collections, to include prompt invoicing and monitoring of debts as well as a system for escalating the pressure on debtors over time, is an essential practical measure for reducing the incidence of payment problems. Efforts to extract payment voluntarily, even if unsuccessful, are not necessarily wasted if written records are created, particularly if those records demonstrate that the debtor has made and broken promises to pay. These records can prove particularly valuable as evidence in subsequent legal proceedings, especially in the absence of any rules of privilege protecting admissions made in an attempt to reach an accord and satisfaction from production.<sup>46</sup>

Litigation or arbitration, depending on the contractual dispute resolution procedure, provide the final means of recourse against intransigent debtors. Legal proceedings can be commenced, as well as, or instead of, the measures outlined above.

<sup>46</sup> Chapter 20 [Evidence].



# 15

## Interest

In an industry as capital intensive as construction the entitlement or absence of it to interest and financing charges is an important issue for all project participants. Add to this the central role of the Islamic Shari'ah in the legal systems of the Gulf states,<sup>1</sup> and the disapproval of *riba* under the Islamic Shari'ah, and the conditions are ripe for controversy.

### 15.1 *Riba* and usury

The Islamic Shari'ah provides that:

God deprives usurious gains of all blessing, whereas He blesses charitable deeds with manifold increase.<sup>2</sup>

Although it is accepted by Islamic jurists that *riba* is prohibited absolutely in the Qur'an, it is far from clear what this means in practice for the recovery of interest, not least because there is no consensus on precisely what constitutes *riba*. Excessive interest or usury<sup>3</sup> is widely accepted as an indicator

<sup>1</sup> Bahrain Constitution, Article 2, Kuwait Constitution, Article 2, Qatar Constitution, Article 1, Oman Constitution, Article 2 and the UAE Constitution, Article 7.

<sup>2</sup> Qur'an, chapter 2, verse 276. See also, The Qur'an chapters 2:275, 2:278, 3:130, 4:161 and 30:39. The distaste for 'usurious gains' is not unique to Islam: the Catholic church through Canon Law historically prohibited excessive interest with the current more permissive approach often being traced to a papal bull in 1515, which permitted interest on loans to the poor.

<sup>3</sup> The word 'usury' derives from the Latin *usura*, which simply means interest.

of *riba* but excessiveness itself is not a universally agreed measure.<sup>4</sup> Indeed, it is an over-simplification of *riba* to treat this solely as referring to usury or, indeed, interest alone.<sup>5</sup> Consequently, a precise definition of *riba* remains elusive.

The crux of the *riba* problem lies, however, not so much in its definition as in the part played by Western finance institutions in the economies of the region. The increasing role of Shari'ah compliant financing in trade and commerce in the Gulf is one manifestation of the ongoing tension between Western banking practices and the Islamic Shari'ah.

This tension is also evident in a number of laws and judgments that emerged during the 1970s until the early 1990s, notably in the United Arab Emirates.<sup>6</sup> In particular, the courts refused in a number of cases to enforce interest on loans and overdrafts despite legislation to the contrary<sup>7</sup> and a landmark decision of the Federal Supreme Court<sup>8</sup> aimed at upholding interest provisions in banking transactions. The refusal to award interest and in 1985 the enactment of the UAE Civil Code enshrining a prohibition on *riba*<sup>9</sup> caused considerable disquiet among the banks and other financial institutions operating in the United Arab Emirates.<sup>10</sup>

The prohibition on recovering interest was compounded two years later by the inclusion in the UAE Penal Code of an offence carrying a minimum sentence of three years' imprisonment, of dealing in usury in any commercial transaction.<sup>11</sup>

The sensitivity of this issue is evident in the differing treatment afforded to the recovery of interest the region's civil codes. Thus, the civil codes of Bahrain and Kuwait contain similar provisions prohibiting the recovery of interest.<sup>12</sup>

<sup>4</sup> For a discussion and contrary view on the need for excess, at least in relation to interest on loans: 'Stipulation of Excess in Understanding and Misunderstanding Riba: The Al-Jassas Link', Dr Mohammad Omar Farooq, ALQ 21 (2001).

<sup>5</sup> *Commercial Law in the Arab Middle East: The Gulf States*, William Ballantyne, Lloyds of London (1986), 122.

<sup>6</sup> In Federal Supreme Court No. 294/12 dated 28 May 1991 the appellant relied on a number of inconsistent judgments unsuccessfully to invoke the appointment of a special panel of the Supreme Court pursuant to the UAE Federal Supreme Court Law, Article 65. A useful commentary on the development of the law is contained in 'Interest Under the UAE Law and as Applied by the Courts of Abu Dhabi', H. Tamimi, ALQ Vol. 17, Iss. 1, p. 50.

<sup>7</sup> Abu Dhabi Law No. 3/1970, Article 62, as amended by Abu Dhabi Law No.s 3 and 4/1987.

<sup>8</sup> Federal Supreme Court No. 14/9 dated 28 September 1981.

<sup>9</sup> UAE Civil Code, Articles 204 and 714 and 'The New Civil Code of the United Arab Emirates', W. M. Ballantyne, ALQ Vol. 1, Iss. 3, p. 263.

<sup>10</sup> For a general discussion of the evolution of laws governing interest in the Middle East: 'Freedom of Contract: What Does it Mean in the Context of Arab Laws?' Nabil Saleh, ALQ (2001), 346.

<sup>11</sup> UAE Penal Code, Article 409. Also the Bahrain Penal Code, Article 401, makes usury a crime.

<sup>12</sup> Bahrain Civil Code, Article 228 and the Kuwait Civil Code, Article 305.

In Oman the corresponding provisions of the Oman Civil Code do not refer to interest expressly but instead state that if the subject matter or purpose of a contract is contrary to the Islamic Shari'ah the contract shall be void.<sup>13</sup> The Qatar Civil Code is also silent on the recovery of interest though in practice an agreement to pay interest in an amount that is not excessive is likely to be upheld and the courts typically award interest on a judgment debt.

In Saudi Arabia interest in all its forms is considered to be contrary to the Islamic Shari'ah and any obligation to pay interest is void and unenforceable in any dispute resolution forum.

## 15.2 Statutory right

In an effort to clarify the law on the recovery of interest in commercial contracts and to provide reassurance to banks and financial institutions several new provisions expressly recognising interest were incorporated in several of the Gulf states' new commercial codes, including the UAE Code of Commercial Practice. Although there is a view that these provisions apply exclusively to commercial loans there is little indication that they are so restricted.<sup>14</sup> In particular, the key provisions contain no indication that they are limited in such a way:

If the contract includes an agreement on the rate of interest and the debtor is late making payment, delay interest shall be calculated on the basis of the agreed rate until full settlement is made.<sup>15</sup>

Even in the absence of agreement, provision is made for interest to accrue on the late payment of commercial debts.

A critical distinction is drawn, however, between civil transactions, in the context of which the prohibition on *riba* survives, and commercial transactions, in the context of which the prohibition has been substantially diluted.<sup>16</sup> For this purpose, a construction contract is invariably commercial.<sup>17</sup>

<sup>13</sup> Oman Civil Code, Articles 120 and 121.

<sup>14</sup> Dubai Cassation No. 52/97 dated 6 April 1997, which arose from a guarantee, albeit a guarantee of a bank loan. It is, nevertheless, important to maintain the distinction between the application of *riba* to contracts and to loans: 'Analysing the Islamic Prohibition on Riba: A Prohibition on Substance or Form?' Hamid Harasani, ALQ 27 (2013), 290.

<sup>15</sup> UAE Code of Commercial Practice, Article 77. Also, Bahrain Commerce Law, Article 81 and the Kuwait Commerce Law, Article 110.

<sup>16</sup> 'Application of Islamic Law in the Middle East – Interest and Islamic Banking', S. Majid, [2003] ICLR, 177 and 'Interest Under the UAE Law and as Applied by the Courts of Abu Dhabi', H. Tamimi, ALQ Vol. 17, Iss. 1, p. 50.

<sup>17</sup> Chapter 2.2 [Construction law: Commercial and civil contracts].

### 15.3 Fixed or crystallised debt

It is provided in respect of commercial contracts that:

Interest for delay in settlement of commercial debts shall be payable immediately they fall due unless the law provides otherwise or it is otherwise agreed.<sup>18</sup>

Thus, in principle, if the value of the debt is fixed or known, interest accrues at the prevailing market rate on that debt from the date on which it falls due, unless the parties have otherwise agreed.

Although the Dubai Court of Cassation gave effect to this principle in a judgment in 1997,<sup>19</sup> awarding interest on a debt from the date that it fell due, a consistency of approach by the domestic courts to the award of interest from the due date cannot readily be discerned.

In particular, there is a tendency to require a debt to have crystallised prior to awarding interest. Although it has been suggested that interest on a judgment represents compensation for 'presumed' damage payable for delaying payment in breach of an obligation and, therefore, is not necessarily inconsistent with principles of the Islamic Shari'ah,<sup>20</sup> the need to avoid uncertainty remains.<sup>21</sup> In consequence, if the amount of the debt is not known at the time that it falls due, interest generally does not accrue until a final judgment is given.

In Bahrain, Kuwait and the United Arab Emirates this has a statutory source. Thus, in the case of the later the UAE Code of Commercial Practice provides that:

If the subject of a commercial obligation is a cash sum in an amount known at the time the debt is established and the debtor delays in making settlement, he shall be obliged to pay the creditor the interest specified in articles 76 and 77 as compensation for the delay unless otherwise agreed.<sup>22</sup>

The courts make reference to this provision in relation to awards of judgment interest, drawing a distinction between judgment for unquantified claims, on

<sup>18</sup> UAE Code of Commercial Practice, Article 90.

<sup>19</sup> Dubai Cassation No. 52/1997 dated 6 April 1997.

<sup>20</sup> Federal Supreme Court No. 371/18 dated 30 June 1998, 332/21 dated 25 September 2001, Federal Supreme Court No. 435 and 516/21 dated 12 June 2001 and Federal Supreme Court No. 371/21 dated 24 June 2001.

<sup>21</sup> In addition to *riba*, Muslims must avoid *gharar*, which is generally translated as uncertainty or speculation.

<sup>22</sup> UAE Code of Commercial Practice, Article 88. Articles 76 and 77 deal with the calculation of interest, a subject considered below. Also, Bahrain Commerce Law, Article 81(1) and the Kuwait Commerce Law, Article 110.

which judgment interest only is awarded and quantified claims, on which interest may be awarded either from the date on which the debt fell due or, more commonly, from commencement of proceedings.<sup>23</sup>

A judgment of the Federal Supreme Court in 2001 confirmed that:

It has long been an established practice of this Court that, if the subject matter of an obligation is a monetary sum which falls to be determined under the lower courts' discretionary powers, any late payment interest awarded should be calculated from the date on which the judgment determining the amount due becomes final as it is only on that date that the sum becomes specific in amount.<sup>24</sup>

The Federal Supreme Court held that the liability of a subcontractor for damage to a villa caused by a fire required an assessment by the Court of Merits and that, accordingly, the amount of the debt became known for the purpose of triggering interest<sup>25</sup> from the date of the judgment.

The Federal Supreme Court has summarised the proper approach to determining whether a claimed amount is crystallised as follows:

For an amount to be considered as a quantified amount on the date of claim as a requirement for calculating the delay interest from the date of the claim, it should not be subject to the full discretion of the judge to quantify such claimed amount. Moreover, where the claimed amount is based on such firm grounds that the judge has limited discretion to assess the same, the claimed amount shall be considered as quantified at the time of the claim even though such amount is challenged by the debtor.<sup>26</sup>

As the amount of a construction claim typically crystallises upon certification (for subcontractors or sub-suppliers often not even then) the practice of the Federal Supreme Court, as expressed above, places a major constraint on the recovery of interest on late payments within the construction industry.

<sup>23</sup> Dubai Cassation No. 74/1998 dated 12 December 1998 involving a shareholder loan, in which the Court of Cassation awarded interest from the date on which proceedings were commenced.

<sup>24</sup> Federal Supreme Court No. 417/21 dated 20 June 2001. Also, Federal Supreme Court No. 383/2004 dated 15 October 2005.

<sup>25</sup> UAE Code of Commercial Practice, Article 88.

<sup>26</sup> Federal Supreme Court No. 220/21 dated 31 December 2001. Cf Dubai Cassation No. 340/1999 dated 16 January 2000 in which the court upheld an interest award on a final account balance calculated from the commencement of proceedings notwithstanding that the amount due fell to be assessed by a court appointed expert.

## 15.4 Interest in the UAE

Interest, where payable, accrues at the agreed rate<sup>27</sup> or if not agreed then at the prevailing market rate, subject to a maximum of twelve per cent annually.<sup>28</sup> The prevailing market rate currently applied by the domestic courts, in general, falls within a range of seven to nine per cent annually.<sup>29</sup> Determination of the applicable rate is a matter for the Court of Merits.<sup>30</sup>

## 15.5 Interest under the FIDIC Conditions

The treatment of interest in the standard form contracts published by FIDIC differs between past and present editions. The fourth edition of the FIDIC Conditions incorporates an agreement for payment of interest<sup>31</sup> while the third edition, published in 1977, does not. The current edition of the FIDIC Conditions, published in 1999, adopts a different approach from both the third and fourth editions, omitting the entitlement to interest in favour of the following:

If the Contractor does not receive payment in accordance with Sub-Clause 14.7 [Payment], the Contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay.<sup>32</sup>

This change is presumably intended to overcome the objection of an employer to any liability for interest, as well as doubts over the enforceability of interest provisions in Islamic countries. As the principle of compounding, included explicitly in the FIDIC Conditions, Sub-Clause 14.8, is particularly abhorrent under the Islamic Shari'ah by virtue of the direct correlation between the exhortation in the Qur'an to avoid 'doubling and redoubling',<sup>33</sup> it is likely that the amended provision causes as much and possibly more offence than the provision for interest that it replaces.<sup>34</sup>

<sup>27</sup> UAE Code of Commercial Practice, Article 77.

<sup>28</sup> UAE Code of Commercial Practice, Article 76.

<sup>29</sup> Omer Eltom (2009). *The Emirates Law in Practice*. Dubai. 181.

<sup>30</sup> Federal Supreme Court No. 417/21 dated 20 June 2001.

<sup>31</sup> FIDIC Conditions, 4th Edition, Sub-Clause 60.10

<sup>32</sup> FIDIC Conditions, Sub-Clause 14.8 [Delayed Payment].

<sup>33</sup> 'Stipulation of Excess in Understanding and Misunderstanding Riba: The Al-Jassas Link', Dr Mohammad Omar Farooq, ALQ 21 (2001), 286.

<sup>34</sup> Federal Supreme Court No. 371/18 dated 30 June 1998 in which the court held that although delay fines are not prohibited by Islam, compound interest is forbidden. This is consistent with Federal Supreme Court No. 26/18 dated 31 December 1996 in which it was held that compound interest is not permitted in banking transactions either. The position in Dubai appears to be that compound interest is permitted, at least on loans: Omer Eltom (2009). *The Emirates Law in Practice*. Dubai. 184–186.

If the calculation of interest results in a liability greater than the principal this is likely, for the same reason, to be objectionable.

## 15.6 Financing charges

Financing charges are the costs of money, which in general means borrowing costs<sup>35</sup> or loss of investment income, incurred by a payee due to delayed payment. It has long been common practice in the construction industry for contractors and subcontractors to resort to a claim for financing charges to circumvent difficulties associated with the recovery of interest.<sup>36</sup>

Although an entitlement to financing charges may arise pursuant to an express contractual entitlement, either specifically to financing charges<sup>37</sup> or to direct loss and expense,<sup>38</sup> financing charges are more typically a component of a damages claim. As with other components of a damages claim, financing charges must have been caused by an event or events for which another party is liable.

There is no express prohibition on the award of financing charges pursuant to local law and on the basis of the principles applicable to the assessment of damages financing charges are, it is submitted, recoverable as general damages. In Qatar, it is clear that actual loss can include loss attributable to delayed payment by virtue of the following:

If the object of the obligation is a sum of money, and the debtor does not pay it after he has been given notice, and the creditor proves that as a result of this he has sustained detriment, the court may order the debtor to pay compensation, taking into account the requirements of equity.<sup>39</sup>

Some support for an entitlement to financing charges may also be derived from the following expression of principle of the Dubai Court of Cassation:

in circumstances where neither the law nor the contract provide for the amount of compensation to be paid in respect of contractual liability, the same is left to the discretion of the judge provided that any compensation granted by the judge should include any loss suffered or profit lost and

<sup>35</sup> Most commonly, the rate of interest on a contractor's project specific bank facility.

<sup>36</sup> It was only in 2008 that the UK's Supreme Court formally abolished the long established prohibition on recovery of interest as damages for breach of contract under English law: *Sempra Metals v HMCIR* [2008] 1 A.C. 561.

<sup>37</sup> FIDIC Conditions, Sub-Clause 14.8 [Delayed Payment].

<sup>38</sup> Financing charges were awarded on the basis of a contractual entitlement to direct loss and/or expense in the English case of *Minter v WHTSO* (1980) 13 BLR 1.

<sup>39</sup> Qatar Civil Code, Article 268.

provided also that the above losses are a natural result of the lack of discharge or delay in the discharge of the obligations.<sup>40</sup>

Delay in the discharge of an obligation is, thus, recognised as a valid basis for compensation, subject to the requirement that the loss is a natural result of such delay. As it is generally recognised that interest is permitted on the basis that this represents compensation for 'presumed' damage for delaying payment in breach of an obligation,<sup>41</sup> it ought to follow that an assessment and award of actual loss in the form of financing charges is, likewise, permitted.

Whereas interest accrues without reference to external circumstances, financing charges are compensatory and thus reflect the particular circumstances of a creditor. As a consequence, a creditor must substantiate both the cause and the amount of the loss. As financing charges are tied to the overall financial circumstances of a creditor, rather than an individual project, the provision of evidence to satisfy the burden of proof that financing charges have been incurred by virtue of non-payment on a specific project often presents a challenge.

<sup>40</sup> Dubai Cassation No. 352/1994 dated 22 April 1995.

<sup>41</sup> Federal Supreme Court No. 371/18 dated 30 June 1998, 332/21 dated 25 September 2001 and 371/21 dated 24 June 2001.



# 16

## Suspension

In addition to remedies that are administered by the domestic courts there are some practical measures and remedies that may reduce the risk of default and the need for a court administered remedy. Suspension and termination, which are considered in the following chapters fall into this latter category.

Suspension and termination are separate remedies, each having a separate statutory basis, though a clear distinction between them is not always maintained by the courts. Suspension is a temporary state that contemplates a resumption of performance.<sup>1</sup> Termination, in contrast, is permanent and final. Suspension and termination remedies can be available at law, by contract or both. In addition, a contractor can have an option to reduce the rate of progress.<sup>2</sup>

### 16.1 FIDIC Conditions

The source of a right to suspend or terminate – whether at law or pursuant to the contract – determines the nature and scope of the rights available. The FIDIC Conditions, 4th Edition, grant a contractor a right to suspend work or reduce the rate of progress if there is a failure of an employer to pay

<sup>1</sup> Known by the phrase *exceptio non adimpleti contractus* from the Roman law origin of the concept and in French as *exception d'inexécution*.

<sup>2</sup> FIDIC Conditions, Sub-Clause 16.1 [Contractor's Entitlement to Suspend Work].

a certificate within the payment period.<sup>3</sup> The scope of the same remedy is expanded in the FIDIC Conditions to cover an engineer's failure to certify.<sup>4</sup>

## 16.2 Statutory right of suspension

A contractual entitlement to suspend performance is compatible with the following right that is available by virtue of the UAE Civil Code:

In contracts binding upon both parties, if the mutual obligations are due for performance, each of the parties may refuse to perform his obligation if the other contracting party does not perform that which he is obliged to do.<sup>5</sup>

An almost identical provision appears in the civil codes of Bahrain, Kuwait, Oman and Qatar.<sup>6</sup>

Critically, obligations must be mutual<sup>7</sup> and due for performance before the failure by one party to perform an obligation permits the other to withhold performance of the corresponding obligation. Further, a party exercising a right of suspension must be ready and willing to perform the obligation that is being withheld.<sup>8</sup>

Although the mutual nature of obligations is sometimes cited as the underlying rationale for the entitlement to suspend it has also been suggested that the right is incorporated in all agreements by reason of the intention of the parties.<sup>9</sup> The latter is easier to reconcile with Islamic jurisprudence which treats contractual obligations as independent, not mutual.<sup>10</sup>

Regardless of the rationale behind the right, it is for the Court of Merits to determine whether the obligations are mutual and whether suspension of performance is justified in the circumstances.<sup>11</sup> The Dubai Court of Cassation in a judgment delivered in 1995 was asked by the defendant to reverse the decision of the lower court ordering it to pay the claimant the

<sup>3</sup> FIDIC Conditions, 4th Edition, Sub-Clause 69.4.

<sup>4</sup> FIDIC Conditions, Sub-Clause 16.1 [Contractor's Entitlement to Suspend Work].

<sup>5</sup> UAE Civil Code, Article 247. A similar provision can be found at Article 414, which deals with rights of retention.

<sup>6</sup> Bahrain Civil Code, Article 150, Kuwait Civil Code, Article 219, Oman Civil Code, Article 157 and the Qatar Civil Code, Article 191.

<sup>7</sup> Dubai Cassation No. 187/1999 dated 17 October 1999.

<sup>8</sup> Dubai Cassation No. 170/1998 dated 3 January 1998 and Dubai Cassation No. 102/2007 dated 19 June 2007.

<sup>9</sup> Dubai Cassation 149/2007 dated 7 October 2007.

<sup>10</sup> 'Remedies for Breach of Contract Under Islamic and Arab Laws', Nabil Saleh, ALQ, Vol. 4, Iss. 4, p. 283.

<sup>11</sup> Dubai Cassation No. 296/2008 dated 22 February 2009.

balance of the purchase price for a consignment of chemicals. The defendant argued in the Court of Cassation, supported by the finding of a court-appointed expert, that it was ready and willing to pay upon production by the claimant of documentation proving its ownership of the chemicals.

The Court of Cassation found as a matter of general principle that a failure by one party to perform its part of a mutual obligation releases the other from any corresponding obligation, expressing the principle in the following terms:

it is established in binding agreements that each party may, if corresponding obligations are outstanding, decline to perform its obligations if the other party fails to perform its obligation. This means that a purchaser may withhold the purchase price even if it was due and payable, until the seller has performed the corresponding obligation, unless the purchaser has waived such right after it accrued or if the contract contains a provision preventing the purchaser from applying such right.<sup>12</sup>

As the parties had agreed that the claimant would provide the defendant with documents of title, the defendant was entitled to withhold payment, even though due, until the claimant fulfilled its obligation to provide the requisite documents. Accordingly, the Court of Cassation reversed the lower court's decision.

### 16.3 Excluding the right of suspension

As the Court of Cassation's reference to the conditions of waiver and an agreement to the contrary demonstrates, the right to suspend is subject to the application of general principles of contract. There is no indication that the right of suspension is mandatory. Indeed, the civil codes of Bahrain and Kuwait expressly qualify the right of suspension by reference to any agreement or any practice to the contrary making it clear that the statutory right can be excluded. Accordingly, the right of suspension is subordinate to the agreement of the parties and can be waived or excluded by agreement.<sup>13</sup>

Significantly for the construction industry, there is no explicit exclusion of a statutory right of suspension or cancellation<sup>14</sup> in the FIDIC Conditions,

<sup>12</sup> Dubai Cassation No. 90/1995 dated 5 November 1995. The court allowed the appeal on the ground that the lower court had failed to consider whether the defendant had a valid defence to the claim for payment of a consignment of hydrochloric acid based on the claimant's failure to provide the required delivery documents.

<sup>13</sup> The same reservations were expressed in Dubai Cassation No. 130/2006 dated 10 September 2006.

<sup>14</sup> A discussion of this remedy, which is closely related to suspension, follows below.

but the following may restrict the contractor's entitlement to exercise such a right in relation to progressing the works:

Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.<sup>15</sup>

The meaning and effect of this provision and any other relevant provisions of the FIDIC Conditions, falls to be determined in accordance with the general principles applicable to the interpretation of contracts.<sup>16</sup>

## 16.4 Formalities

Provided that the statutory right of suspension has not been excluded, there are no specific formalities required before the remedy is exercised either by virtue of the provisions in the applicable civil codes or in practice.

In a claim brought by a subcontractor against a main contractor for the recovery of sums due for the execution of mechanical, electrical and plumbing works, the Dubai Court of Cassation upheld the subcontractor's entitlement to suspend performance notwithstanding the lack of formal notice or a judgment:

if a contracting party fails to implement its obligation, the other party shall be entitled not to fulfil its obligation without the need for notice or a judgment concerning the cancellation of the contract so long as each of the obligations is in return for the other. This shall be limited to the suspension of performance and shall not be treated as cancellation of the contract as cancellation shall be preceded by notices and warnings.<sup>17</sup>

Although a distinction may be drawn between the related remedies of suspension and cancellation for the purpose of the requirement for notice the provision of notice that performance is being withheld against a corresponding failure to perform reduces the scope for misinterpretation of the circumstances at a later date.

<sup>15</sup> FIDIC Conditions, Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision]. The corresponding provision in the FIDIC Conditions, 4th Edition, can be found at Sub-Clause 67.1. Sub-Clause 20.4 forms part of the mechanism for appointing a dispute adjudication board. As this mechanism is commonly deleted in its entirety from contracts used in the Gulf, this wording is often not part of the contract.

<sup>16</sup> Chapter 4 [Interpretation].

<sup>17</sup> Dubai Cassation Nos. 14/2003 dated 6 April 2003 and 130/2006 dated 10 September 2006. It is not apparent from the judgment whether the subcontract made any specific reference to a right of suspension, though it appears likely that it did not.

# 17

## Termination

Termination or 'cancellation' as the term is more commonly translated, as with suspension, is a creature of both contract and law.

### 17.1 Termination of an innominate contract

Termination, like suspension, is a statutory remedy that arises in respect of all innominate contracts<sup>1</sup> and, also like suspension, it is retaliatory.

The distinction between suspension and cancellation has been summarised as follows:

Thus, each of the two contracting parties has the right to withhold performance of that which he is obliged to do until he is given that which he is entitled to, and by relying on that right or defence he is doing no more than to suspend the operation of the contract. The contract is not cancelled in such a case, nor are the obligations arising out of it terminated in any way. It is simply a case of the halting of performance, and this is fundamentally different from cancellation, and the defence of non-performance of the contract.<sup>2</sup>

<sup>1</sup>Dubai Cassation No. 266/2004 dated 14 February 2005 in which the court held that a settlement agreement had been validly terminated due to a failure to pay part of the agreed compensation.

<sup>2</sup>UAE Ministry of Justice Commentary, p. 154.

Whereas suspension is a temporary measure, cancellation is irreversible.

Termination has a statutory source in the civil codes of each of the Gulf states and takes an almost identical form as follows:

1. In a contract that imposes mutual obligations,<sup>3</sup> if one party does not perform that which he is obliged to perform under the contract, the other party may, after serving notice on the obligor, require that the contract be performed or cancelled.
2. The judge may order the obligor to perform the contract forthwith or may defer (performance) to a specified time, and he may also order that the contract be cancelled and compensation paid in any case if appropriate.<sup>4</sup>

As with the right to suspend performance, this is a discretionary power that is exercised by the Court of Merits.<sup>5</sup>

Superficially, cancellation produces a result akin to rescission in many common law jurisdictions.

The remedy of rescission, by which the parties are returned to the position they were in prior to contract formation, is not, however, available under common law merely by virtue of a party's failure or refusal to perform a contractual obligation. Although such failure or refusal, provided it constitutes a repudiation of the contract, permits a party to treat its ongoing obligations as at an end, the contract and the rights accrued under the contract survive.

The civil law remedy of cancellation or in common law language, rescission, is thus available in circumstances that, in a common law context, would permit repudiation only.<sup>6</sup>

There is no statutory guidance on the type or gravity of mutual obligations that qualify for an exercise of the remedy.

The sale of motor parts that are unfit for their purpose has been held to be sufficient grounds to rescind the contract<sup>7</sup> as has a failure to transfer ownership of a property following payment of the purchase price.<sup>8</sup> Accordingly,

<sup>3</sup> This opening phrase is sometimes translated as 'synallagmatic contracts'.

<sup>4</sup> UAE Civil Code, Article 272. Bahrain Civil Code, Article 140, Kuwait Civil Code, Article 209, Oman Civil Code, Article 171 and the Qatar Civil Code, Article 183. In Abu Dhabi Cassation No. 859/2010 dated 17 April 2011 the court relied on the UAE Civil Code, Article 272 to cancel a reservation agreement in response to an argument that Article 247 was limited to suspending performance.

<sup>5</sup> Dubai Cassation No. 287/1995 dated 31 March 1996, Federal Supreme Court No. 287/18 dated 31 March 1996 and Dubai Cassation No. 130/2006 dated 10 September 2006.

<sup>6</sup> Under French law a distinction is drawn between *résolution* and *résiliation*, the former being closer to annulment and the latter to repudiation, though the court can, to some extent, mix and match the remedies flowing from each: John Bell, 2008. *Principles of French Law*. 2nd Edition. Oxford University Press, pp. 357–359.

<sup>7</sup> Federal Supreme Court No. 88/1998 dated 11 March 1989.

<sup>8</sup> Federal Supreme Court No. 420/21 dated 29 April 2001.

while it is clear that a breach of a significant element of a contract is sufficient grounds for cancellation there is no established formula by which a court calibrates a breach by reference to its gravity.

The approach has been expressed in the following terms by the Dubai Court of Cassation:

It is established that the assessment of the sufficiency of the grounds for cancelling a contract, the extent of a party's default and the basis for abstaining from performance of the correlative obligations in a contract is a matter of fact which falls within the sole jurisdiction of the Court of Merits.<sup>9</sup>

Reference to sufficiency of the grounds for cancellation and to the extent of the breach indicates a qualitative assessment of the gravity of the breach albeit that this is a matter for the Court of Merits. Typically, and in contrast to their common law counterparts, civil law courts have shied away from reducing this exercise to a series of intricately crafted judicial rubrics.

Despite the discretionary nature of the assessment, there are a number of conditions that are commonly identified and considered as part of any deliberation over the exercise of a cancellation right.<sup>10</sup> These are:

- a material breach of a binding obligation<sup>11</sup>
- equality or mutuality of the obligations breached and to be terminated
- the party exercising the right must be ready to perform the corresponding obligation<sup>12</sup>
- the party exercising the right must not itself be in breach.

It is also sometimes suggested that restoration of the parties to their respective positions must be possible.<sup>13</sup>

<sup>9</sup> Dubai Cassation No. 130/2006 dated 10 September 2006.

<sup>10</sup> 'Dissolution of Contract in Islamic Law', Muhammad Wohidul Islam, ALQ [1998] 336–368 and 'Termination for Breach in Arab Contract Law', Adnan Amkhan, ALQ [1995], 17–30. Also, Dubai Cassation No. 183/2011 dated 8 January 2012 in which the court stated that there are four conditions but, disappointingly, did not set them out.

<sup>11</sup> In Dubai Cassation No. 273/1991 dated 9 February 1992 the court relied on there being insufficient evidence of a breach of mutual obligations to permit an early termination of the lease.

<sup>12</sup> Dubai Cassation No. 183/2011 dated 8 January 2012. The court stated that this requirement is the most important.

<sup>13</sup> 'Dissolution of Contract in Islamic Law', Muhammad Wohidul Islam, ALQ [1998], p. 360. In Federal Supreme Court 298/2001 dated 6 January 2002 the court rejected an application for termination of a transfer of shares because the company was being liquidated and, therefore, restoration of the parties to their original positions was impossible but the claimant had not sought an alternative remedy in damages. Cf. Abu Dhabi Cassation No. 859/2010 dated 17 April 2011. Also, Federal Supreme Court No. 82/21 dated 13 May 2001 in which the court applied the UAE Civil Code, Article 895, to uphold an award of loss of profit made in favour of an engineering consultant.

Some uncertainty surrounds the formalities applied to the exercise of the right of cancellation, notably the requirement for notice and the role of the courts in the administration of this remedy. In contrast to suspension, exercising a right of cancellation explicitly requires notice.<sup>14</sup> In Bahrain it is prescribed that this notice must be issued as a formal summons.<sup>15</sup> In Kuwait, Oman, Qatar and the United Arab Emirates the form that such notice must take is not specified but appears to be flexible as it has been held, for example, that even commencing proceedings to request cancellation constitutes valid notice of termination.<sup>16</sup>

Likewise, it is prescribed that a court may order a contract to be performed or cancelled,<sup>17</sup> potentially introducing a requirement for a court order prior to exercising a cancellation right, a conclusion that draws further support from the following provision of the UAE Civil Code:

If the contract is valid and binding, it shall not be permissible for either of the contracting parties to resile from it, nor to vary or rescind it, save by mutual consent or an order of the court, or under a provision of the law.<sup>18</sup>

A party is bound to perform that which has been agreed unless exempted from doing so by a court order, by consent or by law. A requirement for a court order is notably absent from the corresponding provisions in Bahrain, Kuwait and Qatar.<sup>19</sup>

As the value of cancellation lies in the immediate relief it offers from any ongoing contractual obligation, a requirement that a court order must first be obtained would significantly diminish the potency of this remedy. Critically in this context, there is no means by which an order can be obtained on an interim or summary basis and an enforceable order is typically forthcoming only upon the conclusion of substantive proceedings in the Court of First Instance and the Court of Appeal.

Despite this difficulty a requirement for a court order has been endorsed in a number of judgments of the domestic courts. By way of illustration, in the

<sup>14</sup> UAE Civil Code, Article 272(1). Also, Bahrain Civil Code, Article 140, Kuwait Civil Code, Article 209, Oman Civil Code, Article 171 and the Qatar Civil Code, Article 183.

<sup>15</sup> Bahrain Civil Code, Article 140.

<sup>16</sup> Federal Supreme Court No. 420/21 dated 29 April 2001 and Abu Dhabi Cassation No. 1127/3 dated 30 December 2009.

<sup>17</sup> Bahrain Civil Code, Article 140(2), Kuwait Civil Code, Article 209(2), Qatar Civil Code, Article 183(2), Oman Civil Code, Article 171(2) and the UAE Civil Code, Article 272(2).

<sup>18</sup> UAE Civil Code, Article 267. For an example of a provision of the law permitting termination see the UAE Civil Code, Article 273. Also, Oman Civil Code, Article 167.

<sup>19</sup> Bahrain Civil Code, Article, 128, Kuwait Civil Code, Article 196 and the Qatar Civil Code, Article 191(1).



case of a partnership agreement, the Federal Supreme Court held that a court order is required and that no party may terminate unilaterally.<sup>20</sup> The Dubai Court of Cassation also lent support to the requirement for a court order in a real estate case, refusing to grant the seller's application for retroactive cancellation based on the buyer's failure to make an instalment payment.<sup>21</sup>

Despite this possible constraint, cancellation remains an effective remedy, in practice, by combining this with the related right of suspension. Provided that these remedies are implemented sequentially, suspension operates to bridge the gap between withdrawal of performance and an order granting cancellation of a contract.<sup>22</sup> In other words, during a period of suspension an order for cancellation can be sought and made. This requires a party, at least in theory, to be ready to perform the corresponding obligation up to the moment that the court grants the remedy of cancellation and for the defendant to seek specific performance of the corresponding obligation.

By combining suspension and cancellation in this way and avoiding a formulaic approach to granting a cancellation order the courts preserve their broad discretionary power over the provision of cancellation as a remedy. An assessment of the underlying merits appears, in practice, to exert as much (if not more) influence over the required formalities as do the applicable provisions of the region's civil codes.

## 17.2 Termination of a *muqawala*: Employer

The foregoing discussion concerns an innominate contract. In the case of a construction contract, or more accurately a *muqawala*, there is an added layer of complexity by virtue of a variety of provisions that govern termination.

In Bahrain, Kuwait and Qatar an employer has a right to terminate a contract at any time as follows:

An employer may terminate the contract and stop the work at any time before the completion of the works provided that he compensates the contractor or for all expenses he has incurred, for the work done and the profit that he would have made if he had completed the work.<sup>23</sup>

<sup>20</sup> Federal Supreme Court No. 90/19 dated 30 June 1998.

<sup>21</sup> Dubai Cassation No. 130/2006 dated 10 September 2006.

<sup>22</sup> *Ibid.*

<sup>23</sup> Bahrain Civil Code, Article 611, Kuwait Civil Code, Article 688 and the Qatar Civil Code, Article 707.

The compensation for profit may be reduced to reflect the circumstances of the termination. This right is conferred on an employer only.

Although there is no similar provision in the United Arab Emirates or Oman it has been held that as an exception to the general rule that the parties are bound by their agreement, an employer has a right of cancellation for convenience in recognition of the long term nature of a construction project.<sup>24</sup> Specific performance is not available as a remedy to compel an employer to continue with or complete a project as damages are an adequate remedy for a contractor. There is no obvious source of support in the UAE Civil Code for these conclusions.

### 17.3 Termination of a *muqawala*: Contractor

A unilateral right of termination is not extended, at least not explicitly, to a contractor in any of the Gulf states. It is sometimes suggested instead that termination is prohibited in the absence of a court order.

In the United Arab Emirates and Oman termination is dealt with as follows:

A contract of *muqawala* shall terminate upon the completion of the work agreed or upon the cancellation of the contract by consent or by order of the court.<sup>25</sup>

No corresponding provision appears in the civil codes of Bahrain, Kuwait or Qatar, which are silent on a general right of termination.

The first part of the applicable provision of the UAE Civil Code and the Oman Civil Code is a reflection of the concept that a construction contract is time bound and ceases upon fulfilment of the obligations arising from it. The remainder of the provision differs significantly from the equivalent provision applicable to an innominate contract. Not only is the central element of mutuality of obligations absent in the former but it is not provided that a failure by one party permits the other to serve notice requiring that the contract be performed or cancelled.

Although there is no provision for unilateral termination of a *muqawala* it is, nevertheless, envisaged that cancellation may occur by consent or by

<sup>24</sup> Dubai Cassation No. 218/2005 dated 20 February 2006. It was held that the same rationale applies to a subcontract. According to the UAE Ministry of Justice Commentary the Civil Code, Article 218, recognises this exception in the context of various nominate contracts as an exception to the general principle that contracts are binding, though a *muqawala* is not mentioned by name.

<sup>25</sup> UAE Civil Code, Article 892 and the Oman Civil Code, Article 646.

court order. By way of illustration, a court ordered cancellation may be granted for defective work<sup>26</sup> or force majeure.<sup>27</sup>

Whether, in addition, a court may order cancellation based on the same principles that govern innominate contracts is unclear. The differences between the provision governing cancellation of a *muqawala* and that governing an innominate contract cast doubt on any intent that the provisions should overlap. In particular, if a *muqawala* is not considered a synallagmatic contract, a statutory right of suspension and cancellation, both of which require mutuality, would be inapplicable to a *muqawala*. However, in the absence of a clear indication in the applicable civil codes that this power is excluded in the case of a *muqawala* the chances of such a constraint being self-imposed by the domestic courts are low. There is nothing in the judgments of the domestic courts to indicate that the power to order cancellation is constrained in this way. Indeed, the statutory recognition that a *muqawala* is capable of cancellation by court order<sup>28</sup> most likely ensures similar treatment of an innominate contract and a *muqawala*.

As it is commonplace for a construction contract to deal expressly with termination, the relevance in practice of the statutory regime is potentially limited. The circumstances permitting termination by a contractor in the FIDIC Conditions<sup>29</sup> include a failure by the engineer to issue a payment certificate, a failure of the employer to provide evidence of the employer's arrangements for financing the work or a substantial failure to perform the employer's obligations.<sup>30</sup> The operation of these provisions is prescribed in some detail in the FIDIC Conditions.

The influence of the statutory regime depends, therefore, on whether the parties are free to set the grounds for and consequences of termination or whether, alternatively, the statutory regime takes precedence over any such agreement.

Of particular interest is whether termination requires a court order irrespective of any relevant conditions of contract. This issue is especially acute in the United Arab Emirates and Oman by virtue of a prohibition on termination of an innominate contract other than by mutual consent, by court order or at law.<sup>31</sup>

<sup>26</sup> UAE Civil Code, Article 877.

<sup>27</sup> UAE Civil Code, Article 893 and the Oman Civil Code, Article 647.

<sup>28</sup> Civil Code, Article 892 and the Oman Civil Code, Article 646.

<sup>29</sup> FIDIC Conditions, Sub-Clause 16.2 [Termination by Contractor].

<sup>30</sup> This is an expanded list of grounds compared to the FIDIC Conditions, 4th Edition. The circumstances permitting an employer to terminate have, in contrast, remained largely the same, with the exception of bribes and inducements which constitute an additional ground for termination by an employer in the FIDIC Conditions.

<sup>31</sup> UAE Civil Code, Article 267 and the Oman Civil Code, Article 167. Cf. Qatar Civil Code, Article 184, which allows the parties to agree to an 'automatic' termination as long as this is recorded expressly.

As it is relatively rare for parties to reach an ad hoc agreement to cancel a *muqawala* once a project is in progress<sup>32</sup> and rarer still for such a cancellation to give rise to a dispute the issue that most commonly arises for consideration is whether a contract condition allowing a party unilaterally to cancel a contract can validly be incorporated from the outset and be operated some time thereafter. If any such mechanism is overridden by a requirement for a court order a party's remedies may, in practice, differ substantially from those conferred by a contract. Specifically, the operation of a contractual right of termination may be found not to produce an accompanying right to compensation but, instead, to produce a liability to pay compensation for wrongful termination.

This is a risk that can neatly be sidestepped if the cancellation provisions of the applicable civil codes are confined to a scenario in which the effect of a contractual termination is that the contract is annulled. As the rights conferred on a terminating party in most construction contracts do not resemble cancellation in this form the cancellation provisions of the UAE Civil Code and the Oman Civil Code are, it could be concluded, inapplicable to any such agreement. The FIDIC Conditions, for example, confer on the parties a contractual right to terminate the contract<sup>33</sup> while expressly preserving an employer's and contractor's accrued rights following termination.<sup>34</sup> Annulment requires that the parties are restored to their respective positions prior to execution of the contract.<sup>35</sup>

Isolating a contractual termination mechanism from the statutory regime in this way faces the difficulty that the remedy of cancellation is not confined exclusively to a scenario in which the parties are restored to their respective pre-contract positions. In consequence, the effects of termination pursuant to the FIDIC Conditions are not readily distinguishable from those of a court ordered cancellation. Drawing a distinction that a court would recognise between cancellation and a contractual termination is not, therefore, straightforward.

Distinguishing a contractual termination mechanism from the statutory regime faces the further, more fundamental, difficulty that civil law is a less

<sup>32</sup> Such agreements were fairly common from the end of 2008 until the end of 2009 during the global financial crisis but the circumstances at that time were, it is hoped, exceptional.

<sup>33</sup> The phrase 'termination of employment' (rather than 'termination of the Contract') has sometimes been used in construction contracts (e.g. the FIDIC Conditions, 4th Edition, Sub-Clause 63.1 [Default of Contractor] and 69.1 [Default of Employer]) to convey the same sense that while a contractor's obligation or entitlement to execute the works ceases, the underlying contract survives together with accrued rights and any provisions governing the parties' ongoing rights.

<sup>34</sup> FIDIC Conditions, Sub-Clause 15.2 [Termination by Employer] and Sub-Clause 16.2 [Termination by Contractor] respectively.

<sup>35</sup> Chapter 17.4 [Termination: Consequences of termination].

literal, more subjective, system than common law and is resistant to attempts to subvert the overarching supervisory jurisdiction of the courts by distinctions of this nature.

On the other hand, provided a party is seeking to enforce its rights pursuant to a contract and does not seek to be restored to its pre-contract position, a court may see no reason to apply the termination provisions of the civil codes of the UAE and Oman. Irrespective of the use in the FIDIC Conditions, for example, of the language of termination there is no direct correlation between the remedy being sought – enforcement of the contract – with the remedy of cancellation as contemplated at law. Support for this approach may be drawn from the recognition of a *muqawala* as a contract giving rise to ongoing obligations that can, accordingly, be terminated without affecting the parties' accrued rights.

As the cancellation provisions in the *muqawala* section of the applicable civil codes are not formulated using the mandatory language found elsewhere in the civil codes there is no obvious ground for an objection to applying the parties' agreement.<sup>36</sup> On the contrary, the parties are explicitly permitted to reach agreement. Provided, as this indicates, cancellation is not considered a matter of public order the principle of respect for an agreement can be expected to take precedence over any preference that the courts may harbour for preserving their discretionary power over cancellation.<sup>37</sup>

Whatever the proper analysis, the risks associated with termination can be mitigated by including in a contractual termination mechanism an explicit waiver of any requirement for a court order and generally reflecting the wording of the relevant provisions of the civil codes.

## 17.4 Consequences of termination

Although, in principle, the consequence of a valid cancellation is that the contract is treated as void<sup>38</sup> and the parties shall be restored to their respective positions prior to the agreement<sup>39</sup> the domestic courts of the United Arab Emirates do not adhere rigidly to this approach.

<sup>36</sup> For some examples of the language used in such mandatory terms see Chapter 5.2 [Contractual principles: Mandatory obligations].

<sup>37</sup> Remedies for Breach of Contract Under Islamic and Arab Laws' Nabil Saleh, ALQ, Vol. 4, Iss. 4, p. 284. Also Federal Supreme Court No. 88/16 dated 31 May 1994, Federal Supreme Court No. 40/21 dated 10 October 2001 and Dubai Cassation No. 254/2008 dated 19 May 2009.

<sup>38</sup> Abu Dhabi Cassation No. 657/3 dated 12 February 2009.

<sup>39</sup> Bahrain Civil Code, Article 147, Kuwait Civil Code, Article 211, Oman Civil Code, Article 173, Qatar Civil Code, Article 185 and the UAE Civil Code, Article 274. Federal Supreme Court No. 420/21 dated 29 April 2001, Federal Supreme Court No. 2/22 dated 3 July 2000, Dubai Cassation Nos. 88/1988 dated 11 March 1989 and 500/2004 dated 19 June 2005.

The continuing nature of a *muqawala* sets this apart from a contract, such as a contract of sale that in essence involves a single point of exchange or a series of exchanges that can often be reversed. In recognition of this difference cancellation of a construction contract does not necessarily result in accrued rights being extinguished:

The construction contract is one of the permanent contracts such that cancellation has no effect on the works implemented. A judgment to pay the dues to the Appellee for the works implemented is considered performance of the construction contract and not one of the cancellation effects.<sup>40</sup>

As the parties cannot be restored to their respective positions prior to the contract other remedies, notably damages<sup>41</sup> including loss of profit,<sup>42</sup> may be awarded instead. Awarding compensation as part of a cancellation order is, indeed, provided for explicitly.<sup>43</sup>

In contrast, it has been held that any agreement governing liability, including any agreed limitation or exclusion of liability will be inapplicable and damages will be assessed at law on principles applicable to delict.<sup>44</sup> A cancellation order has the potential, therefore, to replace the terms of a contract with general compensatory and restitutionary principles.

Thus, in keeping with the flexible approach of civil law neither the remedy of cancellation nor the results of cancellation are rigidly applied.

## 17.5 Impossibility and force majeure

Separately, the applicable civil codes confer on a party to a construction contract a right to terminate the contract 'if any cause arises preventing the performance of the contract or completion of the performance thereof'.<sup>45</sup>

<sup>40</sup> Abu Dhabi Cassation No. 293/2009 dated 27 May 2009.

<sup>41</sup> Federal Supreme Court No. 93/23 dated 30 December 2001 in which a farm lease was rescinded and the lessor was ordered to pay compensation for loss of crops and for repairs performed on farm buildings.

<sup>42</sup> Dubai Cassation Nos. 218/2005 dated 20 February 2006 and 248/2005 dated 20 February 2006 in which the court upheld an assessment of the contractor's entitlement to be paid an amount based on the benefit produced rather than the agreed rates and prices.

<sup>43</sup> Bahrain Civil Code, Article 147, Kuwait Civil Code, Article 211, Oman Civil Code, Article 173, Qatar Civil Code, Article 185 and the UAE Civil Code, Articles 272 and 274.

<sup>44</sup> Abu Dhabi Cassation Nos. 43, 78 and 161/4 dated 31 March 2010 in which the court cancelled a construction contract and consequently refused to apply the delay damages provision.

<sup>45</sup> Bahrain Civil Code, Article 608, Kuwait Civil Code, Article 685, Oman Civil Code, Article 647, Qatar Civil Code, Articles 402 and 704 and the UAE Civil Code, Article 893.

This provision has its origins in the concept of force majeure and in the treatment of impossibility under civil law.<sup>46</sup>

Contracts in general are subject to the following:

In contracts binding on both parties, if force majeure supervenes which makes the performance of the contract impossible, the corresponding obligation shall cease, and the contract shall be automatically cancelled.<sup>47</sup>

By virtue of the status of a *muqawala* as a nominate contract this provision is subordinate to any provisions that address the principles applicable to force majeure in a specific construction context.<sup>48</sup> Nevertheless, little distinction is likely to be made in practice between this provision and the corresponding provision applicable to a *muqawala*.

The necessary components for a remedy based on force majeure have been summarised by the Abu Dhabi Court of Cassation<sup>49</sup> in the following terms:

This means that rescission by operation of law shall not be applicable unless it is impossible to perform the obligations of the contract specifically by reason of force majeure or unavoidable accident that makes the performance of the obligations absolutely impossible. The burden of proving the impossibility of performing the obligations of a contract shall be borne by the obligor. Failing to do so, he shall be liable to perform such obligations by way of contractual compensation. Impossibility means that the subject of the obligation loses one of its conditions, which makes the performance thereof impossible to all parties. A causal relationship between the external cause of default and the impossibility of the performance shall be present whenever the external cause of default has occurred during the term of the performance of the contract. An external cause of default is different from a contingent incident, which makes the performance only burdensome.

Thus, impossibility must be due to an external cause and be universal or 'unavoidable'.<sup>50</sup> The event must be such that its impact is not confined to a particular party but rather must prevent performance regardless of the

<sup>46</sup> For the formation of a contract there must be a valid *objet*. If the subject of performance is impossible from the outset there will be no *objet* and thus, no contract. The discussion here concerns an occurrence of impossibility after a valid contract has been formed.

<sup>47</sup> UAE Civil Code, Article 273. Also, Bahrain Civil Code, Article 145, Kuwait Civil Code, Article 215, Oman Civil Code, Article 172 and the Qatar Civil Code, Article 188.

<sup>48</sup> For a note on these principles, 'A Note on Force Majeure in Islamic Law', Dr Sue Rayner, ALQ, Vol. 6, Part 1, 87.

<sup>49</sup> Abu Dhabi Cassation No. 13/2010 dated 15 April 2010.

<sup>50</sup> Federal Supreme Court No. 24/15 dated 5 October 1993.

party affected. Further, it is not sufficient that an external event has made performance merely more onerous or that the event, while improbable, was nevertheless foreseeable.<sup>51</sup>

The Dubai Court of Cassation in a case in 1998 had to determine whether a carrier was entitled to rely on adverse weather as an event of force majeure as a defence to a claim by the shipper for the cost of completing a voyage from Dubai to Russia<sup>52</sup> after the cargo was offloaded by the carrier in Tashkent. The Court of Cassation found that the true cause for the cargo being offloaded in Tashkent was that the vessel's crew did not have visas to enter Russia. Allowing the appeal, the Court of Cassation held that:

If force majeure had taken place during the execution of the contract (after the Defendant had executed part of the obligation) the Defendant would have been entitled to freight for the completed part of the distance, unless otherwise agreed by the parties. However, the weather has to be exceptionally poor, and not expected and avoidable, to give rise to force majeure.

It is for the party relying on force majeure as a basis for obtaining relief from an obligation to prove that the circumstances relied upon are not merely unexpected but are exceptional. Determining whether of the necessary elements have been satisfied is a matter for the Court of Merits, which has the task of assessing the evidence.<sup>53</sup>

In the event that the parties have anticipated and made contractual provision for force majeure the contractual arrangements ought to prevail over these statutory provisions.<sup>54</sup> In the absence of such provision the consequences of a valid exercise of rights arising from impossibility are similar to those for cancellation. Provided that a contractor has not itself brought about the act or circumstances of prevention, the cost of the work and materials supplied or the value derived by the employer from such work and materials whichever is the lesser will be payable.<sup>55</sup> A court may order a party to pay compensation if this would be consistent with custom in the construction industry and has a general discretion to order compensation in favour of an innocent party injured by cancellation.<sup>56</sup>

<sup>51</sup> Dubai Cassation No. 317/2011 dated 18 March 2012, in which reliance on the global financial crisis was unsuccessful and Abu Dhabi Cassation No. 13 and 15/2010 dated 15 April 2010 in which the court reached the same conclusion holding that both inflation and recession were normal risks of business. For a discussion of the related topic of relief from the consequences of unforeseen circumstances see Chapter 5.9 [Contractual principles: Unforeseen circumstances].

<sup>52</sup> Dubai Cassation No. 443/98 dated 26 December 1998.

<sup>53</sup> Federal Supreme Court No. 24/15 dated 5 October 1993.

<sup>54</sup> Federal Supreme Court No. 24/15 dated 5 October 1993.

<sup>55</sup> UAE Civil Code, Article 894. Also Bahrain Civil Code, Article 608 Kuwait Civil Code, Article 685, Oman Civil Code, Article 648 and the Qatar Civil Code, Article 704.

<sup>56</sup> Oman Civil Code, Article 650 and the UAE Civil Code, Article 895.



# 18

## Self-help Remedies

Suspension and termination are not the only practical measures and remedies that are available to reduce the risk of default and the need for a court administered remedy. The construction industry in the Gulf embraces the full range of options that are available to reduce the risk of default and the need to resort to formal methods of dispute resolution.

### 18.1 Retention of ownership

Ownership of goods or materials will, in accordance with general principles of the applicable civil codes, transfer from a supplier to a purchaser when the sale and purchase agreement is concluded unless the parties or the law provide otherwise.<sup>1</sup> In contrast, risk transfers on delivery.<sup>2</sup> Ownership typically, therefore, passes to a purchaser on conclusion of an agreement, followed by risk on delivery. If payment falls due on delivery or on certification some time thereafter not only is the seller at risk of any loss to the goods or materials up to delivery but also a seller has no recourse to ownership rights or remedies in the event of a payment default.

<sup>1</sup> Bahrain Civil Code, Article 389, Kuwait Civil Code, Article 463, Oman Civil Code, Article 375, Qatar Civil Code, Article 430(3) and the UAE Civil Code, Article 511. The same position applies under English law, albeit based on the presumed intention of the parties, by virtue of the Sale of Goods Act 1979, section 18(1).

<sup>2</sup> UAE Code of Commercial Practice, Article 103 and the UAE Civil Code, Article 496. Under English law risk passes with ownership and, therefore, goods or materials are held at a buyer's risk from the conclusion of a sale, unless there is a contrary agreement: Sale of Goods Act 1979, section 20(1).

In an effort to reduce the exposure to payment default it is relatively common in standard supply contracts for parties to agree that ownership transfers only on payment of the purchase price. Thus a supplier retains ownership of materials until payment is made and, in principle, retains the rights conferred by ownership notwithstanding that the materials have been delivered. The laws of the Gulf expressly recognise and preserve the right of a materials supplier to retain ownership by agreement in this way:

1. If the price is deferred or payable in instalments, the seller may stipulate that the transfer of ownership to the purchaser be suspended until he pays the whole price, notwithstanding that the goods have been delivered.
2. If the price is paid in full, the transfer of ownership to the purchaser shall operate retrospectively to the time of the sale.<sup>3</sup>

Thus, if the parties so agree, a supplier may retain ownership of materials delivered to site until payment is made in full.

Transfer of ownership of goods and materials pursuant to a construction contract while broadly similar is affected by both the work element and the attachment of materials to land. Specifically, there is a presumption that buildings are the property of the landowner:

Any building, plant or work erected upon land shall be deemed to have been placed there by the landowner at his expense and to be owned by him unless there is evidence to the contrary.<sup>4</sup>

Accordingly, in the absence of agreement there is limited scope for a supplier to prevent third party claims against goods or materials for which payment has not been made.<sup>5</sup>

As between an employer and contractor, standard form construction contracts typically provide that ownership of materials passes on delivery or on

<sup>3</sup> Bahrain Civil Code, Article 391. Also, Kuwait Civil Code, Article 464, Oman Civil Code, Article 378, Qatar Civil Code, Article 430(1) and the UAE Civil Code, Article 513.

<sup>4</sup> Bahrain Civil Code, Article 850, Kuwait Civil Code, Article 881, Oman Civil Code, Article 896, Qatar Civil Code, Article 909 and the UAE Civil Code, Article 1267. The construction and operation of plant on land belonging to an employer or third party is normally accompanied by a lease or other form of long term real estate agreement. If not, a *musataha* may be implied by virtue, for example, of the UAE Civil Code, Article 1354 with the landowner being required, by virtue of the UAE Civil Code, Articles 1270 and 1271, to provide compensation to a contractor for the benefit of ownership resulting from the attachment of the asset to the land.

<sup>5</sup> UAE Civil Procedure Code, Article 287, requires a party seeking to prevent execution against moveable assets to prove ownership. The equivalent provision applicable to real property is Article 309.

their inclusion in a payment certificate. The FIDIC Conditions provide, for example, that:

Each item of Plant and Materials shall, to the extent consistent with the Laws of the Country, become the property of the Employer at whichever is the earlier of the following times, free from liens and other encumbrances:

- (a) when it is delivered to Site;
- (b) when the Contractor is entitled to payment of the value of the Plant and Materials under Sub-Clause 8.10 [Payment for Plant and Materials in Event of Suspension].<sup>6</sup>

Ownership passes to the Employer, therefore, on delivery notwithstanding the default position under the applicable civil codes. Risk remains with a contractor until the Taking-Over Certificate is issued.<sup>7</sup>

## **18.2 Possessory lien**

A possessory lien describes a right to retain property lawfully belonging to another pending discharge or settlement by its owner of debts or claims owed to the party in possession.<sup>8</sup> This form of lien differs from the general body of priority rights that are categorised as liens but which exist independently of possession.<sup>9</sup> Both forms of lien are recognised as a lawful means of securing rights at both common law and civil law.<sup>10</sup>

In a construction context there are a number of uses for a possessory lien. A supplier, subcontractor or contractor may wish to withhold delivery of plant, equipment or materials pending payment, notwithstanding that ownership has passed.<sup>11</sup> Or a contractor may wish to refuse to deliver the works notwithstanding that the contract has been terminated.

<sup>6</sup> FIDIC Conditions, Sub-Clause 7.7 [Ownership of Plant and Materials]. There is a corresponding provision in the Conditions of Subcontract for Construction at Sub-Clause 7.4 [Ownership of Subcontract Plant and Materials].

<sup>7</sup> Sub-Clause 17.2 [Contractor's Care of the Works].

<sup>8</sup> Due to its application in the familiar context of work undertaken on vehicles a possessory lien is also sometimes referred to as a 'mechanic's lien'.

<sup>9</sup> Oman Civil Code, Article 63(2) and the UAE Civil Code, Article 110(2). For an overview see 'The Availability in the UAE of Liens to Secure Payment under Construction Contracts', N. Brendel at al., ALQ 24 (2010) 309–317, p. 314.

<sup>10</sup> The rights of an unpaid seller to a lien are recognised under English law by virtue of the Sale of Goods Act 1979, section 39.

<sup>11</sup> Ownership generally passes upon conclusion of a sales agreement, though for a main contractor or subcontractor the position is likely to be governed by the contract terms.

A supplier is entitled to demand overdue payment and failing payment, delivery is deemed to have taken place thereby crystallising the right to payment.<sup>12</sup> Alternatively, a supplier is entitled to demand an overdue payment and failing payment, to re-sell the goods and claim any loss arising on the realised sale proceeds.<sup>13</sup> In Bahrain it is provided that:

When the whole or part of the price is payable immediately the seller, unless he grants the purchaser additional time for payment after the date of the sale, may retain the thing sold until payment is made even if the purchaser has offered a mortgage or security.<sup>14</sup>

Although it is implicit in these remedies that a party can, likewise, exercise a possessory lien<sup>15</sup> the UAE Civil Code provides expressly for a possessory lien in the following terms:

Any person who has incurred necessary or beneficial expense on property of another in his possession may refuse to return such property until he recovers what is due to him at law, in the absence of an agreement or a provision of law to the contrary.<sup>16</sup>

A similar provision can be found in Bahrain, Kuwait, Oman and Qatar.<sup>17</sup>

This is a general right that is applicable to an innominate contract and is accompanied by a number of ancillary rights and caveats. Thus, a lien is extinguished if the concerned property passes out of the possession or control of a creditor with the creditor's knowledge or consent.<sup>18</sup> In the event that loss or damage to the property occurs while a contractor is exercising a statutory lien, the contractor is not entitled to payment to the extent of the loss or damage. Significantly, it is provided that a lien gives a creditor a prior right over other creditors to have the amount due discharged out of the preserved property.

<sup>12</sup> UAE Civil Code, Article 529 and Dubai Cassation No. 19/2009 dated 28 March 2010.

<sup>13</sup> Bahrain Civil Code, Article 429, Kuwait Civil Code, Article 502 and the UAE Code of Commercial Practice, Article 107.

<sup>14</sup> Bahrain Civil Code, Article 431. Also, Kuwait Civil Code, Article 502.

<sup>15</sup> This is also consistent with a right to suspend performance. In Dubai Cassation No. 298/2005 dated 16 April 2006 the court confirmed a general 'right of retention' based on the mutual nature of obligations and the Civil Code, Articles 414 and 415.

<sup>16</sup> UAE Civil Code, Article 416.

<sup>17</sup> Bahrain Civil Code, Article 240, Kuwait Civil Code, Article 318, Oman Civil Code, Article 289 and the Qatar Civil Code, Article 280.

<sup>18</sup> Bahrain Civil Code, Article 244, Kuwait Civil Code, Article 322, Oman Civil Code, Article 292, Qatar Civil Code, Article 284 and the UAE Civil Code, Article 419.

The position for contractors wishing to exercise a possessory lien over the works is more problematic. In the United Arab Emirates and Oman a possessory lien over construction works is given statutory recognition in the following terms:

If the work of the contractor produces (a beneficial) effect on the property in question, he may retain it until the consideration due is paid, and if it is lost in his hands prior to payment of the consideration, he shall not be liable for the loss, nor shall he be entitled to the consideration.<sup>19</sup>

Thus, subject to any relevant contract terms<sup>20</sup> a contractor is entitled, in principle, to exercise a possessory lien over the works by, for example, withholding keys or access codes required by an employer to gain access to and take over works for which payment is overdue. As there are no accompanying provisions governing the application of this possessory lien, the provisions governing general rights of retention, it is submitted, apply.

In practice, exercising a possessory lien over construction works or buildings gives rise to a variety of issues. These include the need to establish that an amount is due, competing rights of an owner and occupier and effecting a forced sale to generate the cash required to discharge a debt. Although a construction contract grants a contractor a licence to occupy a site, whether expressly<sup>21</sup> or by implication, such licence is generally also terminable, either expressly<sup>22</sup> or by implication,<sup>23</sup> largely at will. As it is a criminal offence to occupy property without permission from the owner<sup>24</sup> remaining on site after the owner has given notice to vacate often results in the involvement of the police. A building permit may give a contractor some protection against immediate removal but as it is usually possible for an owner to have this transferred to another contractor the entitlement to remain in occupation rests, at law, solely on the statutory lien and, in practice, on police or other physical intervention. Exercising a lien over the works, in consequence, typically leads to an escalation of any dispute and uncertain results.

<sup>19</sup> UAE Civil Code, Article 879. Also, the Oman Civil Code, Article 633.

<sup>20</sup> FIDIC Conditions, Sub-Clause 7.7 [Ownership of Plant and Materials] provides that Plant and Materials are transferred 'free from liens and other encumbrances'.

<sup>21</sup> FIDIC Conditions, Sub-Clause 2.1 [Right of Access to the Site].

<sup>22</sup> FIDIC Conditions, Sub-Clause 16.3 [Cessation of Work and Removal of Contractor's Equipment].

<sup>23</sup> Transfer of a building permit to a replacement contractor may, in practice, be treated as sufficient evidence of the termination of a contractor's rights of occupation.

<sup>24</sup> UAE Penal Code, Article 434. Also Kuwait Penal Code, Article 254.

### 18.3 Priority right

Priority rights – also categorised as liens by virtue of the civil codes in the United Arab Emirates and Oman<sup>25</sup> – over the value added to land or buildings by the works executed are available to cover payments that are due to a contractor or a consultant:

1. Amounts due to contractors and building engineers who have undertaken to construct buildings or other installations, or to reconstruct, repair or maintain the same, shall have the status of a priority right over such structures, but to the extent to which it exceeds the value of the land at the time of sale, by reason of such works.
2. Such priority right must be registered and it shall rank as from the time of registration.<sup>26</sup>

A similar provision can be found in Bahrain, Kuwait and Qatar.<sup>27</sup>

The creation of this priority right in a contractor's favour as a result of non-payment differs fundamentally from a possessory lien, the latter offering tangible security over plant, equipment, goods and even the works which the former does not. In effect, a priority right in favour of a contractor or consultant is a statutory encumbrance entitling a beneficiary to a priority claim against any value added to the proceeds ultimately realised from a sale of the concerned property.<sup>28</sup>

It is a condition of a contractor's or consultant's priority right that this must be perfected by registration in order to secure a contractor's debt in priority to others created after it has been registered. The mode of registration is not specified, though registration of pledges, mortgages and other similar forms of security in a land registry is contemplated.<sup>29</sup>

In the absence of a Federal land registry in the United Arab Emirates the Dubai Land Department is responsible for maintaining the register of property rights, transfers and interests in the Emirate of Dubai. In principle, a priority right can be registered as a property right<sup>30</sup> but there is currently no established practice either as to the entry to be made or the evidence required

<sup>25</sup> Oman Civil Code, Article 63(2) and the UAE Civil Code, Article 110(2).

<sup>26</sup> UAE Civil Code, Article 1527.

<sup>27</sup> Bahrain Civil Code, Article 1053, Kuwait Civil Code, Article 1081 and the Qatar Civil Code, Article 1185.

<sup>28</sup> Dubai Cassation No. 339/97 dated 23 November 1997.

<sup>29</sup> UAE Civil Code, Article 1423. In the case of Bahrain various registers are contemplated, including one maintained by the court as per the Bahrain Civil Code, Article 977.

<sup>30</sup> Dubai Law No. 7/2006, Article 9. Rights that can be registered are defined as any real right, whether original or consequential attaching to a property.

in support.<sup>31</sup> Unless these practical obstacles can be overcome, either on an exceptional case by case basis or by the adoption of a new approach to registration, this form of lien exists in theory but not in practice.

## **18.4 Direct payment**

Direct payment provides a practical means by which a subcontractor can circumvent a contractor's failure or refusal to pay amounts otherwise due. The interests of an employer and subcontractor in the making and receiving of direct payment most often coincide in the event of a contractor insolvency<sup>32</sup> but the principles apply equally to any form of payment default and at any tier of the supply chain.

Standard construction contracts, including the FIDIC Conditions reserve for an employer an option to pay a nominated subcontractor or supplier directly and to deduct such a payment from any sums due or to become due to the contractor.<sup>33</sup> In such cases direct payment has the potential to remedy payment and related problems.

For domestic subcontractors that do not have the benefit of an explicit direct payment right pursuant to the FIDIC Conditions or other participants in the supply chain without similar protection there is no entitlement in the United Arab Emirates and Oman to direct payment by an employer under local law. On the contrary, it is provided that:

A subcontractor shall have no claim against the employer for anything due to him from the main contractor unless the main contractor has assigned to him a right against the employer.<sup>34</sup>

In consequence, a subcontractor ordinarily has no claim for payment directly against an employer unless such a right has been assigned to it by a main contractor.<sup>35</sup>

If an employer and subcontractor are in agreement, and payment is made directly, bypassing a contractor, such payment is not effective to discharge

<sup>31</sup> In contrast, Dubai Law No. 14/2008 provides for the registration of mortgages by banks and financial institutions which can be, and are in practice, registered at the Dubai Land Department.

<sup>32</sup> The FIDIC Conditions, Sub-Clause 15.2 [Termination by Employer] provides for an assignment of subcontracts from a contractor, which is a valuable right in the event of a contractor's insolvency but as assignment requires a positive act by a contractor an employer may, in practice, have to consider alternatives including direct payment.

<sup>33</sup> Sub-Clause 5.4 [Evidence of Payments].

<sup>34</sup> UAE Civil Code, Article 891 and Oman Civil Code, Article 645. Federal Supreme Court No. 273/19 dated 30 May 1999.

<sup>35</sup> The requirements for a valid assignment were considered in Dubai Cassation No. 270/2001 dated 18 November 2001.

the employer's debt to the contractor, and the employer risks paying twice. An exception is made if payment is made under 'compelling necessity', by court order or, more promisingly, in accordance with custom<sup>36</sup> but no guidance is available as to the applicable custom, which is, therefore a matter for the Court of Merits to determine.

Notably, the position in Bahrain, Kuwait and Qatar differs from that in the United Arab Emirates and Oman. The position here not only follows the French Civil Code<sup>37</sup> which confers on labourers a claim directly against an employer but goes further, extending the right to a subcontractor as follows:

A subcontractor and workmen employed by a contractor in the execution of a contract have a direct right of action against the employer but only to the extent of such sums as are due from the employer to the main contractor on the date that action is commenced.<sup>38</sup>

A payment claim may be made by a subcontractor directly against an employer, therefore, provided that the amount being claimed is due to the contractor and is unpaid.

## 18.5 Set off

A set off is the full or partial satisfaction of a debt owed to a creditor by a debt due from the creditor.<sup>39</sup> In other words, the party exercising a set off must be a debtor in respect of a principal sum and a creditor in respect of the amount to be set off.

A right of set off underpins the construction industry practice of applying 'contra-charges' or 'back-charges' to reduce or extinguish a payment obligation. Withholding payment without a valid entitlement constitutes a breach of contract giving rise to a cause of action for damages and other remedies, such as suspension or termination.

A statutory right of set off in respect of mutual obligations is recognised in the civil codes of each of the Gulf states. In the United Arab Emirates and Oman:

Set off may either be mandatory, occurring by operation of law, or voluntary, occurring by agreement between the parties, or judicial, occurring by order of the court.<sup>40</sup>

<sup>36</sup> UAE Civil Code, Articles 334 and 325.

<sup>37</sup> French Civil Code, Article 1798.

<sup>38</sup> Bahrain Civil Code, Article 605. Also Kuwait Civil Code, Article 682 and Qatar Civil Code, Article 702.

<sup>39</sup> Abu Dhabi Cassation No. 12/1 dated 14 November 2007.

<sup>40</sup> UAE Civil Code, Article 369 and the Oman Civil Code, Article 247.



A set off may be mandatory, by agreement or judicial.

A mandatory set off entitlement arises at law without the need for agreement or a court order.<sup>41</sup> There are a number of conditions that must be satisfied in order for a mandatory set off to apply:<sup>42</sup>

- the parties to the set off must be the same
- the obligations must be of the same type and description
- the obligations must be equally due and of equal strength or weakness<sup>43</sup>
- the making of the set off must not be prejudicial to the rights of third parties.<sup>44</sup>

Although it has been held that for the obligations to be 'equally due' the two debts must be specific in amount and admitted,<sup>45</sup> the scope of mandatory set off is not, it is submitted, as restrictive. Provided that there is sufficient overlap between the debts and the amounts are crystallised, a mandatory set off is permitted.

Set off by agreement may be reached before or after the concerned liabilities arise. Although it is common for parties to include such agreement in construction contracts the FIDIC Conditions notably apply conditions to an employer's right to make a set off against a certified sum in the following terms:

The Employer shall only be entitled to set off against or make any deduction from an amount certified in a Payment Certificate, or to otherwise claim against the Contractor, in accordance with this Sub-Clause.<sup>46</sup>

An employer's right of set off against a certified amount is, thus, conditional on notice being given 'as soon as practicable after the Employer became aware of the event or circumstance giving rise to the claim'. In the absence of any express set off mechanism an employer must establish a set off entitlement at law.

A broader right of set off appears to be contemplated by the prescribed content of an interim payment application.<sup>47</sup> Specifically, a contractor is required to include in any application for interim payment any deductions

<sup>41</sup> A frequently cited example of a mandatory right set off is the UAE Labour Law, Article 135, which provides that: 'An employer may deduct any amounts owed to him by an employee from the severance pay.'

<sup>42</sup> UAE Civil Code, Article 370.

<sup>43</sup> Federal Supreme Court No. 285/24 dated 27 September 2003.

<sup>44</sup> Abu Dhabi Cassation No. 12/1 dated 14 November 2007.

<sup>45</sup> Dubai Cassation No. 45/1993 dated 2 May 1993.

<sup>46</sup> FIDIC Conditions, Sub-Clause 2.5 [Employer's Claims]. There is no corresponding provision in the FIDIC Conditions, 4th Edition.

<sup>47</sup> Sub-Clause 14.3(f) [Application for Interim Payment Certificates].

that have fallen due under the Contract 'or otherwise', presumably a reference to damages for breach. To the extent that this creates a conflict with the explicit exclusion of an employer's general rights of set off this is to be resolved by reference to the intent of the parties as deduced from the contract itself, and other sources such as contemporary correspondence, the nature of the transaction, commercial custom and practice and the expectation that transactions are created in a spirit of goodwill, trust and in the parties' mutual interests.<sup>48</sup>

The courts may also apply a judicial set off, either between separate legal actions or between competing claims in a single action. Provided that the necessary conditions are satisfied a judicial set off takes place by court order.<sup>49</sup> Although the conditions are not specified it has been held that judicial set off requires a separate and independent claim or counterclaim<sup>50</sup> and may be claimed even if the legal ground is disputed.<sup>51</sup> Judicial set off may thus be ordered where some of the requirements of a mandatory set off are absent.<sup>52</sup>

The rationale for requiring a set off to be raised as a separate and independent claim or counterclaim is that a defence is limited to opposing the remedy sought by the other party. A defence to a claim for payment may include a denial that the work has been executed or an allegation that the work is defective, negating the entitlement to payment. A set off such as a claim for delay damages, on the other hand, is not a defence to payment for work executed but arises as a separate cause of action and must, accordingly, be raised as an incidental claim and by way of a formal application.<sup>53</sup>

A distinction between a mandatory, voluntary and judicial set off is not replicated in the civil codes of Bahrain, Kuwait or Qatar. Set off is permitted as follows:

The debtor has the right to make a set off between what is payable by him to his creditor and what is payable to him by that creditor, even if the causes of the two debts are different, if the object of both of them is cash or representative articles of the same type and quality, and both the debts are free from dispute, due for settlement and valid for a claim before the judiciary.<sup>54</sup>

Set off of debts arising from different circumstances is only permitted, therefore, if the debt has crystallised.

<sup>48</sup> Chapter 4 [Interpretation].

<sup>49</sup> UAE Civil Code, Article 372 and the Oman Civil Code, Article 250.

<sup>50</sup> Federal Supreme Court No. 421/28 dated 14 May 2007, Dubai Cassation Nos. 295/1993 dated 30 January 1994 and 363/1998 dated 21 November 1998. It follows that a case has to be filed and court fees paid, the procedure for which is found in the Civil Procedure Code, Articles 97-99.

<sup>51</sup> Dubai Cassation No. 45/1993 dated 2 May 1993.

<sup>52</sup> Dubai Cassation No. 45/1993 dated 2 May 1993.

<sup>53</sup> Dubai Cassation No. 78/2007 dated 17 April 2007.

<sup>54</sup> Qatar Civil Code, Article 390. Also, Bahrain Civil Code, Article 353 and the Kuwait Civil Code, Article 425.

# 19

## Damages

Rights and obligations are of limited value without the means by which these can be converted into enforceable remedies. Enforceable remedies are the deliverables of a civil justice system.

In the Gulf these mainly comprise specific performance or performance by compulsion as it is more commonly translated from Arabic, and damages.

### 19.1 Performance by compulsion

The domestic courts have the power to order a party to perform its contractual obligations.<sup>1</sup> Indeed, the starting point in civil law, in contrast to common law, is that all obligations should be specifically performed and that damages may only be awarded if specific performance is not possible. The following provision of the Qatar Civil Code is typical of the approach of the region's civil codes to the remedies available for a breach of contract:

The debtor, after he has been given notice, will be compelled to execute his obligation in kind when this is possible.

Nevertheless if the execution in kind is burdensome to the debtor, the court, pursuant to his application, may restrict the right of the creditor to require compensation if this will not cause him to incur massive detriment.<sup>2</sup>

<sup>1</sup> UAE Civil Code, Articles 380 to 385.

<sup>2</sup> Qatar Civil Code, Article 245. Also, the Bahrain Civil Code, Article 206, Kuwait Civil Code, Article 284 and the Oman Civil Code, Article 258.

Coincidentally or otherwise, the Islamic *Shari'ah*, with its distaste for anything speculative or intangible, shares this preference for the implementation of an agreement over the derivation of rights, such as compensatory damages, for a failure to perform.<sup>3</sup> In the context of a dispute arising from a sale contract the starting point, in principle, is that the subject matter of the sale should be ordered to be delivered and the price ordered to be paid.

As a result, performance by compulsion, or specific performance as it is better known in a common law jurisdiction, is the primary remedy for breach of contract, with damages being an appropriate substitute only if specific performance is not possible. However, in determining whether specific performance is appropriate, the court may take into account the defaulting party's reasons for refusing performance and may, as a matter of discretion, award damages instead of compelling performance. It has been observed that:

The availability of specific performance depends on the nature of the obligation, its extent and the material means that are necessary for affecting such a performance.<sup>4</sup>

As specific performance rather than damages may only be granted if the obligation is capable of being performed specific performance is, in practice, only ordered in circumstances in which no intervention by the obligor itself is necessary. Professor Al Sanhuri elaborated as follows:

Specific performance is regarded as impossible if executing the same requires the personal involvement of an obligor who is not willing to interfere. However, in respect of obligations such as transferring a right in rem or any obligations relating to something in which a judge's order may be enforced by way of direct performance of the obligation such as in case of a promise to sell, specific performance is possible by operation of law or the court judgment<sup>5</sup>

Where an obligor is required to do or not to do any act or thing, a request for specific performance will be declined as it is not practically possible to enforce an active personal intervention. On the other hand, if an obligation can be performed without any intervention by the obligor, specific

<sup>3</sup> 'Definition and Formation of Contract under Islamic and Arab Laws', N. Saleh, ALQ, Vol. 5, No. 2 (1990), pp. 101–116.

<sup>4</sup> 'Al Waseet', Professor Al Sanhuri, Vol. 2 Page 760, Beirut Edition (A).

<sup>5</sup> Above.

performance ought to be granted. Thus, specific performance of an obligation to register a commercial agency agreement has been granted as this can be performed by way of registering a judgment upholding its validity and enforceability.<sup>6</sup>

Conversely, as damages are only available if specific performance is impossible, a party in breach of contract is, in principle, entitled to insist on remedying such breach before incurring liability for damages. In an appeal heard by the Abu Dhabi Court of Cassation in 2009, the court had to consider whether to reverse an award of damages for defects against a contractor that had been denied an opportunity to remedy the defects.<sup>7</sup> The contractor submitted that the lower court ought to have awarded specific performance, providing an opportunity for the defects to be rectified, prior to awarding damages. Relying on the provisions of the UAE Civil Code<sup>8</sup> that make a contractor liable for defects, rather than on the impossibility of compelling intervention by the contractor, the Abu Dhabi Court of Cassation rejected the appeal, holding that the available remedies included specific performance and damages or damages alone.

If having made an order for specific performance the obligation remains unperformed compensation may be awarded, taking into account the damage suffered by the claimant and the culpability of the party in breach.<sup>9</sup>

## 19.2 Entitlement to damages

Despite a philosophical preference for specific performance, a monetary award in the form of damages is, in practice, the sanction of choice of the civil courts.<sup>10</sup>

<sup>6</sup> Federal Supreme Court No. 56/23 dated Court No. 27 November 2001 and Dubai Cassation Nos. 128/2000 dated 18 June 2000 and 128/2000 dated 18 June 2000.

<sup>7</sup> Abu Dhabi Cassation No. 391/3 dated 18 June 2009.

<sup>8</sup> Articles 872, 878, 880 and 882.

<sup>9</sup> Bahrain Civil Code, Article 208, Kuwait Civil Code, Article 292(3), Oman Civil Code, Article 263 and the UAE Civil Code, Article 385.

<sup>10</sup> Declaratory relief is the other significant form of relief, albeit rarely sought in practice. A request for declaratory relief must overcome the requirement of the need for a claimant to have a legitimate interest in the proceedings as per, for example, the UAE Civil Procedure Code, Article 2, a provision replicated in the civil codes of the other Gulf states, but is available in real estate cases: Dubai Cassation No. 19/2009 dated 28 March 2010. No relief is available if the claimant's interest in the proceedings is purely hypothetical: Dubai Cassation Nos. 295/1994 dated 30 January 1994 and 178/2005 dated 25 December 2005.

A claim for damages in the civil courts may arise:

- pursuant to a contract<sup>11</sup>
- under provisions of applicable law<sup>12</sup>
- for breach of contract.

Whereas damages under the first category fall to be determined and assessed by reference to the terms of the contract itself<sup>13</sup> and under the second category fall to be assessed on the basis of the relevant provision of law, an award under the third category is compensatory. As these different methods of assessment often produce different results the underlying basis for an award should be correctly identified and strictly observed.

### 19.3 Assessment of damages

In the case of breaches of contract, the region's civil codes adopt a broadly consistent measure of damages. In Bahrain, for example, damages are defined as any loss, including loss of profit, that is the natural result of the failure to perform or delay in performance of an obligation.<sup>14</sup> Loss for this purpose is treated as arising as a natural result of a cause of action if this could not have been avoided by 'reasonable effort'. An identical test applies in Kuwait and Qatar.<sup>15</sup>

The UAE Civil Code provides in relation to the assessment of compensation or damages, that:

If the amount of compensation is not fixed by law or by the contract, the judge shall assess it in an amount equivalent to the damage in fact suffered at the time of the occurrence thereof.<sup>16</sup>

<sup>11</sup> For a discussion of agreements on damages, including delay damages see Chapter 12 [Delay damages and other remedies].

<sup>12</sup> See, for example the Oman Labour Law, Article 118, which is discussed at Chapter 6.6 [Health safety and welfare: Sanctions and penalties] together with *arsh* and *diya* which are a form of statutory compensation.

<sup>13</sup> The FIDIC Conditions provide, for example, that the Contractor is entitled to recover 'Cost plus reasonable profit' for a failure by the Engineer to issue timely design information or instructions (Sub-Clause 1.9 [Delayed Drawings or Instructions]) but only cost if the Contractor encounters unforeseeable physical conditions (Sub-Clause 4.12 [Unforeseeable Physical Conditions]).

<sup>14</sup> Bahrain Civil Code, Article 223. This is similar to the first limb of the test set out in the judgment of Alderson B. in *Hadley v Baxendale* [1854] EWHC J70, which is generally taken to be the starting point for an assessment of damages under English law. Since the Supreme Court judgment in *Transfield Shipping Inc v Mecator Shipping Inc* [2007] EWCA Civ 901 this measure is, however, subject to the parties' expectations of the potential losses for which they are liable at the time of entering into a contract.

<sup>15</sup> Kuwait Civil Code, Article 300(2) and the Qatar Civil Code, Article 263.

<sup>16</sup> UAE Civil Code, Article 389.

In Oman the test, likewise, centres of the damage actually suffered.<sup>17</sup> Such damages may be awarded for monetary loss, referred to as material damages, or for non-monetary loss, such as reputational damage,<sup>18</sup> referred to as moral damages.<sup>19</sup>

For delict claims,<sup>20</sup> it is provided that compensation shall be assessed by reference to the amount of harm suffered by the victim 'together with loss of profits, provided that they are a natural result of the harmful act'.<sup>21</sup> The courts, in practice, rely on these provisions interchangeably.<sup>22</sup>

Beyond these generic principles further guidance on the approach to be adopted in assessing damages is sparse, as acknowledged by the Dubai Court of Cassation:

As the laws are devoid of any provision requiring the adoption of specific measures in the assessment of compensation, the Court of Merits is independent in assessing the same as a matter of fact, without interference, as long as it has stated the elements of the damage and the reason for the right of the claimant to the compensation.<sup>23</sup>

Although the domestic courts, accordingly, have considerable latitude when assessing compensation they are not entirely unconstrained in the way that their power is exercised.<sup>24</sup> In particular, domestic courts must consider each element of a claim for compensation to determine whether it is a type of loss that can be awarded and whether it is substantiated by documentary evidence.

<sup>17</sup> Oman Civil Code, Article 264.

<sup>18</sup> Dubai Cassation No. 217/2004 dated 24 April 2005.

<sup>19</sup> UAE Civil Code, Article 293 and Supreme Court No. 82/21 dated 13 May 2001.

<sup>20</sup> Roughly analogous to the duty of care in tort applicable under English law. See Chapter 2.3 [Construction law: Delict (tort)].

<sup>21</sup> UAE Civil Code, Article 292. Also, Qatar Civil Code, Article 201 and the Oman Civil Code, Article 181.

<sup>22</sup> Dubai Cassation No. 46/2006 dated 8 May 2006, an agency dispute and Dubai Cassation No. 431/2004 dated 4 June 2005, a banking dispute, in both of which the court relied on Article 292. In Dubai Cassation No. 252/1993 dated 26 December 1993 the court cited both Article 292 and Article 389 without distinction. Cf. Dubai Cassation No. 56/2004 in which the Court of Cassation held that the delict and contractual provisions should be kept separate, albeit for the purposes of establishing liability.

<sup>23</sup> Dubai Cassation No. 350/2004 dated 16 April 2005. Also, Dubai Cassation Nos. 355 and 394/1998 dated 21 November 1998, and 511/2002 dated 5 April 2003.

<sup>24</sup> Federal Supreme Court No. 435 and 516/21 dated 12 June 2001 in which the court reversed a lower court's award of loss of profit as this had been reduced by the lower court from the figure calculated by a court appointed expert on the arbitrary basis that the lower court considered the profit to be excessive.

The Dubai Court of Cassation, in a judgment delivered in 2000, issued the following guidance to the Dubai Court of Appeal on the correct approach to the assessment of compensation:

It is established by the rulings of this Court and in accordance with the provisions of [Federal law] that in all cases compensation shall be assessed on the basis of the amount of harm suffered by the victim, including loss of profit. Even though the assessment of compensation is one of the powers vested in the Court of Merits, it should set out the elements of damage which are part of the compensation calculation which is one of the legal issues to be supervised by the Court of Cassation. Even though the Court of Merits may award total compensation for all the elements of damage without specifying the amount assessed in respect of each element, it should specify the elements of damage included in the compensation assessment and the evidence to this effect and the Court of Merits should deliberate over each element separately and should base its finding on proper grounds substantiated by the documentary evidence. The burden of proof to establish the elements of damage including loss of profit lies with the injured party.<sup>25</sup>

In other words, the factual and legal basis for awarding each head of damages must be validated but beyond this it is unnecessary for a damages award to identify the amount awarded for each of these elements individually.<sup>26</sup> This allows a superior court to exercise a supervisory jurisdiction over the composition of a damages award. Notwithstanding this supervisory backstop, the assessment or quantification of compensation is the responsibility of the Court of Merits,<sup>27</sup> a task that, in practice, is almost invariably delegated to a court-appointed technical expert. The burden of proof rests, of course, with the party seeking damages.<sup>28</sup>

## 19.4 Global claims

Applied to a claim for time related costs and, more specifically, to a claim that does not present a clear causal connection between individual events giving rise to an entitlement and the damages or additional payment

<sup>25</sup> Dubai Cassation No. 466/1999 dated 25 March 2000.

<sup>26</sup> Dubai Cassation No. 46/2006 dated 8 May 2006. Cf. Dubai Cassation No. 204/2004 dated 20 March 2005 in which the court allowed an appeal due to a failure of the lower court to adequately particularise the elements of the damages award.

<sup>27</sup> Dubai Cassation No. 359/2003 dated 17 October 2004 among many others.

<sup>28</sup> Kuwait Law of Proof, Article 1, Oman Law of Proof, Article 1 and the UAE Law of Proof, Article 1(1) and Dubai Cassation No. 113 and 142/2004 dated 20 February 2005.



sought – commonly referred to as a global claim – the approach is broadly similar to that under English law.<sup>29</sup>

A global claim has been defined in the following terms:

What is commonly referred to as a global claim is a contractor's claim which identifies numerous potential or actual causes of delay and/or disruption, a total cost on the job, a net payment from the employer and a claim for the balance which is attributable without more and by inference to the causes of delay and disruption relied upon.<sup>30</sup>

Such claims are a common feature of the construction industry, the Gulf being no exception.

On the basis that the principles to be applied are broadly similar to those under English law, breach or entitlement and the resulting loss or damage must be proved on the balance of probability by a party seeking recovery. Reliance on more than one event without attributing the resulting loss or damage thereto runs the risk of failing to satisfy the burden of proof. This risk is heightened if evidence is adduced of other causes of the claimed loss or damage, for which a party seeking recovery has no entitlement, including that party's own default, third party intervention or force majeure.

But provided a claim is adequately particularised, such that the components of a monetary award are individually identified and are found to have been caused by some or all of the events giving rise to an entitlement such an award is consistent, it is submitted, with the applicable principles of local law as applied, in practice, by the superior courts.<sup>31</sup>

## 19.5 Loss of profit

In Bahrain, Kuwait and Qatar an entitlement to loss of profit in an assessment of damages is expressly recognised.<sup>32</sup>

<sup>29</sup> For a general summary: Ali D. Haidar, Peter Barnes (2011) *Delay and Disruption Claims in Construction: A Practical Approach*, ICE Publishing and 'Global Claims', I. Pennicott QC, <http://www.keatingchambers.co.uk>.

<sup>30</sup> *Walter Lilley & Company Ltd v MacKay and DMW Developments Ltd* [2012] BLR 503.

<sup>31</sup> Dubai Cassation No. 511/2002 dated 5 April 2003 in which the court held that if fault and harm have been established, causation is presumed.

<sup>32</sup> Bahrain Civil Code, Article 223, Kuwait Civil Code, Article 300(2) and Qatar Civil Code, Article 263.

In the United Arab Emirates and Oman an injured party is entitled, instead, to the loss 'in fact suffered at the time of the occurrence thereof'.<sup>33</sup> It is doubtful that future loss, including loss of earnings and loss of profit, is properly described as loss in fact suffered at the time of occurrence of a cause of action. Domestic courts in the United Arab Emirates nevertheless entertain claims not only for loss of future earnings<sup>34</sup> but also for loss of a chance to earn a profit.

In a claim by an engineer arising from termination of its appointment following provision of the drawings and specification the Dubai Court of Cassation reversed the lower court's refusal to award damages, holding:

A victim may be awarded compensation against material damage if his financial interest is affected, including damages and loss of earnings. This is because even though a chance is uncertain, the loss of such chance is certain.<sup>35</sup>

Loss of chance is thus considered to be a loss for which compensation is payable.

In 1995 the Dubai Court of Cassation examined the recoverability of loss of profit in a case involving the defendant's failure to deliver 500 tonnes of Thai rice, being the balance of the total agreed delivery quantity of 1500 tonnes. Delivering judgment on a claim by the purchaser, the Dubai Court of Cassation stated that:

In circumstances where neither the law nor the contract provides for the amount of compensation to be paid in respect of contractual liability, the same is left to the discretion of the judge provided that any compensation granted by the judge should include any loss suffered or profit lost provided also that these losses are a natural result of the lack of discharge or delay in the discharge of the obligations.<sup>36</sup>

The Federal Supreme Court reached a similar conclusion in a subcontractor's claim for loss of profit following the termination of a contract created by a letter of intent.<sup>37</sup> Having concluded that there was a valid contract, the court went on to consider whether the subcontractor was entitled to

<sup>33</sup> UAE Civil Code, Article 389 and the Oman Civil Code, Article 264. It has been suggested in relation to the Jordanian Civil Code (1977) that the omission of any reference to loss of profit is purposeful, reflecting the Islamic Shari'ah's distaste of all things speculative or intangible: 'Civil Codes of Arab Countries: The Sanhuri Codes', N. Saleh, ALQ, Vol. 8, No. 2 (1993), at pp. 165–166.

<sup>34</sup> Dubai Cassation No. 46/2006 dated 8 May 2006.

<sup>35</sup> Supreme Court No. 82/21 dated 13 May 2001.

<sup>36</sup> Dubai Cassation No. 352/1994 dated 22 April 1995.

<sup>37</sup> Federal Supreme Court No. 435 and 516/21 dated 12 June 2001.

loss of profit. Upholding the award for loss of profit, the Federal Supreme Court cited with approval the lower court's approach as follows:

The court replies to the second aspect of the above argument with respect to the entitlement to the loss of profits which was upheld by the judgment under cassation on the grounds that if the profits can be possibly earned, the loss of such profits is ascertained. Loss of profits may be calculated on the basis of the profits the aggrieved party anticipated from the contract so long as the anticipation is reasonable. The court compensated the Respondent company against the loss of profits which it anticipated from the performance of the works under the subcontract. The above ruling is admissible and derived from the facts established in the papers and the Court correctly applied the law.

It is a matter for the Court of Merits to assess the likelihood and amount of profit, a task invariably assigned to an expert. However, it is also well-established that to qualify as a basis for awarding damages any future loss must be established by a claimant<sup>38</sup> with a sufficient degree of certainty.<sup>39</sup> Establishing merely that actionable conduct has the potential to cause loss of revenue or profit is not sufficient.<sup>40</sup>

## 19.6 Consequential and indirect loss

English phrases such as 'consequential loss' and 'indirect loss', together with their Arabic counterparts, are commonly used in construction contracts<sup>41</sup> but are accorded no specific definition or meaning, whether under local law or as a matter of practice. As with other forms of contractual shorthand it is prudent, if certain types of compensation are contemplated, to identify these individually and explicitly.<sup>42</sup>

<sup>38</sup> Dubai Cassation No. 214/1998 dated 3 January 1999.

<sup>39</sup> Dubai Cassation Nos. 431/2004 dated 4 June 2005, 204/2004 dated 20 March 2005 and 252/1993 dated 26 December 1993.

<sup>40</sup> Dubai Cassation Nos. 113 and 142/2004 dated 20 February 2005.

<sup>41</sup> The phrase 'indirect or consequential loss' appears, for example, in the FIDIC Conditions, Sub-Clause 17.6 [Limitation of Liability].

<sup>42</sup> For example, consequential loss may encompass loss of profit, overheads, production, revenue, opportunity, goodwill, business interruption, reputational damage, indemnification of third parties, financing costs or interest. It usually comes as a surprise to anyone not familiar with English law that these types of loss have long been considered to be direct, not indirect and consequential, though this approach has been widely criticised and is ripe for change. See, for example, 'The Achilleas: Custom and Practice or Foreseeability?', Lord Hoffman, (2010) 14(1) Edin. LR 47. The same approach was taken by the New York Court of Appeals in *Biotronik AG v Conor Medsystems Ireland Ltd* 2014 WL 1237154.

The Dubai Court of Cassation in 1995 concluded that a debtor's liability to compensate a creditor where the claim is not caused by deceit or serious default is limited to the damage that would normally have been expected at the time that the contract was concluded.<sup>43</sup> This is a narrower measure than the creditor's loss in fact suffered as result of the debtor's breach<sup>44</sup> and is consistent with the French Civil Code which imposes an explicit limit on the recovery of damages for breach of contract absent serious fault.<sup>45</sup>

The civil codes of Bahrain, Kuwait and Qatar each explicitly adopt the culpability test of the French Civil Code. Thus, the Qatar Civil Code provides that:

Nevertheless if the source of the obligation is a contract, the debtor who has not committed any fraud or serious fault will only be obligated to pay compensation for the detriment that could normally have been anticipated at the time the contract was made.<sup>46</sup>

Although neither the UAE Civil Code nor the Oman Civil Code contain a corresponding limit in relation to damages for breach, the delict provisions provide that:

If the harm is direct, it must unconditionally be made good, and if it is consequential there must be a wrongful or deliberate element and the act must have led to the damage.<sup>47</sup>

As the damages provisions for delict and breach of contract are, in practice, treated as interchangeable this, it is submitted, lends support to a culpability test even if the damages arise from a breach of contract.<sup>48</sup>

Discretion to take account of culpability is also consistent with the following:

If specific performance has taken place, or if the obligor persists in refusing performance, the judge shall determine the amount of compensation to be

<sup>43</sup> Dubai Cassation No. 352/1994 dated 22 April 1995.

<sup>44</sup> UAE Civil Code, Article 389.

<sup>45</sup> French Civil Code, Article 1150.

<sup>46</sup> Qatar Civil Code, Article 263(3). Also, Bahrain Civil Code, Article 223 and the Kuwait Civil Code, Article 300(3).

<sup>47</sup> UAE Civil Code, Article 283. Also, Oman Civil Code, Article 176(2).

<sup>48</sup> This is also consistent with the UAE Code of Commercial Practice, Article 91(1), which provides that damages in addition to delay interest are payable despite the absence of evidence that these are attributable to 'cheating or gross fault'.

paid by the obligor, having regard therein to the prejudice suffered by the obligee, and the unreasonableness of the attitude of the obligor.<sup>49</sup>

The domestic courts thus, in contrast with common law courts, take culpability into account when considering remoteness and the recoverability of loss in general. Significantly, recovery of damages is restricted to direct loss in the absence of deceit or serious default.

No assistance is provided by the UAE Civil Code on the definition of consequential harm, though it does not include loss of earnings or loss of profit as this is awarded, in practice, without any necessity for deceit or serious default. The meaning is, instead, related to remoteness and foreseeability as confirmed by the Dubai Court of Cassation in an action arising from a fatal site accident:

The trial court has discretionary authority to identify an actionable failure and whether the damage generated arose from a direct act or by the party who caused it and the link of causation between them and to determine the damage to the injured party in the light of evidence and documents submitted to the trial court as long as this is not beyond the content of the evidence and may weigh the elements of evidence between one another.<sup>50</sup>

Remoteness and foreseeability are matters for the Court of Merits whose determination is subject only to light supervision by the superior courts.

## 19.7 Mitigation

A duty of mitigation is not formally recognised as forming part of an assessment of damages. At common law the duty of mitigation comprises several main rules and sub rules but essentially prevents a claimant from recovering loss that the claimant would have avoided if the claimant had taken reasonable steps to do so.

Although it is significant that French law is unsupportive of a duty of mitigation,<sup>51</sup> indicating that the absence of a codified duty in the Gulf is not merely an oversight, the courts may reduce the damages awarded if the claimant participated in causing or increasing the loss. Thus, the Qatar Civil Code provides:

<sup>49</sup> UAE Civil Code, Article 385. As damages are, in principle, secondary to specific performance as a form of relief, specific performance will, in principle, have been considered and discounted before any assessment of damages.

<sup>50</sup> Dubai Cassation 219/2000 dated 10 December 2000.

<sup>51</sup> John Bell, 2008. *Principles of French Law*. 2nd Edition. Oxford University Press. pp. 354–355.

The court may reduce the amount of the compensation, or not award particular compensation, if the creditor by his fault has contributed to the occurrence of the detriment or has increased it.<sup>52</sup>

Similar provisions appear in Bahrain and Kuwait.<sup>53</sup>

Although the corresponding power in Oman and the United Arab Emirates<sup>54</sup> is included in contemplation of liability in delict rather than contract, the provisions governing the assessment of damages are generally applied interchangeably. The result may be that a damages assessment can take into account a failure to take measures to minimise the loss, though not on the basis of a positive duty alike that at common law.

## 19.8 Limitation of liability

Although there is a tendency in the applicable civil codes to disapprove of any waiver or relinquishment of a right before it has accrued it appears that an agreement excluding or limiting a party's liability is effective.<sup>55</sup> This is subject to several exceptions and to general contractual principles.

The exceptions are exclusions of liability in delict,<sup>56</sup> liability arising from mandatory provisions<sup>57</sup> and liability for fraud or gross mistake. The last is clearly expressed in Kuwait as follows:

It may be agreed to exonerate the obligor of any responsibility resulting from non-performance or delayed performance of contractual obligations except that which arises from fraud or gross fault.<sup>58</sup>

Similar provisions can be found in Bahrain and Qatar.<sup>59</sup>

The primary source for the prohibition on excluding liability for fraud or gross mistake in the United Arab Emirates and Oman is the following provision:

<sup>52</sup> Qatar Civil Code, Article 257.

<sup>53</sup> Bahrain Civil Code, Article 217 and Kuwait Civil Code, Article 294.

<sup>54</sup> Oman Civil Code, Article 180 and the UAE Civil Code, Article 290.

<sup>55</sup> Dubai Cassation No. 195/2003 dated 22 June 2003 in which the court upheld the Court of Merits' decision to apply an exclusion of liability to some repairs (which subsequently failed) to a ship turbine and Dubai Cassation No. 153/2007 dated 6 November 2007.

<sup>56</sup> Bahrain Civil Code, Article 181, Kuwait Civil Code, Article 254, Oman Civil Code, Article 183, Qatar Civil Code, Article 259 and the UAE Civil Code, Article 296. This is roughly equivalent to the Unfair Contract Terms Act 1977, section 2(1), which under English law invalidates any attempt to exclude liability for death or personal injury occasioned by negligence.

<sup>57</sup> Chapter 5.2 [Contractual principles: Mandatory obligations].

<sup>58</sup> Kuwait Civil Code, Article 296.

<sup>59</sup> Bahrain Civil Code, Article 219 and the Qatar Civil Code, Article 259.

In all cases, the obligor shall remain liable for any fraud or gross mistake on his part.<sup>60</sup>

The inclusion of this mandatory provision among those dealing with specific performance does not signify that the provision is inapplicable outside the confines of this remedy.<sup>61</sup> Its positioning merely reflects the prominence of specific performance in the civil law analysis of remedies and its usage reflects the pragmatic approach of the courts to the application of the relevant civil code damages provisions.

The Dubai Court of Cassation has elaborated on conduct for which liability cannot be excluded in the following terms:

It is settled that contracting parties may agree to exclude contractual liabilities provided the obligor has not committed fraud or gross error. Fraud involves refusal to perform a contractual obligation with bad faith; however, it may not necessarily involve intentional damage to the obligee. Gross error involves not a slight error and is a form of negligence and inattention; however, it involves carelessness as to rights and gross recklessness as to obligations without paying attention to the potential damage caused by such recklessness.<sup>62</sup>

Although it is for the Court of Merits to establish whether the evidence supports a finding of fraud or gross mistake this must be sufficient to overcome a presumption that a party has acted in good faith and that any loss or damage is unintentional.<sup>63</sup>

General contractual principles that have the potential to render an exclusion or limitation of liability ineffective include the judicial discretion to modify unfair contract terms, the prohibition of any agreement that contravenes public order and rules of contractual interpretation. In Qatar, for example, it is provided that:

Doubt will be interpreted to the benefit of the debtor.

However if the contract contains a term exempting of liability it will be interpreted narrowly.<sup>64</sup>

<sup>60</sup> UAE Civil Code, Article 383 and the Oman Civil Code, Article 261. The wording of the FIDIC Conditions, Article 17.6 [Limitation of Liability] contains a similar but slightly wider set of exceptions, namely, fraud, deliberate default and reckless misconduct.

<sup>61</sup> Dubai Cassation No. 21/1997 dated 15 November 1997. Although the court did not cite the UAE Civil Code, Article 383 or any other source apart from the precedents of the court, the principle applied is consistent with Article 383.

<sup>62</sup> Dubai Cassation No. 153/2007 dated 6 November 2007.

<sup>63</sup> *Ibid.*

<sup>64</sup> Qatar Civil Code, Article 170.

An attempt to enforce an exclusion or limitation of liability for death or personal injury would almost certainly fail on public order grounds.

Further, if a cap on liability is properly categorised as an agreement fixing the amount of damages, this is subject to a mandatory power of adjustment that, in principle, permits an award in excess of the cap.<sup>65</sup> Although this mandatory power allows an application for adjustment to be made by either party, so it is possible for an applicant to seek an amount in excess of a cap the courts, in practice, consistently operate the power to reduce an award resulting from an agreement, usually for delay damages, suggesting that the court's concern is to avoid agreements resulting in excessive rather than insufficient compensation.

<sup>65</sup> Bahrain Civil Code, Article 226, Kuwait Civil Code, Article 303, Qatar Civil Code, Article 266, Oman Civil Code, Article 267 and the UAE Civil Code, Article 390.



# 20

## Evidence

A significant difference between common law and civil law jurisdictions is the treatment of evidence. As almost every dispute turns on the facts, an understanding of this difference, applicable throughout the Gulf, is a critical element of assessing any construction dispute.

### 20.1 Burden of proof

The burden of proof is expressed in the following terms:

It is the responsibility of the claimant to prove his claim and that of the defendant to refute it.<sup>1</sup>

A similar formulation of the burden of proof applies in Bahrain, Kuwait, Oman and Qatar.<sup>2</sup>

A simple denial of a claim or fact is sufficient to impose the burden of proof on the party asserting the claim or fact. But if the counterparty either admits the claim or facts while advancing a defence on an alternative basis, or asserts an alternative version of the facts, the burden shifts to that party.

<sup>1</sup> UAE Law of Proof, Article 1(1). A very similar provisions is included in the UAE Civil Code, Article 113.

<sup>2</sup> Bahrain Law of Proof, Article 1, Kuwait Law of Proof, Article 1, Oman Law of Proof, Article 1 and the Qatar Civil Procedure Code, Article 211. In Bahrain, the Law of Proof is subordinate to Emiri Decree No. 30/2009 concerning the Commercial, Financial and Investment Dispute Centre by virtue of Article 35 of the latter.

Further, if the claim is based on facts that appear true the burden of proof transfers to the other party to disprove those facts.<sup>3</sup> It is, accordingly, for the party asserting facts to prove them, whether as claimant or respondent.

## 20.2 Documents

The burden of proof can be satisfied by means of documents, witness testimony and experts' reports. In a manner consistent with the civil law tradition the domestic courts typically place greater weight on documentary evidence than on witness testimony. In contrast to common law principles applicable to hearsay, documentary evidence is not inadmissible as evidence of the facts disclosed therein. Instead, documents are categorised as either official or common, the former being those created by a public official,<sup>4</sup> the latter being those created by one of the parties,<sup>5</sup> with different rules applying to each. Official documents are presumed to be genuine and the contents to be true unless there is evidence to the contrary.<sup>6</sup> Common documents are admissible in evidence provided that they are originals,<sup>7</sup> but copies, if challenged, must be demonstrated to be authentic, failing which they may be disregarded by the court.<sup>8</sup> In consequence, it is common practice for litigants to challenge the authenticity of a document, thereby putting the party adducing the document to proof of its authenticity, even if an original is in the litigant's own possession.

## 20.3 Disclosure and production

There is no automatic process of disclosure and production of documents as part of proceedings in the domestic courts. The parties must, instead, rely on the documents in their possession or seek an order for production of

<sup>3</sup> Dubai Cassation No. 256/2005 dated 5 February 2005 in which the court held that the burden of proof was on a bank's customer to prove that the account statements were incorrect.

<sup>4</sup> Bahrain Law of Proof, Article 9, Kuwait Law of Proof, Article 8, Oman Law of Proof, Article 10, Qatar Civil Procedure Code, Article 216 and the UAE Law of Proof, Article 7.

<sup>5</sup> Bahrain Law of Proof, Article 13, Kuwait Law of Proof, Article 13, Oman Law of Proof, Article 15, Qatar Civil Procedure Code, Article 220 and the UAE Law of Proof, Article 11.

<sup>6</sup> Kuwait Law of Proof, Article 9, Oman Law of Proof, Article 11, Qatar Civil Procedure Code, Article 218 and the UAE Law of Proof, Article 8 and Dubai Cassation No. 156/2004 dated 3 April 2005.

<sup>7</sup> Pursuant to UAE Federal Law No. 36/2006 (amending the UAE Law of Proof), Article 17, electronic records have the like status as official and customary documents. Further, pursuant to Dubai Law No. 2/2002, Article 11 electronic records shall be treated as originals, subject to the use of secure verification and retrieval systems. Also, Oman Law No. 69/2008 issuing the law on Electronic Transactions.

<sup>8</sup> Dubai Cassation Nos. 569/2003 dated 2 June 2004 and 207/2004 dated 21 March 2005. A failure to challenge authenticity results in a presumption of authenticity by virtue of the UAE Law of Proof, Article 11: Dubai Cassation No. 328/1997 dated 10 January 1998.

specific documents.<sup>9</sup> An applicant must state the description and content of the document, its relevance and the basis for its existence and possession by the opposing party. In practice, applications and orders for production of specific documents are rare. In contrast, a court appointed expert, if appointed, has a broad power and discretion to require access to documents in the possession of the parties or others, which can be and often is exercised if an expert considers that such access is required in order to perform the investigation ordered by the court.<sup>10</sup>

The Dubai Court of Cassation confirmed in a judgment in 2004<sup>11</sup> that a court may order production of a document, in this case the original of a statement of account a copy of which had been filed with the court by the claimant. The defendant, which created the statement of account, challenged the authenticity of the copy produced by the claimant. The court held that the defendant's failure to produce the original or to swear under oath that no such document existed gave rise to a presumption that the copy was genuine.

It follows that as there is no automatic process of disclosure and production of documents as part of proceedings in the domestic courts there are no corresponding exemptions from such disclosure. Notably, there is no exemption, unlike in common law jurisdictions, applicable to a document containing an offer of settlement. It is for the Court of Merits to assess the content of such a document and, in particular, to determine whether any admission has been made.<sup>12</sup>

If the documents are in any language other than Arabic a translation into Arabic by a certified legal translator must be submitted with the original text. Likewise, oral evidence must be given in Arabic:

Arabic is the language of the courts. The court shall hear the statements of litigants, witnesses or others who refrain from Arabic through a translator after taking the oath, unless he has taken it upon being appointed or upon being licensed as translator.<sup>13</sup>

Allowance for the time and cost of procuring translations is, thus, a necessary aspect of conducting proceedings in the domestic courts.

<sup>9</sup> Bahrain Law of Proof, Article 21, Kuwait Law of Proof, Article 23, Oman Law of Proof, Article 20, Qatar Civil Procedure Code, Article 228, UAE Law of Proof, Article 18 and UAE Civil Procedure Code, Article 45.

<sup>10</sup> Oman Law of Proof, Article 94, Qatar Civil Procedure Code, Articles 346 and 347 and the UAE Law of Proof, Article 82(3).

<sup>11</sup> Dubai Cassation Nos. 185/2003 dated 17 October 2004 and 569/2003 dated 12 June 2004.

<sup>12</sup> Dubai Cassation No. 352/1994 dated 22 April 1995.

<sup>13</sup> UAE Civil Procedure Code, Article 4. Also, Abu Dhabi Law No. 23/2006, Article 12, Dubai Law No. 3/1992, Article 9 and the Bahrain Civil Procedure Code, Article 57.

## 20.4 Witness testimony

Although documents are the primary source of evidence other sources include witness testimony and experts' reports. Witness testimony may be tendered but only following a successful application. In Bahrain, Kuwait, Oman, Qatar and the United Arab Emirates witness testimony is only permitted in a case exceeding a specified value in the absence of any agreement or law to the contrary.<sup>14</sup>

Although the circumstances in which witness testimony can be adduced are limited and the decision rests with the Court of Merits, a party should not be deprived of an opportunity to adduce witness testimony if no documentary evidence is available.<sup>15</sup> In stark contrast with the approach in common law jurisdictions, if the documentary evidence is sufficient on its own there is no compelling reason to permit the parties to adduce witness testimony.<sup>16</sup>

In consequence, evidentiary hearings, in which common law proceedings culminate, do not feature in proceedings in the Gulf. In a rare case of witness testimony being admitted, a hearing is convened specifically for this purpose and is directed by the court, not the adversary. As illustrated in the following provision of the Bahrain Law of Proof, the provision of witness testimony is intended to be tightly controlled:

A judgment that orders the testimony of witnesses should explain every one of the incidents that are ordered to be proved, otherwise it shall be void. The judgment shall also include the day and time of commencement of interrogation.<sup>17</sup>

The rarity of witness testimony contributes significantly to the lower cost of litigation, particularly complex high value litigation, in the Gulf states in comparison to common law jurisdictions such as England and Wales.

If permitted, witness testimony should be given under oath, in the absence of other witnesses who have yet to give evidence<sup>18</sup> and should be confined to matters seen or witnessed.<sup>19</sup>

<sup>14</sup> Bahrain Law of Proof, Article 61 and Bahrain Civil Procedure Code, Article 127, Kuwait Law of Proof, Article 39, Oman Law of Proof, Article 41, Qatar Civil Procedure Code, Article 260 and the UAE Law of Proof, Article 15.

<sup>15</sup> Dubai Cassation Nos. 202/2005 dated 10 October 2005 and 204/97 dated 30 November 1997.

<sup>16</sup> Dubai Cassation No. 160/2013 dated 1 October 2014.

<sup>17</sup> Bahrain Law of Proof, Article 72.

<sup>18</sup> Bahrain Law of Proof, Articles 84 and 82, Bahrain Civil Procedure Code, Article 115, Kuwait Law of Proof, Article 44, Oman Law of Proof, Article 44 Qatar Civil Procedure Code, Articles 284 and 286 and the UAE Law of Proof, Article 41. In Dubai Cassation No. 503/2003 dated May 15, 2005 the court annulled an arbitration award on the grounds that the witness testimony had not been given under oath.

<sup>19</sup> Qatar Civil Procedure Code, Article 269 and the UAE Law of Proof, Article 38.

## 20.5 Court appointed experts

Notwithstanding the existence of witness testimony as an alternative to documents, by far the most influential form of evidence is, in practice, that of a court appointed expert. The prominent role of court appointed experts is a key feature of proceedings in the Gulf and one that marks a significant departure from the corresponding procedure in common law jurisdictions.

The power of the domestic courts in the United Arab Emirates to appoint an expert is found in the following provision of Federal law:

The Court may when necessary, rule to appoint one or more experts from amongst the State's employees or from those listed in the register of experts, so as to obtain their opinion on the issues to be decided in the case.<sup>20</sup>

Similar provisions are found in Bahrain, Kuwait, Oman and Qatar.<sup>21</sup>

The power is a discretionary one that is exercised by the Court of Merits, subject only to the supervisory jurisdiction of the Court of Cassation.<sup>22</sup> The influence on construction cases of experts appointed by the courts would be difficult to overstate.

In the large majority of cases that involve a technical issue – a term that is interpreted broadly – the Court of First Instance appoints one or more experts to conduct an investigation and prepare a report on the issues in dispute. Less commonly, an expert may be appointed by the Court of Appeal instead of, or as well as, by the Court of First Instance. As issues of fact are not considered at the final appeal stage it follows that experts are not appointed by the highest court but a judgment may, nevertheless, remit a case to the lower court with a direction that an expert be appointed, redirected or replaced.

Although opposing litigants are entitled in Bahrain, Qatar and the United Arab Emirates to agree upon the identity of an expert,<sup>23</sup> this opportunity is rarely taken. In the United Arab Emirates the selection is invariably made for the parties upon the direction of the courts in the case of a construction dispute from a list of engineering consultants maintained by the Ministry of

<sup>20</sup> UAE Law of Proof, Article 69.

<sup>21</sup> Bahrain Law of Proof, Article 132, Bahrain Civil Procedure Code, Article 149, Kuwait Law of Proof, Article 71, Qatar Civil Procedure Code, Articles 242 and 333, Oman Law of Proof, Article 80.

<sup>22</sup> Dubai Cassation No. 89/2005 dated 15 October 2005.

<sup>23</sup> Bahrain Law of Proof, Article 133, Bahrain Civil Procedure Code, Article 150, Qatar Civil Procedure Code, Article 334 and the UAE Law of Proof, Article 70 and UAE Federal Law No. 7/2012, Article 2(1).

Justice or the Dubai Ruler's Court. A purely financial dispute or the financial element of a dispute may, however, prompt the courts to direct the appointment of an accountant. The selection may be challenged on grounds relating to an expert's independence and impartiality.<sup>24</sup>

An expert undertakes a process of investigation that in most cases involves assessing the submissions of the parties, convening meetings and collecting evidence, including attendance at site or the parties' premises as the expert considers necessary.<sup>25</sup> This process may take anywhere between several months to several years, the final product of which is a report that is submitted to the court and then to all parties for submissions on its contents.

An expert is guided by the directions and formulation of the issues contained in the court's decision appointing him, the detail and precision of which varies substantially from case to case. It is essential, therefore, that the issues on which each party intends to contest a claim should be identified from the outset in the written submissions and be framed in a manner that offers the best chance of those issues being included in the court's directions to a technical expert.

Notwithstanding any challenges – which are commonplace – to an expert's report, the courts rarely accept such challenges.<sup>26</sup> The assessment of an expert's report is, as with the assessment of other forms of evidence, a matter for the Court of Merits, subject only to a supervisory jurisdiction of the Court of Cassation, the role of which is confined to ensuring that such an assessment addresses the issues referred to an expert, is based on admissible grounds and is consistent with the source from which it is drawn.<sup>27</sup> In consequence, experts' reports are ordinarily ratified and their contents adopted, whether in full or in part, giving an expert a pivotal role in determining construction disputes.

<sup>24</sup> Bahrain Law of Proof, Article 138, Qatar Civil Procedure Code, Article 339 and UAE Law of Proof, Article 77 and UAE Federal Law No. 7/2012, Article 11.

<sup>25</sup> Abu Dhabi Cassation No. 287/2 dated 18 September 2008 in which an appeal relying on the expert's failure to attend the Respondent's premises was rejected.

<sup>26</sup> Dubai Cassation No. 228/2004 dated 22 May 2005 rejecting a challenge based on the expert's consultation with a third party specialist and Dubai Cassation No. 42/2004 dated 10 October 2004 rejecting a challenge and upholding the judgment on the ground that it is sufficient for the Court of Merits to rely on an expert's report without addressing all the challenges thereto.

<sup>27</sup> Dubai Cassation Nos. 160/2013 dated 1 October 2014, and 430/2000 dated 28 January 2001. Cf. Federal Supreme Court No. 541/21 dated 15 May 2001 in which an appeal was allowed due to a court appointed expert's failure to assess an MEP subcontractors' delay against the main contract programme or to address the MEP subcontractor's assertion that its delays were attributable to other subcontractors and to late payment by the main contractor.

## 20.6 Conclusive findings of fact

Findings of fact in criminal proceedings are treated as conclusive and a party relying on such facts is, therefore, exempt from the burden of proof.<sup>28</sup> Acquittal, on the other hand, does not operate as a binding rejection of the facts on which the charges were based<sup>29</sup> and neither, it follows, does a decision of a public prosecutor not to lay charges.<sup>30</sup> A civil claim for damages arising from events that form the basis for criminal proceedings may be lodged in those proceedings,<sup>31</sup> for the purpose of obtaining such findings. As a conviction serves as evidence of liability in delict of not only the individual convicted but also generally of that person's employer<sup>32</sup> intervention by claimants in criminal proceedings is relatively common.

<sup>28</sup> Bahrain Law of Proof, Article 100, Bahrain Civil Procedure Code, Article 125, Kuwait Law of Proof, Article 54, Oman Law of Proof, Article 56 and the Qatar Civil Procedure Code, Article 301. Also, UAE Law of Proof, Article 50, the UAE Penal Procedures Code, Article 269, applied in Federal Supreme Court No. 34/20 dated 16 November 1999 and Dubai Cassation No. 50/2012 dated 14 October 2012.

<sup>29</sup> Dubai Cassation No. 113 and 142/2004 dated 20 February 2005.

<sup>30</sup> Dubai Cassation Nos. 219/2000 dated 10 December 2000 and 288/1994.

<sup>31</sup> UAE Penal Procedures Code, Article 22.

<sup>32</sup> Pursuant to the UAE Civil Code, Article 313(b) any person controlling, supervising or directing another in the performance of a duty is vicariously liable for acts causing harm committed by the subordinate.





# 21

## Prescription

Time limits or time bars are a feature of civil and common law systems each of which imposes restrictions on a party's recourse to legal proceedings based on the passage of time.

### 21.1 Islamic Shari'ah

Notwithstanding a Shari'ah principle that valid claims do not expire, there are a significant number of individual prescription periods established by local law. The effect of these time limits is not that a right is extinguished but, instead, that access to the courts for confirmation of a right and subsequent enforcement is available for a predetermined and limited period.<sup>1</sup> The Federal Supreme Court has, thus, held that:

It is well established that the Islamic Shari'ah adopts the principle based in the Hadith that no Muslim's claim shall be lost even though it is old. Both the Maliki and Hanafi schools hold that a right does not become time barred, though they both acknowledge on the other hand that an action will be time barred after the expiry of a known period.<sup>2</sup>

<sup>1</sup> In England and Wales, the Limitation Act 1980, likewise, bars a right of action, which is defined as proceedings in a court of law.

<sup>2</sup> Federal Supreme Court Nos. 721 & 815/26 dated 22 January 2006. Also, see 'Time Bar Clauses in Saudi Arabian Contracts', Mahir Jalili, 4 ICLR, 488 in which instances are reported of Shari'ah judges refusing to enforce time limits on the basis that 'rights are absolute'.

Although the Shari'ah principle that a valid claim never expires is recorded in this and other judgments relying on Islamic jurisprudence, its original source is not readily discernible. It may be derived from a combination of the numerous references in the Hadith to the obligation on Muslims to pay their debts and the separate prohibition in the Hadith on any abuse of time. Nevertheless, it is clear that a natural right persists but cannot be enforced. This may be of more than merely theoretical relevance if, for example, satisfaction of such a right can be achieved by way of set off or if payment is made by mistake in which case no restitution will be available.<sup>3</sup>

By preserving any underlying right and barring only a remedy, time bars are reconciled with the principles of the Islamic Shari'ah, allowing for the adoption of time bars on pragmatic grounds such as protecting parties from the deterioration or loss of evidence.<sup>4</sup> Whatever the analysis and justification, failure to comply with a time limit has potentially catastrophic consequences for a claimant.

## 21.2 Commercial obligations

Although there are many time limits dispersed among the applicable laws of the Gulf states,<sup>5</sup> only a few of these are commonly applicable in the context of construction contracts and disputes.

First and foremost, a claim arising out of a commercial transaction in Bahrain, Kuwait, Oman, Qatar and the United Arab Emirates must be commenced within ten years:

When denied, and without lawful excuse, actions related to the obligations of traders to each other and in connection with their commercial business shall not be heard upon the expiration of ten years from the due date for fulfilment of the obligation, unless the law provides for a lesser period.<sup>6</sup>

<sup>3</sup> 'Prescription in Arab Civil Codes and the Unidroit Principle of International Commercial Contracts of 2004: A Comparative Analysis', B. Malkawi, Vol. 20, Iss. 1, *Bond Law Review*, at p. 87. The possibility of a set off using a time barred right is recognised explicitly in some of the applicable civil codes, for example, the Bahrain Civil Code, Article 357 and the Oman Civil Code, Article 254.

<sup>4</sup> Federal Supreme Court No. 24/15 dated 19 June 1993 and Dubai Cassation No. 381/2001 dated 12 January 2002, relying on the Maliki school of jurisprudence.

<sup>5</sup> There are over sixty such time limits under the laws applicable in the United Arab Emirates alone.

<sup>6</sup> UAE Code of Commercial Practice, Article 95. Also Bahrain Law of Commerce, Article 87, Kuwait Law of Commerce, Article 118, Oman Law of Commerce, Article 92 and the Qatar Law of Commerce, Article 87.

There is also a ten year prescription period applicable in Saudi Arabia for claims arising from government contracts.<sup>7</sup>

The due date for fulfilment from which the ten year period runs is easier to pinpoint in some cases than in others. For the supply of equipment or materials the time limit will generally commence from the due date for delivery or for payment.<sup>8</sup> However, the due date for fulfilment of a consultant's or a contractor's obligations, the performance of which typically spans a period of months or years, is less easy to pinpoint.

A single universal ten year time limit applicable to construction claims would have the substantial merit of simplicity but the position in reality is complicated by the existence of a variety of other time limits. The complication stems partly from uncertainty as to whether a construction contract is properly categorised as a commercial transaction or a civil transaction.<sup>9</sup>

### 21.3 Civil obligations

Whereas the primary time limit for claims arising out of a commercial transaction is ten years, the primary time limit for claims arising out of a civil transaction is fifteen years.<sup>10</sup> Furthermore, the fifteen year time limit may be displaced by shorter time limits in specific types of claims arising out of a civil transaction.

**Table 21.1** Time limits in the United Arab Emirates

Claim	Commencement	Time
Damage to goods in transit <sup>11</sup>	Delivery	30 days <sup>12</sup>
Quality, quantity or description of materials <sup>13</sup>	Delivery	6 months <sup>14</sup>
Guarantee <sup>15</sup>	When payment falls due	6 months

(continued)

<sup>7</sup> Royal Decree No. M/3 dated 22/1/1435 H, Article 8(6) and Royal Decree No. M/78 dated 19/9/1428 H 1 October 2007 BOG Law, Article 13(d).

<sup>8</sup> UAE Civil Code, Article 885, Federal Supreme Court No. 201/20 dated 3 July 2000 and Dubai Cassation No. 19/2000 dated 28 March 2010.

<sup>9</sup> Refer to Chapter 2.2 [Construction Law: Commercial and civil contracts].

<sup>10</sup> Bahrain Civil Code, Article 365 Kuwait Civil Code, Article 438, Oman Civil Code, Article 340, Qatar Civil Code, Article 403 and the UAE Civil Code, Article 473 as confirmed in Federal Supreme Court No. 354/22 dated 28 April 2001.

<sup>11</sup> UAE Code of Commercial Practice, Article 317.

<sup>12</sup> Notice to be given within seventy-two hours.

<sup>13</sup> UAE Code of Commercial Practice, Article 111.

<sup>14</sup> Notice to be given within fifteen days and proceedings commenced within sixty days unless the defect cannot be discovered in which case notification to be given as soon as discovered.

<sup>15</sup> UAE Civil Code, Article 1092.

**Table 21.1** (Continued)

Claim	Commencement	Time
Dishonoured cheque <sup>16</sup>	Cheque date <sup>17</sup>	2 years
Delict <sup>18</sup>	Awareness of the harm and the person responsible	3 years <sup>19</sup>
Decennial liability <sup>20</sup>	Discovery of the defect or collapse	3 years
Insurance contract <sup>21</sup>	Insured event or knowledge thereof	3 years
Consultants' fees and disbursements <sup>22</sup>	When payment falls due	5 years
Commercial contract <sup>23</sup>	Due date for performance	10 years
Civil contract <sup>24</sup>	When the right falls due	15 years

The time limit applicable to a claim can, therefore, be as long as fifteen years or as short as thirty days depending, in part, on whether a construction contract is categorised as a commercial transaction or a civil transaction. Nevertheless, ten years is the applicable time limit in most cases.<sup>25</sup>

## 21.4 Restriction on amendment

A provision that purports to displace these or any other time limits prescribed by local law is unenforceable by reason of the following mandatory provision:

It shall not be permissible to waive a time bar defence prior to the establishment of the right to raise such defence, nor shall it be permissible to agree that a claim may not be brought after a period differing from the period laid down by law.<sup>26</sup>

<sup>16</sup> UAE Code of Commercial Practice, Article 638.

<sup>17</sup> Possibly from expiry of the presentation period.

<sup>18</sup> UAE Civil Code, Article 298.

<sup>19</sup> Subject to a maximum of maximum fifteen years.

<sup>20</sup> UAE Civil Code, Article 880.

<sup>21</sup> UAE Civil Code, Article 1036.

<sup>22</sup> UAE Civil Code, Article 475(1).

<sup>23</sup> UAE Code of Commercial Practice, Article 95.

<sup>24</sup> UAE Civil Code, Article 473 and Federal Supreme Court No. 354/22 dated 28 April 2001.

<sup>25</sup> Federal Supreme Court Nos. 327/2010 dated 27 October 2010 and. 65/26 dated 10 May 2005 and Dubai Cassation No. 311/96 dated 23 February 2007 in which the court confirmed that the ten year time limit applies in the context of commercial transactions. In Federal Supreme Court No. 354/22 dated 28 April 2001 the court, rejecting a challenge to part of a monetary award for plant and equipment requisitioned by the employer on termination, held that a construction contract is governed by the general 15 year time limit in the UAE Civil Code, Article 473, not the 3 year time limit for the supply of goods at Article 476.

<sup>26</sup> UAE Civil Code, Article 487(1).

The same constraint is imposed on a party's entitlement to adjust a statutory prescription period in Bahrain, Kuwait, Oman and Qatar.<sup>27</sup>

Thus, once a time limit has passed waiving a right to rely on this is permitted but otherwise an agreement to extend or reduce a statutory time limit is void. In particular, an agreement that denies a party a right to commence proceedings to enforce a claim arising pursuant to or for breach of a construction contract before ten years have passed risks contravening this prohibition.

Construction contracts do not generally purport to adjust the statutory prescription period but the prevalence of notice requirements in construction contracts<sup>28</sup> causes a specific controversy in the context of the application of local law. Although at first sight a requirement for notice of a claim may not have much in common with a statutory prescription period, the forfeiture mechanism tied to such a provisions is at risk if it strays into the realms of time limits and the jurisprudence behind prescription in general. Specifically, as an actionable right to enforce a commercial obligation survives for ten years from the date of accrual, forfeiture on expiry of a shorter period unless notice is given<sup>29</sup> potentially constitutes an adjustment of the statutory prescription period and, if so, is void.

One objection to such an analysis is that an obligation to give notice so as to preserve a right differs fundamentally from extinguishing a right based only on the lapse of time. On this basis, a forfeiture provision is a valid and customary element of the law of the parties that falls outside the purview of the prohibition on an adjustment of a statutory prescription period.

Looking more closely at the statutory prohibition itself, this applies to any adjustment of the time for commencing proceedings in a manner consistent with the philosophy of barring the right of action, not the right itself. In principle, if a notice provision in a construction contract has the effect that a right is lost due to a failure to notify a claim on time rather than the right to commence proceedings this does not contravene the statutory prohibition, or at least, not on a literal reading of the law. An agreement to this effect, however, faces a different but related objection on the public order grounds that forfeiture of an accrued right based on a lapse of time is contrary to the Islamic Shari'ah.<sup>30</sup> Any agreement the effect of which is that a right is extinguished based on the effluxion of time must overcome this objection.

<sup>27</sup> Bahrain Civil Code, Article 380, Kuwait Civil Code, Article 453, Oman Civil Code, Article 354 and the Qatar Civil Code, Article 418.

<sup>28</sup> In the FIDIC Conditions, 4th Edition, notice requirements are contained in Sub-Clauses 6.4, 12.2, 27, 44.1, 52.2, 53 and 69.4. The notice provisions are consolidated in the FIDIC Conditions at Sub-Clause 20.1 [Contractor's Claims].

<sup>29</sup> Pursuant to the FIDIC Conditions, Sub-Clause 20.1 [Contractor's Claims], the applicable notice period is 28 days.

<sup>30</sup> Federal Supreme Court No. 721 & 815/26 dated 22 January 2006.

If instead of forfeiture for failure to notify a claim a contract provides that a right to additional time or money arises only on timely notice being given the mandatory prohibition appears not to be engaged. After all, if accrual of a right is conditional on notice being given and no right is brought into existence there is no forfeiture of any such right if timely notice is not given. It follows that no offence against the Islamic Shari'ah is caused.<sup>31</sup> Whether this is the effect of a specific contract and, in particular, whether this is the effect of the FIDIC Conditions<sup>32</sup> is a matter for determination by the Court of Merits in accordance with applicable principles of interpretation.<sup>33</sup>

If liability is acknowledged or admitted, either expressly or by implication, before a time limit has passed, time starts afresh from the date of the admission or acknowledgment.<sup>34</sup> Once a time limit has passed, the right to raise it as a defence can be waived either expressly or by implication.<sup>35</sup>

<sup>31</sup> Dubai Cassation No. 430/2000 dated 28 January 2001 in which a notice requirement in an insurance policy was upheld without any reference to the Islamic Shari'ah. Insurance policies generally make the provision of notice of a claim a condition precedent to a valid claim.

<sup>32</sup> FIDIC Conditions, Sub-Clause 20.1 [Contractor's Claims] states that failure to give notice shall result in time not being extended and the contractor not being entitled to any additional payment. There is also a reference to an employer being discharged from all liability and to a claim being excluded by reason of non-compliance with the contractual timeframes.

<sup>33</sup> Chapter 4 [Interpretation].

<sup>34</sup> Bahrain Civil Code, Article 376(1), Kuwait Civil Code, Article 449, Oman Civil Code, Article 349, Qatar Civil Code, Article 414(1) and the UAE Civil Code, Article 483.

<sup>35</sup> Bahrain Civil Code, Article 380(2), Kuwait Civil Code, Article 453(2), Oman Civil Code, Article 354(2), Qatar Civil Code, Article 418(2) and the UAE Civil Code, Article 487(2).

# 22

## Litigation

While the resolution of disputes through the civil courts is often a last resort or not a matter of choice at all, the role that the civil courts play within the context of the business dealings of the construction industry is a crucial one, the salient features of which merit examination.

### 22.1 Court structure

The UAE Constitution entrenches the rule of law and the independence of the judiciary in the country's legal system as follows:

Justice is the basis of government. In performing their duties, judges shall be independent and shall not be subject to any authority but the law and their own conscience.<sup>1</sup>

Similar principles are expressed in the constitutions Bahrain, Kuwait, Oman and Qatar.<sup>2</sup>

With the exception of Saudi Arabia, the civil justice system through which these principles are implemented is typical of those that operate in other civil law countries around the world and is governed by procedures that are consistent with the constitutional aspiration to the rule of law and an independent judiciary.

<sup>1</sup> UAE Constitution, Article 94.

<sup>2</sup> Bahrain Constitution, Article 104(1) and (2), Kuwait Constitution, Article 162 and 163 Oman Constitution, Articles 59–61 and the Qatar Constitution, Articles 129–131.

Likewise, in keeping with civil law tradition, proceedings in these courts, in sharp contrast to the adversarial approach of their common law counterparts, are inquisitorial by nature, a difference that has implications not only for the proceedings themselves but also for elements of substantive law including, critically, the rules of evidence.

### *United Arab Emirates*

As the United Arab Emirates is, unlike, its Gulf counterparts, a Federal state the structure of the courts is different from that in Bahrain, Kuwait, Oman and Qatar.

A three tiered court system comprising the Court of First Instance, the Court of Appeal and the Federal Supreme Court presides over disputes in the emirates of Sharjah, Ajman, Fujairah and Umm Al Quwain.<sup>3</sup> The remaining three emirates have opted out of the Federal court system and, in consequence, there is an independent three tiered court system in each of Abu Dhabi,<sup>4</sup> Dubai<sup>5</sup> and Ras Al Khaimah.<sup>6</sup> Dubai has established a second and parallel court, comprising two tiers – a Court of First Instance and a Court of Appeal – which operates as part of the Dubai International Financial Centre<sup>7</sup> and Abu Dhabi is set to follow suit.

Although they operate independently of the Federal Courts, the structure of the courts in Abu Dhabi, Dubai and Ras Al Khaimah mirrors their Federal counterpart. In particular, the Emirates of Abu Dhabi, Dubai and Ras Al Khaimah have adopted the UAE Civil Procedure Code,<sup>8</sup> which establishes the processes and procedures by which the civil courts operate.

Cases issued in Sharjah, Ajman, Umm Al Quwain and Fujairah are, therefore, processed through the Federal courts, commencing in the Federal Court of First Instance which has branches located in each of these Emirates. Judgments of the Federal Court of First Instance can be appealed on points of fact and law to the Federal Court of Appeal.<sup>9</sup> Although effectively a

<sup>3</sup> UAE Federal Law No. 6/1978, as amended by UAE Federal Law No. 18/1991, Articles 1 and 1(1). Prior to 2006, the Federal courts had jurisdiction over disputes in the Emirate of Abu Dhabi pursuant to Federal Law No. 6/1978. In consequence, judgments of the Abu Dhabi courts only exist from 2006 onwards. Prior to 2006, cases over which the Abu Dhabi courts now preside were heard by the Federal courts and, in particular, by the Federal Supreme Court as the final appellate court.

<sup>4</sup> Abu Dhabi Law No. 23/2006.

<sup>5</sup> Dubai Law No. 3/1992, which superseded Dubai Law Constituting the Civil Courts (1970).

<sup>6</sup> Until Ras Al Khaimah Law No. 4/2006 the Federal Supreme Court was the highest court in Ras Al Khaimah and heard appeals from the Emirate's courts. Since 2006 Ras Al Khaimah has its own Court of Cassation.

<sup>7</sup> UAE Federal Decree 15/2013 and Dubai Law No. 12/2004, Article 3(1), as amended.

<sup>8</sup> UAE Civil Procedure Code, as amended by Federal Law No. 30/2005 and UAE Federal Law No. 10/2014. Adopted, for example, in Dubai pursuant to Dubai Law No. 5/1992.

<sup>9</sup> UAE Civil Procedure Code, Article 165(1).



rehearing, there are some restrictions on the submission of new evidence in support of an appeal.<sup>10</sup> Judgments of the Federal Court of Appeal can be appealed on points of law only to the Federal Supreme Court which is located in Abu Dhabi.<sup>11</sup> As the UAE Civil Procedure Code is followed in Abu Dhabi, Dubai and Ras Al Khaimah the right and scope of appeal in these Emirates mirrors that in the Federal courts.<sup>12</sup>

The Federal courts and the courts in Abu Dhabi, Dubai and Ras Al Khaimah are split into divisions covering criminal cases, governed by the UAE Penal Procedures Code, commercial and civil cases and Shari'ah or personal status cases, the latter dealing primarily with family and inheritance matters.<sup>13</sup> Although confining the jurisdiction of the Shari'ah courts to personal status cases has the effect of limiting the direct application of the Islamic Shari'ah beyond such cases, the Shari'ah retains a central role in the laws and courts of the United Arab Emirates.<sup>14</sup> There is no specialist construction court and no access to specialist construction judges. In addition to courts, each Emirate is entitled to establish special committees<sup>15</sup> and tribunals.<sup>16</sup>

### *Bahrain, Kuwait Oman and Qatar*

Bahrain has a three tiered civil court structure that is competent to hear all civil and commercial disputes provided that these do not fall under the threshold for small claims.<sup>17</sup> A minor claims court has a separate jurisdiction along with a Shari'ah court to hear personal status cases. The court system in Qatar comprises the Preliminary Court, the Appeal Court and the Supreme Court.<sup>18</sup> In Bahrain and Qatar the Cassation Court has a separate legislative mandate from the lower courts.<sup>19</sup>

Although Oman<sup>20</sup> and Kuwait<sup>21</sup> have a unified court structure that is responsible for criminal, Shari'ah, civil and commercial matters each has

<sup>10</sup> UAE Civil Procedure Code, Article 165(2).

<sup>11</sup> UAE Civil Procedure Code, Article 173.

<sup>12</sup> Dubai Law Nos. 3/1972 and 5/1992.

<sup>13</sup> Abu Dhabi Law No. 23/2006, Article 8.

<sup>14</sup> Chapter 1.3 [Overview: Islamic Shari'ah].

<sup>15</sup> For example, Abu Dhabi Executive Council Resolution No. 53/2007 for Rental Disputes Resolution and Dubai Decree No. 56/2009 forming an ad hoc judicial committee to resolve cheque disputes in real estate transactions.

<sup>16</sup> Dubai Law No. 3/1992, Article 3. A well-known example is the Dubai World Tribunal formed pursuant to Dubai Decree 57/2009.

<sup>17</sup> Bahrain Civil Procedure Code, Articles 7 and 10.

<sup>18</sup> Qatar Law No. 10/2003, Article 4.

<sup>19</sup> Bahrain Law No. 8/1989 issuing the Law of the Cassation Court and Qatar Law No. 12/2005 issuing the Law of Cases and Procedures of Objection by Cassation in Non-criminal Matters.

<sup>20</sup> Sultan Decree No. 90/1999. SNR Denton LLP, 2011. *Business Laws of Oman*. 1st Edition. Lexgulf Publishers Ltd. Pp4–5.

<sup>21</sup> Amiri Decree No. 19/1959 as amended pursuant to which a Shari'ah division is created within the unified court.

established a separate administrative court to handle claims arising from administrative contracts.<sup>22</sup>

As in the United Arab Emirates an independent court – the Qatar International Court and Dispute Resolution Centre – has been established with a mandatory jurisdiction for the resolution of Qatar Financial Centre related disputes and an extended jurisdiction where parties agree in a dispute resolution clause or by mutual agreement to submit to the jurisdiction of the court.<sup>23</sup> The appeal circuit of the court is the final appellate tribunal.

### *Saudi Arabia*

The court system in Saudi Arabia comprises a number of courts and committees that have overlapping jurisdiction. The Board of Grievances has jurisdiction over commercial and administrative disputes,<sup>24</sup> while the General Islamic Court retains a residual jurisdiction over all other disputes. A specialist committee hears and decides banking and insurance disputes.

The Board of Grievances has a three tiered structure and applies the Islamic Shari'ah:

The courts of the Board shall apply Sharia (Islamic law) derived from the Qu'ran and the Sunnah (the traditions of the Islamic prophet Muhammad, which also include Islamic scholarly consensus developed after Muhammad's death and analogical reasoning by Muslim judges) and rules which are not contrary to them and abide in their procedures by the provisions in this Law.<sup>25</sup>

Reform of the court structure was foreshadowed in 2007 by legislation to create a system modelled more closely on that found in other Gulf states but these reforms have not yet been brought into effect. Specifically, it is envisaged that a commercial court replaces the Board of Grievances for hearing commercial disputes but this has yet to be put into operation. As the public sector is not permitted to agree to refer a dispute to arbitration<sup>26</sup> without special authorisation the proposed reform of the domestic court system is particularly relevant to the construction sector.

<sup>22</sup> Amiri Decree No. 20/1981 Creating a Division of the Al Kulliya Court to hear Administrative Disputes. Oman Constitution, Article 67 and Sultan Decree No. 91/1999 Establishing Administrative Courts. See also Chapter 2.4 [Construction law: public procurement].

<sup>23</sup> QFC Law No. 7 of 2005 as amended by QFC Law No. 2 of 2009.

<sup>24</sup> KSA Royal Decree No. M/78 dated 19/9/1428 H 1 October 2007.

<sup>25</sup> KSA Royal Decree No. M/3 dated 22/1/1435 H 22 November 2013.

<sup>26</sup> KSA Arbitration Law, Article 10.

## 22.2 International jurisdiction

In cases involving foreign parties or foreign subject matter the jurisdiction of the region's courts is wide. The applicable laws vest jurisdiction in the domestic courts over any case brought against a citizen of that state or a foreigner having a domicile or place of residence within the relevant territorial jurisdiction.<sup>27</sup>

The Dubai Court of Cassation decided in a case in 1999 that the presence in Dubai of a branch office of a company having its head office overseas was not sufficient to give the court jurisdiction over a collision at sea outside United Arab Emirates' territorial waters.<sup>28</sup> The local presence of a branch office will not itself, therefore, vest jurisdiction in the domestic courts.<sup>29</sup>

The domestic courts will, however, accept jurisdiction against a foreigner without a domicile or place of residence in the United Arab Emirates on a number of grounds including, most significantly:

If the action involves an obligation concluded, executed or required to be executed in the United Arab Emirates, a contract to be attested there or an event occurring there.<sup>30</sup>

As a result, any claim arising out of or in connection with a construction project in the Gulf falls within the jurisdiction of the domestic courts, notwithstanding that one of the parties is foreign or that performance (for example, the manufacturing process) takes place abroad.

The domestic courts in the United Arab Emirates have, on a number of occasions, declined to enforce an agreement giving exclusive jurisdiction to a foreign court on the basis that jurisdiction is a matter of public order and these provisions cannot, therefore, be ousted by agreement.<sup>31</sup>

<sup>27</sup> Bahrain Civil Procedure Code, Article 14 and Emiri Decree No. 6/2015, the Kuwait Civil Procedure Code, Article 23, the Oman Civil Procedure Code, Article 29 and the UAE Civil Procedure Code, Article 20. The law implementing the Qatar Civil Procedure Code, Article 4, appears to have been intended to govern the jurisdiction of the civil courts but omits the relevant text.

<sup>28</sup> Dubai Cassation No. 341/99 dated 19 December 1999. Also, Dubai Cassation Nos. 325/2004 dated 12 March 2005 and 348/1997 dated 29 March 1998.

<sup>29</sup> Cf DIFC Law No. 12/2004, Article 5(A) which confers jurisdiction on the DIFC courts by virtue of a branch of a foreign entity being registered in the DIFC.

<sup>30</sup> UAE Civil Procedure Code, Article 21(3). Also, Bahrain Civil Procedure Code, Article 15, the Kuwait Civil Procedure Code, Article 24 and the Oman Civil Procedure Code, Article 30.

<sup>31</sup> Federal Supreme Court No. 428/18 dated 15 April 1997.

### 22.3 Jurisdiction between emirates

As the United Arab Emirates is a Federal state in which a number of emirates maintain independent courts<sup>32</sup> it is necessary for jurisdiction to be allocated between the courts of the emirates, a task performed by the UAE Constitution and the UAE Civil Procedure Code. Thus, the Federal Supreme Court has exclusive jurisdiction over disputes between Emirates and between Emirates and the Federal Government as well as over challenges to the constitutionality of laws,<sup>33</sup> the latter being allocated to the Constitutional Division of the Federal Supreme Court. Access to the Federal Supreme Court for constitutional challenges is strictly controlled.<sup>34</sup> In addition, cases brought by or against the Federal Government must be commenced in the Federal courts.<sup>35</sup> Jurisdiction over cases involving contracts with the Government of Dubai is vested in the civil courts of Dubai.<sup>36</sup>

Other cases must be commenced in the emirate within which the defendant is domiciled or if the defendant has no domicile in the United Arab Emirates, then in the emirate in which the defendant's residence or place of business is located.<sup>37</sup> A claim may be brought in one of the other emirates, provided that the loss or damage occurred in that emirate, or the contract out of which the dispute arises was entered into or performed in whole or in part in that emirate.<sup>38</sup> If there are a number of defendants, the courts of the emirate in which any one of them is domiciled, can hear the claim but the territorial jurisdiction of the courts is otherwise inviolable:

Based on the foregoing, the independence of the Federal court from the local judicial authorities, and the independence of each judicial authority from each other; and the fact that the jurisdiction of each Federal court or judicial authority is territorially limited within the boundary of each

<sup>32</sup> Abu Dhabi, Dubai and Ras Al Khaimah have their own courts whereas Sharjah, Ajman, Fujairah and Umm Al Quwain rely on the Federal courts.

<sup>33</sup> UAE Constitution, Article 99 and UAE Federal Law No. 10/1973, Article 33. See Federal Supreme Court No. 352/23 dated 20 January 2002.

<sup>34</sup> UAE Federal Law No. 10/1973, Article 58. In Federal Supreme Court No. 4/2012 dated 19 February 2013, the court declined to hear a constitutional challenge which had been raised by arbitrators on the grounds that this did not follow one of the permitted routes to the court. Also, Federal Supreme Court No. 647/25 dated 23 October 2005.

<sup>35</sup> UAE Civil Procedure Code, Article 25.

<sup>36</sup> Dubai Law No. 6/1997, Article 83, though it is doubtful that this is effective outside the emirate: Federal Supreme Court No. 4/2012 dated 19 February 2012.

<sup>37</sup> UAE Civil Procedure Code, Article 31(1).

<sup>38</sup> Above, Article 31(2) and Dubai Cassation No. 375/97 dated 26 April 1998 in which the court accepted jurisdiction on the basis that the employer received the contractor's acceptance of the contract in Dubai notwithstanding that the project was in Al Ain and that separate proceedings had been commenced in Al Ain.

emirate, are all derived from the Constitution and the laws issued to effect the same; jurisdiction as such is related to the public order; each court, whether related to the Federation or any of the local judicial authorities shall be bound by the limits of its jurisdiction and may not violate those limits whether negatively or positively; each court may not abandon its jurisdiction or seize the jurisdiction of another court as per the provisions of the Constitution and the implementing laws thereof.<sup>39</sup>

The parties may, in principle, agree to vest jurisdiction in the courts of a particular emirate<sup>40</sup> or, in the case of Dubai, in either of the co-existing courts.<sup>41</sup> As a matter of practice, however, the courts accept jurisdiction in the presence of the grounds conferring jurisdiction under the UAE Civil Procedure Code and decline jurisdiction if they are absent, notwithstanding any agreement purporting to allocate jurisdiction differently.<sup>42</sup>

## 22.4 Commencement of proceedings

Commencement of proceedings requires a summons to be lodged at a competent court setting out the names and addresses of the parties, the subject matter of the proceedings and must be signed by or on behalf of the claimant.<sup>43</sup> In keeping with the inquisitorial nature of proceedings, the summons must also be accompanied by the documents on which a claimant relies<sup>44</sup> failing which, even in the absence of a defence, a claim is likely to be dismissed. As the language of the courts is Arabic<sup>45</sup> all materials must be submitted in Arabic and or must be accompanied by a certified legal translation into Arabic.

<sup>39</sup> Federal Supreme Court No. 116/13 dated 1 October 1991. Also Dubai Cassation Nos. 342/2007 dated 4 March 2008, 256/2008 dated 24 February 2009 and 58/2009 dated 14 March 2010.

<sup>40</sup> UAE Civil Procedure Code, Article 31(5). See also Article 86, which contemplates an agreement being reached after proceedings have commenced.

<sup>41</sup> Dubai Law No. 16/2011, amending Dubai Law No. 12/2004, Article 5(A)(2). Since October 2011 an agreement to vest jurisdiction in the DIFC courts is permitted notwithstanding the absence of any connection between the DIFC and the parties, the subject matter or any other aspect of the transaction.

<sup>42</sup> Dubai Cassation Nos. 146/2008 dated 20 January 2009, 228/2004 dated 22 May 2005, 18/2004 dated 26 June 2004, 158/2004 dated 16 January 2005 and 134/1994 dated 24 December 1994.

<sup>43</sup> Bahrain Civil Procedure Code, Articles 23 and 69, the Kuwait Civil Procedure Code, Article 45, the Oman Civil Procedure Code, Article 64, Qatar Civil Procedure Code, Article 64 and the UAE Civil Procedure Code, Article 42.

<sup>44</sup> Bahrain Civil Procedure Code, Article 24, the Kuwait Civil Procedure Code, Article 46, the Oman Civil Procedure Code, Article 65, Qatar Civil Procedure Code, Article 33 and the UAE Civil Procedure Code, Article 45(1).

<sup>45</sup> Oman Civil Court, Article 27, Qatar Law No. 10/2003, Article 16.

Fees are payable prior to a court accepting a summons and opening a file. In Dubai the fees payable for a quantified claim for damages are:

Claim Amount (AED)	Fee Basis	Applicable Fee	Maximum Fee
<500,000	6%	Up to AED 20,000	AED 20,000
500,001 to 1,000,000	6%	Up to AED 30,000	AED 50,000
>1,000,000	6%	Up to AED 40,000	AED 90,000 <sup>46</sup>

The corresponding fees in Abu Dhabi are 3% of the damages claimed but, unlike in Dubai, there is no cap.<sup>47</sup> Once registered the court enters a date for the first appearance and arranges service of the summons through the court bailiff.<sup>48</sup>

A notable feature of proceedings in the region's domestic courts is the requirement for a party's representative to be authorised by a notarised power of attorney.<sup>49</sup> The power to appoint an advocate must, in order to satisfy a notary, be traced back to a valid originating source, often the memorandum and articles of a limited liability company. Further, certain powers must be granted explicitly as follows:

It shall not be valid without a special power of attorney to acknowledge a claimed right, waive it or conciliate or arbitrate on it, accept administer or reject an oath, relinquish the litigation or waive the judgment in whole or in part or by way of challenging it, lift the attachment or abandon the deposit by leaving the debt outstanding, file a case for forgery, reject a judge or expert, refuse a real offer or do any other act for which the law requires a special power of attorney.<sup>50</sup>

Thus, settlement, admission, raising a claim of forgery, challenging a judge or expert and, significantly, arbitration, each require a special power of

<sup>46</sup> Dubai Law No. 1/1994, as amended by Dubai Law Nos. 4/1995, 5/1997, 11/1997, 4/2002 and 21/2015, which sets out a detailed table of fees. A nominal fee is added for registration of a power of attorney. Additional fees are payable for a counterclaim on a similar ad valorem basis. The fees were, at the time of writing, due to be revised pursuant to Dubai Law No. 21/2015 with effect from 1 September 2015.

<sup>47</sup> Pursuant to Abu Dhabi Law No. 16/2008 the fees were capped at AED 20,000. This was removed, and the rate reduced from 4%, pursuant to Abu Dhabi Law No. 6/2013, Article 28, ostensibly to discourage inflated and vexatious claims, causing some controversy: 'UAE Attorneys Decry New Judicial Fees as Unfair', *The National*, 4 January 2014.

<sup>48</sup> Pursuant to UAE Federal Law No. 10/2014, amending the UAE Civil Procedure Code, Article 5, a court may delegate service to the claimant or a courier.

<sup>49</sup> Bahrain Civil Procedure Code, Article 43, Kuwait Civil Procedure Code, Article 57, Qatar Civil Procedure Code, Article 41 and the UAE Civil Procedure Code, Article 55(2) and UAE Federal Law No. 23/1991, Article 25. A power of attorney can be notarised locally or in another jurisdiction provided that the foreign notary's seal is properly authenticated, legalised and attested. Also, Bahrain Civil Procedure Code, Article 41, Kuwait Civil Procedure Code, Article 54 and the Qatar Civil Procedure Code, Article 41.

<sup>50</sup> UAE Civil Procedure Code, Article 58(2). Also, for example, Qatar Civil Procedure Code, Article 44.

attorney. A challenge based on unauthorised representation can properly be made by the principal only, not by an opposing party.<sup>51</sup>

## 22.5 Proceedings against the government

A right of legal action against the UAE Federal Government is enshrined in the Constitution and Federal law<sup>52</sup> and no specific procedural requirements are imposed on the commencement of such proceedings. The domestic courts, in practice, also entertain legal proceedings against the governments of the individual emirates without any specific formalities.

In contrast, actions against the Government of Dubai which includes government agencies, authorities and decree companies,<sup>53</sup> must comply with certain formalities.<sup>54</sup> In particular, details of a claim must be submitted to the Director General of the Legal Affairs Department,<sup>55</sup> and the Attorney General must be named as defendant in his representative capacity. If a claim has not been settled within two months following notification it may be submitted to the competent court.<sup>56</sup> Failure to follow the required formalities may render proceedings invalid in the Dubai courts.<sup>57</sup> As the Federal courts are independent of the Dubai courts and are governed by Federal laws relating to civil procedure, not local laws, these formalities are not applicable to proceedings in the Federal courts.<sup>58</sup>

Further, although the definition of lawsuits provided by the applicable law is ambiguous, general references to the courts and the following clarification suggest that only lawsuits in the Dubai courts are contemplated:

For the purposes of this law, a lawsuit shall include submitting and signing pleadings and other relevant applications before the competent court, attending and arguing a lawsuit until the last degree of proceedings, and executing rulings in favour of the government.<sup>59</sup>

<sup>51</sup> Abu Dhabi Cassation No. 924/2009 dated 17 December 2009 and Federal Supreme Court No. 265/22 dated 25 May 2002.

<sup>52</sup> UAE Constitution, Article 102(1) and UAE Civil Procedure Code, Article 25.

<sup>53</sup> Dubai Law No. 3/1996, as amended by Dubai Law No. 4/1997 and Dubai Law No. 10/2005, Article 2.

<sup>54</sup> Dubai Law No. 3/1996, as amended by Dubai Law No. 4/1997 and Dubai Law No. 10/2005, Article 3.

<sup>55</sup> By Dubai Law No. 32/2008 the Legal Affairs Department was established to represent the Government in all lawsuits.

<sup>56</sup> In actions against HH The Ruler or the Government of Dubai, the Director General of the Dubai Legal Affairs Department must be named as defendant in his representative capacity.

<sup>57</sup> Dubai Cassation 311/2008 dated 5 April 2009.

<sup>58</sup> Federal Supreme Court (Constitutional Division) No. 4/2012 dated 19 February 2013.

<sup>59</sup> Dubai Law No. 3/1996, as amended by Dubai Law No. 4/1997 and Dubai Law No. 10/2005, Article 3, Article 6.

In consequence, the prescribed formalities are applicable, it is submitted, to proceedings in the Dubai courts only and, in particular, are not applicable to arbitration proceedings.<sup>60</sup>

Although there is no express recognition of a right of action against government ministries and authorities in the constitutions of Kuwait, Oman and Qatar such actions are clearly contemplated.<sup>61</sup>

## 22.6 Summary actions

Not to be confused with summary judgment or judgment in default each of which is available in common law jurisdictions, summary actions in the courts of the Gulf are those that permit a court to grant provisional relief pending a final judgment in substantive proceedings. In keeping with the inquisitorial nature of civil law proceedings, provision for neither summary judgment nor judgment in default is included in the civil procedure codes of the Gulf states, though a domestic court is able to shorten the duration of proceedings by not deputising a court appointed expert to perform an investigation into the factual evidence.

A variety of relief can be dispensed, usually by a separate division of the civil courts, through a summary action but in practice the most commonly sought forms of relief are orders for the appointment of an assessor to record the condition and value of the works and a precautionary attachment of assets.<sup>62</sup>

### *Status and effect of summary relief*

An application for summary relief does not result in a final order or affect a party's substantive rights. The following description of the Qatar courts' powers and functions in granting summary relief is typical of the applicable procedural laws in Bahrain, Kuwait, Oman and the United Arab Emirates:

The judge of summary matters shall judge temporarily over urgent matters for fear of elapse of time without infringement of the right. Nevertheless, this shall not preclude the competent jurisdiction of the Court of Merits to decide upon these matters if they are submitted by way of joinder.<sup>63</sup>

<sup>60</sup> Prior to Dubai Law No. 3/1996 proceedings against HH The Ruler or the Government were regulated by instructions issued on 2 July 1992, which explicitly exempted arbitration proceedings from the requirement for prior notice and approval.

<sup>61</sup> Kuwait Civil Procedure Code, Article 10(1), Oman Civil Procedure Code, Article 13(1) and 46 and the Qatar Civil Procedure Code, Article 10(1).

<sup>62</sup> Bahrain Civil Procedure Code, Article 176–182, Kuwait Civil procedure Code, Article 222–226, Oman Civil Procedure Code, Articles 371–377, Qatar Civil Procedure Code, Articles 331 and 398–404 and the UAE Law of Proof, Articles 67 and 68 and UAE Civil Procedure Code, Article 252.

<sup>63</sup> Qatar Civil Procedure Code, Article 26. Also, UAE Civil Procedure Code, Articles 22 and 29.



Such orders are available from the courts notwithstanding any agreement that a substantive dispute is to be resolved by arbitration<sup>64</sup> and may be obtained either before or during substantive proceedings.<sup>65</sup>

The Federal Supreme Court has expressed the status of summary relief in the following terms:

It is settled that the state courts have jurisdiction as to summary and precautionary procedures enforced in the state even if the courts are not competent to hear the main case, pursuant to Article 22 of the Civil Procedure Code. If the parties to an arbitration clause or contract do not agree that the arbitrator is competent to take provisional, precautionary or summary procedures and is only competent to interpret or order the performance of the contract, the arbitral tribunal will have no jurisdiction to settle such procedures and the parties may refer them to the courts, which are principally competent to determine them without this being taken as a waiver of the arbitration clause which only covers the substance of the case.<sup>66</sup>

Seeking support from the domestic courts does not constitute a waiver or breach of an arbitration agreement provided that the relief is confined to an provisional or precautionary order from the summary courts.

### *Preservation of evidence*

The source of the power to appoint an independent assessor is as follows:

- (1) It shall be permissible for a person who fears the loss of factual signs which may become the subject of a dispute before the law, in the presence of the parties concerned and in the normal way, to request the summary judge to move in order to observe them. In this case the preceding rulings shall be abided by.
- (2) The summary judge shall be permitted in the aforementioned situation to appoint an expert to move in order to observe and hear witnesses not under oath. The judge shall then specify a session for hearing the remarks of the adversaries on the report of the expert and his actions. The principles stipulated in the chapter on experts shall be applied.<sup>67</sup>

<sup>64</sup> Dubai Cassation Nos. 194/1995 dated 9 March 1996 and 204/2005 dated 2 July 2005.

<sup>65</sup> UAE Civil Procedure Code, Article 98(4). An attachment order is also available following an arbitration award but before or during the ratification process.

<sup>66</sup> Federal Supreme Court No. 225/24 dated 26 September 2002.

<sup>67</sup> UAE Law of Proof, Article 68. Also Bahrain Civil procedure Code, Article 148, Kuwait Law of Proof, Article 72, Oman Law of Proof, Article 81 and the Qatar Civil Procedure Code, Article 331.

Thus, the selection and conduct of an assessor mirrors that of a court appointed expert.<sup>68</sup> This procedure is most commonly used in a construction context following termination of a contract for recording the status of the works before a completion contract is awarded. After the assessment or investigation has concluded, usually marked by submission of an assessor's report, the proceedings are closed and the parties may seek substantive relief, relying on the evidence procured through the summary proceedings.<sup>69</sup> As the procedure is provisional a court that has jurisdiction to make a final judgment is not bound by the findings contained in an assessor's report but may, instead, adopt such findings in whole, in part or not at all.<sup>70</sup>

### *Preservation of assets*

In its other most common form, summary relief is requested in the form of a precautionary attachment order which freezes, without prior warning, the debtor's bank accounts or less commonly other non-tangible assets such as receivables,<sup>71</sup> as well as tangible assets, such as construction machinery, equipment and materials up to the value of a claim, making this an effective way to obtain and preserve security for a claim. An attachment may also be obtained by an owner over movable property that is in the possession a third party, for example, plant or equipment on hire<sup>72</sup> and against a third party issuer of a bond or letter of credit.<sup>73</sup>

An attachment order is a provisional form of relief which is made without notice to the other party and is roughly analogous to injunctive relief in the courts of England and Wales. A decision is usually made on the day on which the application is made or shortly thereafter.

An attachment order may be made:

- if there is a real risk that assets or funds that will be subject to execution in satisfaction of a judgment will be lost, particularly if the debtor is not resident in the State or there is evidence that the assets or funds will be removed from the jurisdiction or otherwise dissipated<sup>74</sup>

<sup>68</sup> See Chapter 20.5 [Evidence: Court appointed experts].

<sup>69</sup> Dubai Cassation Nos. 283/2005 dated 29 October 2005, 93/2006 dated 17 December 2006 and 195/2007 dated 27 October 2007.

<sup>70</sup> Dubai Cassation No. 2117/2013 dated 3 March 2014.

<sup>71</sup> UAE Civil Procedure Code, Article 257.

<sup>72</sup> UAE Civil Procedure Code, Article 253. Also, Kuwait Civil Procedure Code, Article 222.

<sup>73</sup> UAE Code of Commercial Practice, Article 417(2), Dubai Cassation Nos. 109/2001 dated 13 May 2001 and 261/2009 dated 16 September 2009 in which the court lifted the attachment granted by the Court of First Instance and confirmed by the Court of Appeal but stated that an attachment of a bond is permitted in 'exceptional' circumstances, Dubai Court of Appeal No. 44/2010 dated 28 July 2010 and Dubai Court of First Instance No. 733/2009 dated 18 April 2010. Also, Kuwait Civil Procedure Code, Article 261.

<sup>74</sup> UAE Civil Procedure Code, Article 252(1). Also, Qatar Civil Procedure Code, Article 398.

- in favour of a lessor in respect of monies due pursuant to a lease<sup>75</sup>
- if a creditor holds security, a deed or other incontrovertible evidence of an executable debt.<sup>76</sup>

For a successful application based on the first of these scenarios a court will generally have to be satisfied not only that assets or security may be dissipated and, therefore, unavailable to satisfy a judgment but also that the value of the claim is readily quantifiable. In the context of a claim arising from a construction contract this typically requires a payment certificate or a written acknowledgment of liability such as draft final account or a statement at completion.<sup>77</sup> Applications brought against foreign entities more readily meet the first condition than those brought against local entities especially entities having a government shareholder.

An arbitration award is sufficient evidence of a debt for the purpose of the third scenario notwithstanding that ratification is pending. Upholding an attachment obtained by a subcontractor over sums owed by third parties to the judgment debtor, the Abu Dhabi Court of Cassation held that:

It is settled that a precautionary attachment may be levied on the debtor's property in the hands of a third party by virtue of an arbitral award without any enforcement order and even if the arbitral award has no enforcement power as it has precautionary power.<sup>78</sup>

It was held that the lower courts were correct to grant the attachment order without regard to any fear that the debtor's assets would be dissipated as the arbitration award was itself a sufficient ground for the order.

As an attachment order is a provisional or temporary form of relief a successful applicant must commence proceedings to confirm the attachment and seek substantive relief. Such a claim must be commenced within eight days of the attachment being granted, failing which the respondent can apply to have the attachment removed.<sup>79</sup> In Bahrain a successful applicant has fifteen days in which to commence substantive proceedings, in Qatar

<sup>75</sup> UAE Civil Procedure Code, Article 252(2) and Kuwait Civil Procedure Code, Article 222(b) and the Qatar Civil Procedure Code, Article 398.

<sup>76</sup> UAE Civil Procedure Code, Article 252(3).

<sup>77</sup> By UAE Federal Law No. 10/2014 an amendment was made to the UAE Civil Procedure Code, Article 252 removing a requirement that the court must be satisfied that there is a serious claim. It is currently unclear whether this will affect the requirement for evidence in the form of a payment certificate (or similar).

<sup>78</sup> Abu Dhabi Cassation No. 519/2013 dated 2 July 2013.

<sup>79</sup> UAE Civil Procedure Code, Article 255(2) for an attachment over assets and Article 330(5) for a travel ban. Lifting an attachment requires an independent application as an appeal or 'grievance' must be based on the circumstances existing when the attachment was granted: Dubai Cassation No. 144/2005 dated 25 December 2005. Also, Bahrain Civil Procedure Code, Article 308 and the Kuwait Civil Procedure Code, Article 225.

two weeks and in Oman, ten days.<sup>80</sup> If an attachment has been granted by the courts but the substantive dispute is to be referred to arbitration an application can be made for confirmation of the attachment only.<sup>81</sup>

Less commonly, a travel ban on individual debtors is sought and granted on the basis of the following power:

The judge may, if he issues an order preventing a debtor from travelling, order the debtor to deposit his passport at the Court's Treasury and may circulate the order preventing travel to all state entry and exit points.<sup>82</sup>

The Court of Cassation has stated that the power should be exercised only if there is a strong and genuine concern that the debtor will abscond before judgment can be executed.<sup>83</sup> A condition accompanying any order to surrender a passport and imposing a travel ban is that the applicant provides a bank guarantee as counter-security for damages payable if it is subsequently determined that the order was wrongly granted.<sup>84</sup>

## 22.7 Mediation and adjudication

There is a commonly held belief that mediation and amicable settlement is an ancient tradition of the Gulf that has been carried forward into the current business practices of the region. Although there is ample evidence that resolving disputes or differences amicably has been part of the local culture for several millennia there are reasons to question whether and to what extent this has survived the transformation of the region's business environment since the discovery and exploitation of the region's natural resources. Indeed, the inevitable formalisation of business relationships, the introduction of a substantial body of laws and independent courts in which to resolve disputes are evidence of an economy that has developed well beyond the

<sup>80</sup> Bahrain Civil Procedure Code, Article 308 (as amended), Qatar Civil Procedure Code, Article 402 and the Oman Civil Procedure Code, Article 375.

<sup>81</sup> Dubai Cassation No. 194/1995 dated 9 March 1996 and Dubai Cassation No. 204/2005 dated 2 July 2005.

<sup>82</sup> UAE Civil Procedure Code, Article 329(2). Also Bahrain Civil Procedure Code, Article 178 and the Qatar Civil procedure Code, Article 405.

<sup>83</sup> Dubai Cassation No. 1/1993 dated 14 March 1993. Withholding a passport to prevent travel is not permitted without a court order issued pursuant to Article 329: Dubai Cassation No. 168/2001 dated 27 October 2001.

<sup>84</sup> UAE Civil Procedure Code, Article 329(2)(b) and Dubai Cassation 33/1996 dated 11 May 1997.

point at which the traditional notion of mediation continues to have much practical influence over the majority of contentious situations.

There is, however, a growing recognition that an alternative to litigation and arbitration is needed and which is being reflected in some fledgling schemes to encourage mediation. For example, in Oman a court must propose conciliation at the first hearing before proceeding with the remainder of the session.<sup>85</sup>

In a further sign that legislators wish to encourage settlement of disputes, conciliation committees were formed in 1999 as part of the UAE Federal Court of First Instance.<sup>86</sup> Known as Mediation and Reconciliation Committees, they comprise judges and other 'men of experience with a known reputation for impartiality and integrity',<sup>87</sup> whose brief is to facilitate settlement of civil and commercial disputes through conciliation. Any litigation, with limited exceptions such as labour disputes, disputes involving the Government and 'any other matters referred to settlement committees, whatever their description' must be referred to one of the Mediation and Reconciliation Committees prior to filing a case with the Federal courts.<sup>88</sup> They are empowered at the parties' request, to issue an enforceable decision.

Either party may, however, decline to participate and insist that a dispute be referred to the domestic courts.<sup>89</sup> This opt out is typically exercised by parties to a commercial dispute and, in consequence, the role of the Mediation and Reconciliation Committees as a forum for resolving major commercial disputes by mediation or conciliation is limited.

A broadly similar scheme was introduced in Dubai in 2009,<sup>90</sup> though the mandate of the Centre for Amicable Settlement of Disputes established as part of the scheme is limited to disputes that are voluntarily referred or those with a value of less than AED 50,000.<sup>91</sup> Labour disputes and those involving personal status, such as matrimonial disputes are also excluded from the jurisdiction of the Centre. Prior registration of a case with the Centre for Amicable Settlement of Disputes is a precondition to commencing formal proceedings in the courts.<sup>92</sup>

<sup>85</sup> Oman Civil procedure Code, Article 99.

<sup>86</sup> UAE Federal Law No. 26/1999 as amended by Federal Law No. 4/2001.

<sup>87</sup> UAE Federal Law No. 26/1999, Article 1.

<sup>88</sup> UAE Federal Law No. 26/1999, Article 3(1).

<sup>89</sup> UAE Federal Law No. 26/1999, Article 3(2).

<sup>90</sup> Dubai Law No. 16/2009 and subsequent implementing regulations Dubai Resolution No. 23/2010.

<sup>91</sup> Dubai Resolution Nos. 9/2011, 20/2012 and 21/2012.

<sup>92</sup> Dubai Law No. 16/2009, Article 6.

**Key points: factors deterring use of the Mediation and Reconciliation Committee**

- Committee members are generally unknown to the litigants and credentials are not made available
- Committee members are not selected for their knowledge and experience of the subject matter of the dispute
- There is no specific requirement in the governing legislation for Committee members to have any aptitude, training or experience in mediation
- Proceedings of the Committee are not protected from disclosure to the courts
- The exemption of disputes with the Government signals a lack of confidence in alternative dispute resolution on the part of the Government
- Litigants are not required to attend meetings of the Committee in person
- Either party may opt out of the process without any sanction

The role of mediation in construction disputes outside the statutory regime outlined above is limited. The courts do not encourage the parties to consider mediation and project participants are, in general, wary of a process that has no protection from disclosure and subsequent use in formal proceedings.<sup>93</sup>

Unlike in some other jurisdictions, notably the United Kingdom, Australia (New South Wales), Singapore, Malaysia, New Zealand, Germany and Ireland there is no statutory recognition of adjudication in the United Arab Emirates or other Gulf states. Although the Qatar International Court and Dispute Resolution Centre incorporates an Alternative Dispute Resolution Centre which has promoted a consultation on adopting a fast track dispute resolution process for construction projects, known as Q-Construct, this is not expected to be mandatory if adopted at all.

In the absence of any statutory framework to support adjudication the process faces a number of problems. In particular, obtaining recognition and ratification of an adjudication award from the domestic courts is likely to prove problematic. An adjudication conducted pursuant to the FIDIC Conditions, which provide for all disputes to be referred to a dispute adjudication board before proceeding to arbitration, is not immune from these difficulties.<sup>94</sup>

<sup>93</sup> Chapter 20 [Evidence].

<sup>94</sup> For a discussion of the specific provisions see Commentary: FIDIC Conditions, Sub-Clause 20.2 [Appointment of the Dispute Adjudication Board] onwards.

# 23

## Enforcement

Enforcement of a judgment is the endgame of a civil justice system. An effective enforcement regime is essential not only to a successful party but also to the authority of the domestic courts, which preside over the administration of civil and commercial obligations.

### 23.1 Procedure

Enforcement is entrusted to a branch of the civil courts as follows:

The Courts of Execution shall have competence to execute judgments and decisions made by the civil courts in their various kinds and degrees. Executions shall take place under the supervision and control of the judge of the Courts of Execution unless the law determines otherwise.<sup>1</sup>

In Qatar, Oman and Saudi Arabia the execution of judgments is performed by a judge assigned to each of the courts, which maintain a separate list of execution applications.<sup>2</sup>

Execution proceedings, although generally more administrative in nature than substantive proceedings, are governed by the rules applicable in the Court of First Instance and, as a result, retain many of the same features,

<sup>1</sup> Bahrain Civil Procedure Code, Article 244. Also Kuwait Civil Procedure Code, Article 189.

<sup>2</sup> Qatar Civil Procedure Code, Article 366, Oman Civil Procedure Code, Article 334 and KSA Royal Decree No. M/53 dated 13/8/1433H.

including a requirement for service of proceedings, successive hearings and rights of appeal.<sup>3</sup>

In the United Arab Emirates enforcement of a judgment is performed by the execution department of the Court of First Instance in the emirate in which the judgment is given,<sup>4</sup> though the assistance of the execution department of another emirate may be enlisted for enforcement outside the territory of the originating court.<sup>5</sup> Judgments, orders and awards issued or certified by the Dubai International Financial Centre courts will be enforced by the Dubai Court of First Instance provided that the relevant procedural steps have been fulfilled.<sup>6</sup>

A judgment debtor has one day in Qatar,<sup>7</sup> five days in Saudi Arabia,<sup>8</sup> seven days in Bahrain and Oman<sup>9</sup> or fifteen days in the United Arab Emirates<sup>10</sup> from receiving notice of submission of the judgment to the execution department within which to satisfy the judgment, failing which an execution judge is empowered to appoint execution agents to enforce a judgment. The corresponding provision in the Kuwait Civil Procedure Code does not allow any grace period for satisfaction of a judgment.<sup>11</sup>

In practice, execution judges rely on a judgment creditor to supply information regarding the availability and location of assets in the jurisdiction and for the selection of appropriate enforcement measures to deploy. Measures for enforcing a judgment include seizure and sale of assets,<sup>12</sup> seizure of receivables, attachment of real estate and securities, a travel ban<sup>13</sup> and imprisonment.<sup>14</sup>

<sup>3</sup> UAE Civil Procedure Code, Article 219(2).

<sup>4</sup> *Ibid.*, Article 220(2).

<sup>5</sup> *Ibid.*, Article 220(3) et seq.

<sup>6</sup> Dubai Law No. 16/2011, Article 7(2) and the Protocol of Enforcement between the Dubai Courts and the DIFC Courts (2009). The required procedural steps are that the judgment, order or award is final and executable, that it is translated into Arabic, that it is certified by the DIFC Courts for execution and has a formula of execution affixed by the DIFC Courts.

<sup>7</sup> Qatar Civil Procedure Code, Article 369.

<sup>8</sup> KSA Royal Decree No. M/53 dated 13/8/1433H, Article 46.

<sup>9</sup> Bahrain Civil Procedure Code, Article 264 and the Oman Civil Procedure Code, Article 356.

<sup>10</sup> UAE Civil Procedure Code, Article 239.

<sup>11</sup> Kuwait Civil Procedure Code, Article 204.

<sup>12</sup> Bahrain Civil Procedure Code, Articles 273–281, UAE Civil Procedure Code, Book III, Part 2. Assets include fixed and moveable property as well as shares and bonds.

<sup>13</sup> Kuwait Civil Procedure Code, Article 292, KSA Royal Decree No. M/53 dated 13/8/1433H, Article 46(1), Oman Civil Procedure Code, Article 427, Qatar Civil Procedure Code, Article 405 and the UAE Civil Procedure Code, Article 329 and Sharjah Law No. 21/1990.

<sup>14</sup> Kuwait Civil Procedure Code, Article 297, KSA Royal Decree No. M/53 dated 13/8/1433H, Article 46(d), Qatar Civil Procedure Code, Article 514 and the UAE Civil Procedure Code, Article 324 and Supreme Court No. 524/19 dated 28 September 1999 upholding a committal order relying on a finding that the judgment debtor was able to pay but refused to do so.



A seizure of moveable assets is effected by a court bailiff, whose task involves making an inventory of and securing all assets on which an execution is levied, including, if appropriate, appointing a custodian of such assets nominated by one of the parties to the execution. Enforcement is not permitted against assets of the government, including in the case of the United Arab Emirates individual emirates nor against a debtor's residential property, tools of a debtor's trade, food and clothing.<sup>15</sup>

If a judgment remains unsatisfied the assets seized are sold at auction, subject to any third party claims. Real estate or fixed assets are, likewise, liquidated by a public auction. Such auctions are often poorly attended, resulting in reserves placed on items seized by the bailiff not being reached. In these circumstances, a subsequent auction is arranged, at which the highest bid is accepted, irrespective of the reserve.

## 23.2 Appeal

A decision of an execution judge may be challenged by way of appeal, provided the challenge is lodged within the prescribed period, which is generally seven days from the challenged decision.<sup>16</sup> In the United Arab Emirates an appeal is heard by an execution judge in the Court of Appeal but there is no further right of appeal thereafter.<sup>17</sup>

In Saudi Arabia, a decision of an execution judge may also be challenged by way of appeal.<sup>18</sup> Although no period within which such an appeal must be lodged is stated, the general rule is that an appeal must be lodged within thirty days.<sup>19</sup>

In Oman and the United Arab Emirates an appeal against a decision of an execution judge causes the execution proceedings to be stayed.<sup>20</sup> Likewise, an appeal from a judgment issued by a Court of First Instance in substantive proceedings operates as an automatic stay of execution,<sup>21</sup> though a precautionary attachment may be granted on the basis of a first instance judgment or an arbitral award.<sup>22</sup>

<sup>15</sup> Bahrain Civil Procedure Code, Articles 249 and 251, Kuwait Civil Procedure Code, Article 216, Qatar Civil Procedure Code, Articles 387 and 388 and the UAE Civil Procedure Code, Article 247.

<sup>16</sup> Bahrain Civil Procedure Code, Article 257, Qatar Civil Procedure Code, Article 365.

<sup>17</sup> UAE Civil Procedure Code, Articles 222(1) and 173(2). The challenge must fall within one or more of the listed grounds listed.

<sup>18</sup> KSA Royal Decree No. M/53 dated 13/8/1433H, Article 6.

<sup>19</sup> KSA Royal Decree No. M/3 dated 22/1/1435 H, Article 33(1).

<sup>20</sup> Oman Civil Procedure Code, Article 339 and the UAE Civil Procedure Code, Article 222(3).

<sup>21</sup> Oman Civil Procedure Code, Article 339 and the UAE Civil Procedure Code, Article 227.

<sup>22</sup> UAE Civil Procedure Code, Article 254(2) and Abu Dhabi Court of Cassation No. 519/2013 dated 2 October 2013.

In Bahrain it is provided that:

Judgments may not be forcibly executed while it is permitted to challenge them by means of appeal unless summary execution is prescribed by law or ordered in the judgment.<sup>23</sup>

A clear distinction is not drawn between the effect of an appeal against a decision of an execution judge and an appeal lodged in the main proceedings. The position is similar in Kuwait.<sup>24</sup> In contrast, there is no automatic stay in Qatar, the Court of Appeal instead having a discretionary power to stay execution proceedings if it is considered likely that an appeal will succeed or if enforcement risks causing significant irreparable damage to the judgment debtor.<sup>25</sup> In Saudi Arabia an appeal does not result in an automatic stay but a stay may be granted on similar grounds.<sup>26</sup>

A judgment issued by an appellate court in substantive proceedings on the other hand is enforceable notwithstanding any further challenge unless the Court of Cassation or Supreme Court can be persuaded by a judgment debtor to exercise a discretionary power to grant a stay of execution.<sup>27</sup> In the United Arab Emirates a judgment debtor must show that if a stay is not granted a 'heavy loss' is likely.

Partly in consequence of the beneficial effect of an appeal on enforcement proceedings, challenges to judgments and orders in both execution proceedings and substantive proceedings are, in practice, routine.

### **23.3 Enforcement outside the jurisdiction**

Assets located outside the jurisdiction of the execution department of any domestic court present a significant obstacle to enforcement of a judgment, an especially acute issue in countries having a high concentration of foreign businesses.

<sup>23</sup> Bahrain Civil Procedure Code, Article 245 (as amended). Cf. Bahrain Civil Procedure Code, Article 245, Article 259.

<sup>24</sup> Kuwait Civil Procedure Code, Article 192. See also Kuwait Civil Procedure Code 144, which provides that an appeal restores a case to its pre-appeal status in respect of all elements of the judgment that are challenged.

<sup>25</sup> Qatar Civil Procedure Code, Article 375.

<sup>26</sup> KSA Decree No. M/3 dated 22/1/1435 H, Article 9.

<sup>27</sup> Bahrain Law No. 8/1989 issuing the Law of the Cassation Court, Article 10, Kuwait Civil Procedure Code, Article 192, Oman Civil Procedure Code, Article 245 and the UAE Civil Procedure Code, Article 175.

The importance of enforceable cross-border judicial sanctions has long been recognised by governments and the international business community as evidenced by the existence of a number of multilateral treaties on the mutual recognition and enforcement of civil court judgments.<sup>28</sup> These take precedence over domestic civil procedure rules on the basis that such treaties are considered to be equivalent to domestic legislation.<sup>29</sup>

If a convention or an agreement is signed between the UAE and other countries on the execution of foreign judgments, the provisions of that convention or agreement shall take precedence and be enforced rather than the provisions of the local law in this regard.<sup>30</sup>

In the absence of a direct equivalent the position in Saudi Arabia is that a foreign judgment must ordinarily satisfy a test of reciprocity and consistency with public order (Shari'ah).<sup>31</sup>

The role of the courts is limited to verifying whether or not the conditions stipulated in the applicable treaty have been satisfied.

The key international enforcement treaties to which the United Arab Emirates is a party are:

- Riyadh Convention for Judicial Cooperation among Arab States (1983)<sup>32</sup>
- Protocol on Enforcement of Judgments, Requests for Legal Assistance and Service of Judicial Documents Among the States of the Gulf Cooperation Council (1996)<sup>33</sup>

The Riyadh Convention which was ratified by the United Arab Emirates in 1999 superseded the Arab League Convention on the Reciprocal Enforcement of Foreign Judgments (1952).<sup>34</sup>

<sup>28</sup> For example, the *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 2007, known as the Lugano Convention, between European Union states and Iceland, Switzerland, Norway and Denmark.

<sup>29</sup> Bahrain Civil Procedure Code, Article 255, Kuwait Civil Procedure Code, Article 203, Oman Civil Procedure Code, Article 355, Qatar Civil Procedure Code, Article 383 and the UAE Civil Procedure Code, Article 238.

<sup>30</sup> Federal Supreme Court No. 366/21 dated 20 March 2001 in which the court accepted a judgment rendered in Kuwait. Also Dubai Cassation No. 175/2005 dated 18 December 2005 in which the court accepted a judgment rendered in Lebanon.

<sup>31</sup> KSA Royal Decree No. M/53 dated 13/8/1433H, Articles 11 and 12 the Implementing Regulations, Article 11.

<sup>32</sup> Ratified by UAE Federal Law No. 53/1999.

<sup>33</sup> Ratified by UAE Federal Law No. 41/1996.

<sup>34</sup> Riyadh Convention, Article 71. The Arab League Convention on the Reciprocal Enforcement of Foreign Judgments (1952) was ratified by way of UAE Federal Law No. 93/1972.

---

**Signatories to the Riyadh Convention for judicial cooperation among Arab States**


---

Algeria	Oman
Bahrain*	Palestine
Djibouti	Qatar*
Iraq*	Saudi Arabia
Jordan*	Sudan
Kuwait	Syria*
Lebanon	Somalia
Libya*	Tunisia*
Morocco	United Arab Emirates*
Mauritania	Yemen*

---

\*Denotes States that have signed and ratified the Riyadh Convention

Pursuant to the Riyadh Convention the domestic courts are required to recognise and enforce a final judgment of the courts of other convention states and vice versa<sup>35</sup> subject to a number of exceptions, which include judgments that are contrary to the Islamic Shari'ah, the Constitution or public order or decency in the enforcing state.<sup>36</sup>

The Riyadh Convention overlaps to a certain extent with the GCC Protocol<sup>37</sup> and with the numerous bilateral treaties for the mutual recognition and enforcement of judgments adopted by the GCC states. The United Arab Emirates has such bilateral treaties in place, for example, with Tunisia,<sup>38</sup> France,<sup>39</sup> China,<sup>40</sup> India<sup>41</sup> and Pakistan.<sup>42</sup> Separately, there are a number of bilateral treaties for judicial cooperation which follow a largely common form and mainly permit detention of individuals suspected of a

<sup>35</sup> Riyadh Convention, Article 25(b) and Article 31.

<sup>36</sup> Riyadh Convention, Article 30(a). Federal Supreme Court No. 1/20 dated 24 October 2000 in which the court refused to allow a challenge to the enforcement of a foreign judgment based on the inclusion of an interest award as this is not considered, on the basis of the judgments of the Supreme Court, to be contrary to the Islamic Shari'ah. The same conclusion was reached in Dubai Cassation No. 132/2012 dated 22 February 2012 in relation to enforcement of an arbitral award under the New York Convention.

<sup>37</sup> 'Protocol on Enforcement of Judgments, Letters Regulatory and Judicial Notices issued by the Courts of the Member States of the Arab Gulf Cooperation Council' adopted in 1996.

<sup>38</sup> UAE Federal Decree No. 32/1975.

<sup>39</sup> 'Treaty of Judicial Cooperation and Recognition and Execution of Judgments in Civil and Commercial Matters between the UAE Government and the Government of France', which was ratified by the UAE in Federal Law No. 31/1992. The treaty covers arbitration awards in addition to court judgments.

<sup>40</sup> UAE Federal Decree No. 55/2004.

<sup>41</sup> UAE Federal Decree No. 33/2000.

<sup>42</sup> UAE Federal Decree No. 12/2005.

crime, extradition, service of proceedings and taking evidence, but not the mutual recognition and enforcement of judgments.<sup>43</sup>

Whether a judgment obtained in a GCC state is enforceable in a country other than one that has acceded to the Riyadh Convention, the GCC Protocol or that has entered into a bilateral treaty, will depend, in principle, on the local law and practice of the enforcing country. A foreign judgment is enforceable in Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates subject to certain conditions such as reciprocal recognition of judgments in the originating state.<sup>44</sup> Specifically, the enforcement of a foreign judgment is governed by the following provision of UAE Federal law:

Judgments and orders delivered in foreign countries may be executed in the United Arab Emirates on the same basis as judgments and orders issued in the United Arab Emirates can be executed in that country.<sup>45</sup>

Foreign judgments are, therefore, generally enforceable in the GCC subject, however, to a number of conditions in addition to the primary condition of reciprocity. These conditions are that:

- the domestic courts do not have jurisdiction over the dispute that is the subject matter of the foreign judgment
- the foreign court had a valid claim to jurisdiction over the dispute according to that court's domestic law
- the parties to the case have been summoned to appear and have appeared in the proceedings
- the judgment is final, i.e. not susceptible to appeal
- the judgment does not conflict with a judgment or order of the domestic courts and is not contrary to public morals or order.<sup>46</sup>

<sup>43</sup> UAE Federal Decree No. 80/1978 and 57/2006 (Morocco), Federal Decree No. 12/1980 and 60/2002 (Syria), Federal Decree No. 95/1982 (Somalia), Federal Decree No. 12/1984 (Algeria), Federal Decree No. 106/1999 (Jordan), Federal Decree No. 83/2000 (Egypt), Federal Decree No. 8/2005 (Sudan), Federal Decree No. 38/2007 (United Kingdom), Federal Decree No. 100/2007 (France), Federal Decree No. 37/2007 (Azerbaijan), Federal Decree No. 69/2007 (Tajikistan), Federal Decree No. 2/2008 (Australia), Federal Decree No. 23/2009 (Afghanistan), Federal Decree No. 117/2009 (Kazakhstan), Federal Decree No. 25/2010 (Spain) and Federal Law No. 64/2008 (Spain).

<sup>44</sup> Bahrain Civil Procedure Code, Article 252, Kuwait Civil Procedure Code, Article 199, Oman Civil Procedure Code, Article 352, Qatar Civil Procedure Code, Article 379 and KSA Royal Decree No. M/53 dated 13/8/1433H, Articles 11 and 12 the Implementing Regulations, Article 11.

<sup>45</sup> UAE Civil Procedure Code, Article 235(1).

<sup>46</sup> Bahrain Civil Procedure Code, Article 252, Kuwait Civil Procedure Code, Article 199, Oman Civil procedure Code, Article 352, Qatar Civil Procedure Code, Article 380 and the UAE Civil Procedure Code, Article 235(2).

The first of these conditions is particularly difficult to satisfy due to the expansive application of the domestic courts' jurisdiction.<sup>47</sup> Judgments of the domestic courts also suggest that the conditions are strictly applied and that the burden of proving that the conditions are satisfied, is high.<sup>48</sup> In consequence, the conditions present a formidable obstacle to any party seeking to enforce a foreign judgment.

The regime for the recognition and enforcement of foreign judgments in the Dubai International Financial Centre is not governed by the UAE Civil Procedure Code which, together with the general body of UAE Federal laws, is inapplicable to business conducted in DIFC.<sup>49</sup> There is, nevertheless, provision for reciprocal recognition of foreign judgments.<sup>50</sup> In parallel, the DIFC courts are subject to the same international treaty obligations as the domestic courts<sup>51</sup> and have entered into a number of reciprocal enforcement arrangements with like-minded commercial courts in jurisdictions outside the Gulf.<sup>52</sup>

<sup>47</sup> Chapter 22.2 [Litigation: International jurisdiction]. Federal Supreme Court No. 60/25 dated 11 December 2004 and Dubai Cassation No. 117/1993 dated 20 November 1993 reported in *Arab Law Quarterly*, Vol. 10, Part 4, 354.

<sup>48</sup> Federal Supreme Court No. 153/24 dated 7 March 2004. Also, 'Execution of Foreign Judgments in the UAE', *H. Arab, ALQ*, Vol. 17, Part 2, 208–211.

<sup>49</sup> UAE Federal Law No. 8/2004, UAE Federal Decree 35/2004 and Dubai Law No. 9/2004.

<sup>50</sup> Dubai Law No. 4/2010, Article 24(2).

<sup>51</sup> In *Farooq Al Alawi v Lloyds TSB Bank Plc & Ors* ENF 02/2012 the DIFC Court granted an application to enforce a judgment issued in Bahrain, relying upon the GCC Protocol to do so.

<sup>52</sup> The DIFC courts have issued a Memorandum of Guidance dated 23 January 2013 jointly with the Commercial Court of England and Wales setting out the process for mutual recognition of judgments between these courts. A Memorandum of Guidance has also been agreed with the Supreme Court of New South Wales.

# 24

## Arbitration

Arbitration has long been a method of dispute resolution favoured by international businesses, including construction businesses. But as arbitration depends for its effectiveness on recognition and enforcement of arbitration agreements and awards by domestic courts, an amenable legal system is an essential prerequisite for arbitration to become a viable alternative to litigation. This chapter focuses, therefore, on the judicial treatment of arbitration agreements in the Gulf, the regulation of arbitration proceedings and the recognition and enforcement of both domestic and foreign arbitration awards.

### 24.1 Right to arbitrate

Arbitration is widely recognised and accepted by legal systems throughout the Middle East as an alternative to litigation.

In the United Arab Emirates, Federal law gives statutory force to a written agreement to arbitrate in the following terms:

If litigants agree on arbitration in a dispute, no case may be lodged for such dispute before the courts. If a party, nevertheless, lodges a case without considering the arbitration clause and the other party does not object at the first hearing the case may be heard and the arbitration clause shall be considered null and void.<sup>1</sup>

<sup>1</sup> UAE Civil Procedure Code, Article 203(5).

Provided an application is made by a defendant no later than at the first hearing, a case filed in the domestic courts in contravention of a valid arbitration agreement will be dismissed.<sup>2</sup> This extends to an agreement to submit to arbitration in a foreign jurisdiction.<sup>3</sup> Conversely, failure to raise an objection at the first hearing attended by a party or that party's representative is treated as a waiver of an arbitration agreement. The first hearing at which an objection must be lodged includes a hearing at which a party appears in order to request an adjournment for time to submit evidence of representative capacity or an adjournment to prepare a written submission.<sup>4</sup> In contrast to the urgency with which an application must be made, determination of such an application is commonly held in abeyance and only dealt with following an exchange of submissions on the substance of the dispute.

Similarly, in Kuwait and Qatar a domestic court is required to refrain from hearing a claim if there is an arbitration agreement between the parties. In Qatar it is provided that:

If a dispute arises in respect of the performance of a contract that includes an arbitration condition and one of the parties has brought an action before the competent court, the other party may hold to the arbitration condition as an objection to the acceptance of the action.<sup>5</sup>

In Kuwait the arbitration regime is supplemented with a judicially sponsored form of arbitration for a limited class of disputes or those referred by agreement between the parties.<sup>6</sup>

Bahrain has adopted the UNCITRAL Model Law<sup>7</sup> which provides that:

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.<sup>8</sup>

<sup>2</sup> Dubai Cassation Nos. 240/2001 dated 8 December 2001 and 167/2002 dated 2 July 2002.

<sup>3</sup> Dubai Cassation No. 6/1994 dated 13 November 2004, Federal Supreme Court No. 514/19 dated 1 June 1999 and Dubai Cassation No. 6/1994 dated 13 November 1996. Dubai Law No. 6/97, Article 36 prohibits the Government of Dubai from entering into any agreement to arbitrate outside the Emirate of Dubai.

<sup>4</sup> Federal Supreme Court No. 491/24 dated 28 November 2004 and Abu Dhabi Cassation No. 1283/2010 dated 11 October 2011.

<sup>5</sup> Qatar Civil Procedure Code, Article 192. Also Kuwait Civil Procedure Code, Article 173.

<sup>6</sup> Emiri Decree No. 11/1995 concerning Judicial Arbitration in Civil and Commercial Matters.

<sup>7</sup> Bahrain Arbitration Law, Article 1. Arbitration was previously governed by Bahrain Civil Procedure Code, Chapter 7 and Emiri Decree No. 9/1994, which were repealed by the Bahrain Arbitration Law, Article 8.

<sup>8</sup> UNCITRAL Model Law, Article 8.



By adopting the UNCITRAL Model Law and earlier legislation underpinning the integrity of arbitration within the Kingdom,<sup>9</sup> Bahrain is in the vanguard of Gulf states seeking to support and foster arbitration as a viable alternative to the courts.

Although not adopted wholesale, the UNCITRAL Model Law has also been used as the basis for legislation governing arbitration in Saudi Arabia,<sup>10</sup> Oman,<sup>11</sup> DIFC<sup>12</sup> and QFC<sup>13</sup> and, in consequence, a domestic court of these jurisdictions is also required, in the presence of an arbitration agreement, to refer a dispute to arbitration if so requested.

Notwithstanding the recognition given to an agreement to arbitrate, arbitration is not permitted in respect of disputes involving public order. As a contract is unenforceable to the extent that it conflicts with public order or decency,<sup>14</sup> including a conflict with laws passed for the public interest, an arbitration agreement that purports to refer disputes concerning matters of public order or public interest to arbitration is similarly unenforceable.

Public order is defined as follows:

Public order shall be deemed to include matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to sovereignty, freedom of trade, the circulation of wealth, rules of private ownership and the other rules and foundations upon which society is based, in such manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Shari'ah.<sup>15</sup>

The KSA Arbitration Law, in addition, contains numerous express caveats tied to any conflict with the Islamic Shari'ah.<sup>16</sup>

Although the impact of public order in the context of construction disputes is likely to be limited the preservation of jurisdiction over matters of public order is a thread that runs through some significant judgments on arbitration. Thus, it has been found that reliance on the UAE Constitution to resolve a conflict of domestic laws<sup>17</sup> or on failure to register property

<sup>9</sup> Emiri Decree No. 30/2009, pursuant to which the Bahrain Chamber for Dispute Resolution came into existence and which conferred favoured status on arbitral proceedings administered under the decree.

<sup>10</sup> KSA Arbitration Law.

<sup>11</sup> Oman Arbitration Law.

<sup>12</sup> DIFC Law No. 1/2008 (Arbitration Law), which applies if the DIFC is the seat of an arbitration.

<sup>13</sup> QFC Arbitration Regulation 2005.

<sup>14</sup> Chapter 5.2 [Contractual principles: Mandatory obligations].

<sup>15</sup> UAE Civil Code, Article 3.

<sup>16</sup> KSA Arbitration Law, Articles 2, 5, 38, 50(2) and 55.

<sup>17</sup> Federal Supreme Court (Constitutional Division) No. 4/2012 dated 20 March 2012.

based on real estate legislation as a ground to terminate a sale contract<sup>18</sup> are matters of public order and are not, therefore, arbitrable.<sup>19</sup>

## 24.2 Treaty arbitration

In addition to arbitration arising by virtue of an agreement between the parties it is also possible, in some limited circumstances, for a foreign entity to have a right to refer a construction dispute to arbitration conducted under the auspices of the World Bank in Washington.

The Washington Convention on the Settlement of the Investment Disputes between States and Nationals of Other States (1965), to which all of the Gulf states are parties,<sup>20</sup> is aimed at promoting international investment. An arbitration conducted pursuant to the convention is administered by the International Centre for Settlement of Investment Disputes (ICSID), which claims to be:

an independent, depoliticized and effective dispute-settlement institution. Its availability to investors and States helps to promote international investment by providing confidence in the dispute resolution process.<sup>21</sup>

In order to trigger access to an ICSID administered arbitration, consent must be given by the parties or failing such consent, a right of access may arise by virtue of domestic legislation, a bilateral investment treaty or an international investment treaty. Reliance on an investment treaty requires that a dispute arises out of an investment between a member state and a national of another member state.

Cases brought against Gulf states pursuant to the convention are, in practice, rare and cases properly brought are rarer still.<sup>22</sup> Of the two cases registered with ICSID in which the United Arab Emirates is a party, both

<sup>18</sup> Dubai Cassation Nos. 146/2008 dated 9 November 2008, 180/2011 dated 12 February 2012, 14/2012 dated 16 September 2012 and 282/2012 dated 3 February 2013. Real estate transactions fall within the public order definition as these relate to private ownership: Dubai Cassation No. 156/2009 dated 22 April 2009.

<sup>19</sup> Also, Dubai Cassation No. 146/2008 dated 9 November 2008 in which an insurer under a life policy declined to indemnify the claimant on the grounds that the latter was implicated in the murder of the insured who was his wife. Allocation of the proceeds was found to be a matter to be determined in accordance with the Islamic Shari'ah and, therefore, a matter of public order, as per the Civil Code, Article 3.

<sup>20</sup> Ratified in the case of the United Arab Emirates by Cabinet Decision No. 66/1981.

<sup>21</sup> ICSID website.

<sup>22</sup> ICSID records a total of five cases against GCC states: two each against Oman and the United Arab Emirates and one against Saudi Arabia. As of 31 December 2014, ICSID had registered a total of 497 cases, according to *The ICSID Caseload – Statistics*, Iss. 2015-1.

were commenced pursuant to a bilateral investment treaty between the United Arab Emirates and Italy. Neither case resulted in a final award on the merits of the dispute.

### 24.3 Validity of an arbitration agreement

Notwithstanding the longstanding judicial practice of enforcing an arbitration agreement arbitration is treated as an 'exceptional' method of dispute resolution. In consequence, unlike other contractual commitments:

An agreement for arbitration shall only be evidenced in writing.<sup>23</sup>

The Dubai Court of Cassation has set out the rationale for this requirement as follows:

It is settled that arbitration is an exceptional path for determining disputes between parties and it must be expressly agreed upon because it involves a departure from the path of litigating before the competent courts of law and the guarantee bestowed by the ordinary courts.<sup>24</sup>

As the civil courts uphold a party's rights, providing protection from default and dispensing justice, any waiver of the right of recourse to the courts must be established with a higher degree of certainty than other less fundamental rights. Applying this underlying philosophy tends, in practice, to result in any doubt as to the existence of an effective agreement to arbitrate being resolved against a party relying on the agreement and a return to the domestic courts as the default mechanism for dispute resolution.

In 2008, the Dubai Court of Cassation had to consider whether a claim by a fit out contractor arising from a verbal instruction to extend certain fit out works for two villas and a majlis to a third villa in the same compound was governed by the written agreement to arbitrate applicable to the two villas and majlis. Upholding the lower court's decision that the owner had failed to satisfy the burden of proof that there was an agreement to arbitrate covering the third villa, the court held that:

it is established by the Court that voluntary arbitration – being an exceptional method to settle disputes that may arise between the parties – may not be presumed as an agreement for arbitration shall only be evidenced

<sup>23</sup> UAE Civil Procedure Code, Article 203(2) in contrast to the UAE Civil Code, Article 132 which provides that a contractual expression of intent may be made orally or in writing. Also, KSA Arbitration Law, Article 9(2), Kuwait Civil Procedure Code, Article 173, Oman Arbitration Law, Article 12 and the Qatar Civil Procedure Code, Article 190. In Bahrain the UNCITRAL Model Law, Article 7(2) (Option 1) has the same or similar effect.

<sup>24</sup> Dubai Cassation Nos. 51/1992 dated 24 May 1992 and 220/2004 dated 17 January 2005.

in writing as stipulated under Article 203(2) of the Civil Procedure Code because such arbitration agreement will prevent the parties from referring disputes to the ordinary courts which secure the litigants' interests. Moreover, an agreement between the parties to refer any dispute that may arise regarding the performance of their obligations shall not have any effect on any other contracts made between them as long as such contracts do not expressly refer to an arbitration clause.<sup>25</sup>

Not only is a written agreement required but an established course of dealing is not sufficient, therefore, to form the basis for an agreement to arbitrate.

It is not necessary, however, that an agreement to arbitrate is contained in a single document:

Arbitration need not be established in one instrument but an arbitration offer may be stated in one document and acceptance of the offer stated in another document provided that it corresponds to the offer.<sup>26</sup>

An offer and the corresponding acceptance are, therefore, sufficient not only to create a valid contract but also to create a valid arbitration agreement even if recorded sequentially rather than simultaneously.

An agreement to arbitrate, like any other agreement, requires offer and acceptance together with certainty as to the effect of the resulting obligations.<sup>27</sup> In a case arising from the termination of a subcontract following the onset of the global financial crisis in 2008, the Dubai Court of Cassation confirmed that an agreement to arbitrate is effective if a written agreement incorporates another document by reference but qualified the rule as follows:

The referral is only valid if it specifies the arbitration clause included in the document referred to. If the referral to the said document is merely a general referral to the provisions of this document without specifying the arbitration clause, the referral is not valid and the arbitration is not considered agreed between the parties.<sup>28</sup>

The Dubai Court of Cassation upheld the lower court's decision that a reference in the letter of acceptance to an intention to prepare a formal contract on the basis of the FIDIC Conditions was insufficiently certain to form a binding agreement to arbitrate. Determining certainty of intention

<sup>25</sup> Dubai Cassation No. 44/2008 dated 22 April 2008.

<sup>26</sup> Dubai Cassation Nos. 220/2004 dated 17 January 2005 and 73/2010 dated 9 May 2010.

<sup>27</sup> Chapter 3 [Contract formation].

<sup>28</sup> Dubai Cassation Nos. 261/2009 dated 16 September 2009 and 73/2010 dated 9 May 2010.

is a matter for the Court of Merits which is granted significant latitude in the assessment of the parties' agreement.<sup>29</sup>

In contrast, the same court in 2005 upheld the Court of Appeal's judgment that incorporation of the FIDIC Conditions, 4th Edition, by reference, was sufficient to create a binding agreement to arbitrate.<sup>30</sup>

Critically, in the context of construction disputes, a significant proportion of which arise from termination or purported termination of a contract, an arbitration agreement is generally treated being independent of the underlying contract and, therefore, as severable:

It is also settled that the annulment of the main contract containing the arbitration clause or its cancellation or termination does not prevent the arbitration clause from remaining valid and productive to its effect as regards the effects of the annulment or rescission or termination of the main contract unless the annulment is extended to the arbitration clause itself...

The expiry of the contract by the execution of the works as per Article 892 does not make the arbitration clause invalid or expired. This clause remains valid and effective as it is independent.<sup>31</sup>

Notwithstanding that in the absence of agreement the consequence of a valid termination is generally that the contract is treated as void,<sup>32</sup> a party remains bound by an agreement to arbitrate. In contrast, an agreement to arbitrate contained in a contract that is void from the outset is ineffective.<sup>33</sup>

In Bahrain, Oman and Saudi Arabia an arbitration clause is expressly acknowledged to be severable and, thus, to survive a termination of the underlying contract.<sup>34</sup>

<sup>29</sup> Dubai Cassation No. 581/2003 dated 12 June 2004 in which the court refused to hear a counterclaim for alleged defects in an action brought pursuant to a settlement agreement on the basis that the settlement agreement did not contain an agreement to arbitrate whereas the underlying construction contract governing the defects claim did contain an agreement to arbitrate.

<sup>30</sup> Dubai Cassation No. 100/2004 dated 9 January 2005. The Court of Appeal may have been influenced by the existence of a formal contract, resulting in greater clarity of the parties' intention to be bound by the FIDIC Conditions.

<sup>31</sup> Dubai Cassation No. 167/2002 dated 2 July 2002 and Abu Dhabi Cassation No. 108/2009 dated 12 March 2009.

<sup>32</sup> Abu Dhabi Cassation No. 657/3 dated 12 February 2009.

<sup>33</sup> Abu Dhabi Cassation No. 58/2007 dated 30 October 2007.

<sup>34</sup> Bahrain Arbitration Law by virtue of the adoption of the UNCITRAL Model Law, Article 16, Oman Arbitration Law, Article 23 and KSA Arbitration Law, Article 21.

## 24.4 Capacity to agree

A further consequence of the exceptional nature of arbitration is that authority to agree to arbitrate is not granted in the same manner as authority to enter agreements in general. A higher threshold of authority is imposed, the main source for which is as follows:

Arbitration shall not be permissible in matters where no conciliation may be reached and agreement on arbitration shall only hold good by a person having the capacity to act in the right that is the subject matter of the dispute.<sup>35</sup>

Both the Oman Arbitration Law and the KSA Arbitration Law have preserved the capacity to act in the right as a requirement for a valid agreement to arbitrate notwithstanding that both laws are derived from the UNCITRAL Model Law which contains no similar requirement. Thus, the following provision has been included in the Oman Arbitration Law:

Agreement to arbitrate shall be permissible only for a natural or juristic person possessing capacity to dispose of his rights and arbitration shall not be permissible for matters on which compromise is not permissible.<sup>36</sup>

The corresponding provision in Bahrain<sup>37</sup> has been repealed by virtue of the Bahrain Arbitration Law which, having adopted the UNCITRAL Model Law wholesale, contains no similar constraint.

With the exception of Bahrain, capacity to act in the right is, accordingly, a critical component of a valid agreement to arbitrate in the Gulf states. The well-established justification for imposing a higher threshold for establishing the capacity to act in the right in the case of arbitration is that as an agreement to arbitrate involves relinquishing the protection afforded by a right to resolve disputes through the courts, the parties must have the explicit capacity to relinquish this right.<sup>38</sup>

Capacity to act in the right for this purpose refers to an individual possessing capacity to relinquish rights, specifically the right to have disputes

<sup>35</sup> UAE Civil Procedure Code, Article 203(4). Also, Kuwait Civil Procedure Code, Article 173 and the Qatar Civil Procedure Code, Article 190. The corresponding provision of the Bahrain Civil Procedure Code, Article 233, has been repealed by virtue of the Bahrain Arbitration Law which contains no similar constraint.

<sup>36</sup> Oman Arbitration Law, Article 11.

<sup>37</sup> Bahrain Civil Procedure Code, Article 233.

<sup>38</sup> Abu Dhabi Cassation No. 873/3 dated 22 October 2009 and Dubai Cassation No. 577/2003 date 12 June 2004.

determined by the domestic courts.<sup>39</sup> This places an agreement to arbitrate in a narrow class of rights that can, in general,<sup>40</sup> only be delegated by the grant of a special power of attorney or, in the case of a company, by a special power of attorney or the memorandum and articles of association or a shareholders' resolution. In contrast to the capacity to execute most contracts,<sup>41</sup> capacity to execute an arbitration agreement may not be inferred from the surrounding circumstances.<sup>42</sup>

The requirement for a special power of attorney, in the context of an agreement to arbitrate, is not explicitly mandated but derives, instead, from a combination of the requirement for a general power of attorney as evidence of representative capacity in domestic court proceedings<sup>43</sup> and the limitations placed on the scope of this representative capacity. Specifically, in the context of civil court proceedings these limitations are described in the following terms:

It shall not be valid without a special power of attorney to acknowledge a claimed right, waive it or conciliate or arbitrate on it, accept administer or reject an oath, relinquish the litigation or waive the judgment in whole or in part or by way of challenging it, lift the attachment or abandon the deposit by leaving the debt outstanding, file a case for forgery, reject a judge or expert, refuse a real offer or do any other act for which the law requires a special power of attorney.<sup>44</sup>

Thus, in the conduct of civil court proceedings settlement, admission, raising a claim of forgery, seeking removal of a judge or expert and, significantly, arbitration require a special power of attorney.<sup>45</sup> This requirement of civil procedure is extended, in practice, to an individual purporting to enter into an agreement to arbitrate, including an individual trading as an establishment.<sup>46</sup> An exception to the requirement for a special power of attorney may be made if during court proceedings an advocate affirms an arbitration agreement pursuant to a general power of attorney.<sup>47</sup>

<sup>39</sup> Abu Dhabi Cassation No. 873/3 dated 22 October 2009 and Dubai Cassation No. 389/2005 dated 21 January 2006.

<sup>40</sup> An exception, for example, being authority conferred at law on the general manager of a limited liability company pursuant to the UAE Commercial Companies Law, Article 83 (formerly UAE Federal Law No. 8/1984, Article 235).

<sup>41</sup> Chapter 3.5 [Contract formation: capacity].

<sup>42</sup> Dubai Cassation No. 220/2004 dated 17 January 2005.

<sup>43</sup> UAE Civil Procedure Code, Article 55(2) and UAE Federal Law No. 23/1991, Article 25.

<sup>44</sup> UAE Civil Procedure Code, Articles 58(2). In Dubai Cassation No. 87/2010 dated 3 January 2011 the court confirmed that a general power of attorney does not satisfy Article 58(2).

<sup>45</sup> Dubai Cassation No. 191/2009 dated 13 September 2009.

<sup>46</sup> Dubai Cassation Nos. 557/2003 dated 12 June 2004 and 51/2005 dated 28 May 2005.

<sup>47</sup> Dubai Cassation No. 273/2006 dated 5 March 2007. Ratification of an arbitration agreement is also possible without the requirement for court proceedings (below).

To qualify as a special power of attorney this must contain an explicit reference to the authority to enter into an agreement to arbitrate.<sup>48</sup> Conversely, it is not sufficient that a power of attorney confers general powers of representation and management of an individual's affairs however widely such powers may be expressed.

Corporate entities are governed by an overlapping regime depending on the particular corporate form adopted, but a corporate entity's right of recourse to the civil courts is treated as being vested in the shareholders and must, accordingly, be relinquished by the shareholders. This may be achieved by a shareholders' resolution or a special power of attorney from the shareholders conferring power on an individual or on an officer of the company.

The capacity of a public or private joint stock company<sup>49</sup> to enter into a binding arbitration agreement other than by a shareholders' resolution or a special power of attorney is constrained by law as follows:

The Board of Directors shall have all the powers specified in the Articles of Association of the company, other than as reserved by this Law or the Articles of Association of the company to the General Assembly. However, the Board of Directors may not ... make compromise or agree on arbitration, unless such acts are authorized under the Articles of Association of the company or are within the object of the company by nature. In cases other than these two ones, such acts require to issue a special resolution by the General Assembly.<sup>50</sup>

A public or private joint stock company has no authority to enter into a binding settlement or arbitration agreement unless granted by the memorandum and articles of association or unless this is a natural element of the company's business.<sup>51</sup> If the shareholders include in the articles of association the power to agree to arbitration this constitutes a disposal of the right for the purpose of the UAE Civil Procedure Code, Article 203(4). Evidence that a signatory other than a member of the board is duly authorised may still be required.<sup>52</sup>

Shareholders in a limited liability company<sup>53</sup> may, like those of a public or private joint stock company, relinquish the right of access to the domestic courts by a shareholders' resolution, a special power of attorney or by the company's memorandum and articles of association. In addition, a general

<sup>48</sup> Dubai Cassation No. 325/1993 dated 25 June 1994.

<sup>49</sup> As defined in UAE Companies Law, Article 9 (formerly UAE Federal Law No. 8/1984, Article 5).

<sup>50</sup> UAE Companies Law, Article 154 (formerly UAE Federal Law No. 8/1984, Article 103).

<sup>51</sup> This phrase may be intended to mirror the effect of UAE Commercial Companies Law, Article 83 (formerly UAE Federal Law No. 8/1984, Article 237).

<sup>52</sup> Abu Dhabi Cassation No. 351/2014 dated 26 June 2014.

<sup>53</sup> As defined in UAE Companies Law, Article 9.



manager named on a limited liability company's commercial licence has certain statutory powers and may, accordingly, enter into a valid agreement to arbitrate on behalf of the company:

The provisions of Article No. 203 of the Code of Civil Procedures and Article No. 235 of the Commercial Companies Law together indicate that agreement on arbitration shall only hold good by a person having the capacity to act in the subject matter of the dispute and that the manager of a limited liability company is the one that shall have full power in managing the company and disposing of the company's rights including agreeing on arbitration regarding the contracts signed between the company and third parties unless the company's memorandum of association deprive the manager of his right in concluding certain dispositions or explicitly prevent the manager from agreeing on arbitration.<sup>54</sup>

Unless a general manager of a limited liability company is deprived of the right to agree to arbitrate, therefore, this power is included among those conferred on a general manager by law.<sup>55</sup>

Absent capacity an arbitration agreement may be ratified.<sup>56</sup> The Dubai Court of Cassation, in a dispute arising out of a partnership agreement containing an arbitration agreement that was signed on behalf of one of the parties pursuant to a general power of attorney, stated that:

It is established in this Court that the principal may authorise the act of its attorney beyond the limits of the authority given to it in the power of attorney. The authorisation following such act is equivalent to the previous power of attorney.<sup>57</sup>

Relying on correspondence from the principal referencing the partnership contract and on a written submission apparently accepting the validity of the arbitration agreement<sup>58</sup> the Court of Cassation upheld the arbitration agreement.

<sup>54</sup> Dubai Cassation No. 164/2008 dated 12 October 2010, cited with approval by the DIFC Court of First Instance in *International Electromechanical Services Co. LLC v (1) Al Fattan Engineering LLC & (2) Al Fattan Properties LLC* [CFI004/2012]. Also, Dubai Cassation Nos. 220/2004 dated 17 January 2005 and 537/1999 dated 1 April 2000. It is unclear whether the same approach is adopted in the other Emirates.

<sup>55</sup> Authority is conferred in almost identical terms on a manager of a limited liability company in Qatar by virtue of Qatar Law No. 5/2002, Article 39.

<sup>56</sup> The effects of exceeding the limits of a power of attorney are addressed in 'Al Waseet', Al Sanhuri, Part VII, Vol. 1, paragraph 305.

<sup>57</sup> Dubai Cassation No. 204/2008 dated 12 October 2008.

<sup>58</sup> The court treated this as a judicial admission in accordance with the UAE Law of Evidence, Article 53, which the appellant could not retract.

As a challenge based on lack of capacity arises from a reluctance of the domestic courts to allow a party to relinquish a fundamental right to refer a dispute to the courts, it follows that such a challenge can properly be made by the holder of that right only, not by an opposing party.<sup>59</sup> This gives rise to the ostensibly contradictory spectacle of a party that has willingly participated in arbitration proceedings, even as the claimant, being able to challenge the validity of any award on the basis that the underlying arbitration agreement was invalid due to its own lack of capacity.<sup>60</sup> This scenario is avoided, if the parties are willing, by a duly authorised representative of each party signing terms of reference at the commencement of arbitration proceedings ratifying the arbitration agreement.

## 24.5 Jurisdiction and powers

Establishing the existence of a valid arbitration agreement and the correct parties are prerequisites to establishing a properly constituted tribunal with effective jurisdiction over a dispute.<sup>61</sup> But there are other constraints on the jurisdiction and powers of a tribunal.

In particular, when considering whether a tribunal is properly constituted or a dispute is properly within the scope of a tribunal's jurisdiction, an arbitration agreement is narrowly construed,<sup>62</sup> a result of treating arbitration as an exceptional method of dispute resolution.

By way of illustration, the Dubai Court of Cassation, in a judgment in 1992, declined to ratify an award that arose from the termination of a hotel lease on the grounds that the arbitration clause applied only to any dispute as to the interpretation or performance of the lease:

The above pleading is correct because arbitration is an exceptional proceeding to settle disputes out of the ordinary course of litigation, which is guaranteed. Arbitration is contingent on the matters desired by the

<sup>59</sup> Abu Dhabi Cassation No. 924/2009 dated 17 December 2009 and Federal Supreme Court No. 265/22 dated 25 May 2002.

<sup>60</sup> If an arbitration agreement is challenged during arbitration proceedings on the grounds of lack of capacity that party may be prevented from ratifying the agreement subsequently: Dubai Cassation No. 191/2009 dated 13 September 2009.

<sup>61</sup> Dubai Cassation No. 139/1998 dated 19 December 1998. In Dubai Cassation No. 40/2004 dated 26 September 2004 a challenge to an award on the basis that the wrong party had been named was rejected on the grounds that an assignment had been made and that this included the arbitration agreement. However, an arbitration agreement does not permit an award to be made against a subsidiary of a party to that agreement: Dubai Cassation No. 277/2002 dated 13 October 2002.

<sup>62</sup> Dubai Cassation Nos. 455/98 dated 30 January 1999, 167/1998 dated 6 June 1998 and 261/2002 dated 2 November 2002 in which it was held that an arbitration agreement was restricted to disputes arising during the construction period and defects liability period.

parties to be dealt with by arbitration. In other words, the arbitrator's authority is limited to the matters agreed upon by the parties and the arbitrator should adhere to the matters specified in the arbitration agreement.<sup>63</sup>

An arbitration agreement is not treated as general consent to the resolution of all disputes by arbitration but will be confined to the scope expressed therein.

Notwithstanding that an agreement to arbitrate shall be narrowly construed and strictly applied, an agreement to refer to arbitration all disputes arising out of or in connection with a contract is recognised as conferring a broad jurisdiction on a tribunal:

If the parties agree to refer all their disputes to arbitration, this agreement involves all disputes between the parties either at the time of contracting or at the end thereof or thereafter. It is settled that the subject matter of the dispute must be specified in the arbitration agreement so that their compliance with their competence can be observed. This specification may also take place during submissions before the arbitral tribunal or during the alteration of an original claim or altering the subject matter thereof due to new circumstances or ones that appear after bringing the case as long as the alteration is relevant to such claim.<sup>64</sup>

Provided a dispute falls within the scope of an agreement to arbitrate and is connected with the original claim a tribunal thus has some latitude to consider new claims.<sup>65</sup>

Likewise, a multi-tiered dispute resolution clause is applicable strictly. Such clauses, which are a common feature of construction contracts, including the FIDIC Conditions, require a party referring a dispute to arbitration to follow a preparatory process, the aims of which include isolating a dispute from any other commercial issues and subjecting this to an attempt at amicable settlement prior to referral to arbitration. Failure to follow a prescribed procedure can prevent a properly constituted tribunal from being formed. It has been held, for example, that a requirement to refer a dispute

<sup>63</sup> Dubai Cassation No. 52/1992 dated 23 May 1992. The case came back before the court as Dubai Cassation No. 214/1998 dated 3 January 1999.

<sup>64</sup> Abu Dhabi Cassation 924/2009 dated 17 December 2009.

<sup>65</sup> Cf. Supreme Court No. 404/18 dated 6 May 1997 in which the court allowed an appeal from a decision ratifying an award on the basis that the award dealt with the levying of delay damages, an issue that was not addressed in the agreement to arbitrate nor in the issues referred to the tribunal by the parties.

to the engineer pursuant to the FIDIC Conditions, 4th Edition,<sup>66</sup> is binding and enforceable.<sup>67</sup>

In 2008 the Dubai Court of Cassation held that as arbitration is a private contractual means of dispute resolution the parties are free to impose pre-conditions on the commencement of proceedings without contravening public order:

It is prescribed, as per the judicature of this Court and the general rules of contracts, that arbitration, as a contract between the parties, allows the parties to insert any clause they deem appropriate and which does not breach public order or morals. They are allowed to insert clauses precedent to referring to arbitration. If such clauses are not fulfilled, the arbitration request will not be accepted as per the rule that the parties shall abide by the contract.<sup>68</sup>

The Court of Cassation allowed an appeal against the lower court's decision refusing to appoint an arbitrator, holding that the contingent conditions had been satisfied as an auditor had attempted to mediate the dispute, albeit without success.

Establishing the existence of a dispute is also a necessary ingredient for a valid arbitration, a recurrent controversy in construction disputes and one on which there are inconsistent judgments. In general, a dispute exists when a claim or entitlement is asserted by one party and rejected by another:<sup>69</sup>

The purpose of arbitration is to settle a dispute between the litigants by commencing its procedures before the arbitration panel. Therefore, there must be a real dispute between the parties. Dispute means the litigation whose purpose is to protect the litigant's right or legal position which the other has contested.<sup>70</sup>

<sup>66</sup> Clause 67.1

<sup>67</sup> Dubai Cassation No. 167/1998 dated 6 June 1998 which arose from the construction of a hotel under the FIDIC Conditions, 4th Edition. The court held that the arbitration agreement was ineffective because the contractor failed to give a notice of dissatisfaction and intention to commence arbitration within the prescribed period following receipt of the engineer's decision. Also, Dubai Cassation No. 140/2007 dated 7 October 2007 upholding the requirement to refer a dispute to the engineer before proceeding to arbitration and placing the burden of proving compliance with such a condition on the referring party and Dubai Cassation No. 204/2008 dated 12 October 2008 in which the court expressed the view that preconditions to arbitration are permitted.

<sup>68</sup> Dubai Cassation No. 124/2008 dated 16 September 2008.

<sup>69</sup> Dubai Cassation No. 167/2002 dated 2 June 2002.

<sup>70</sup> *Ibid.* in which the court held that the existence of the proceedings commenced by the sub-contractor for payment was evidence of the existence of a dispute.

The threshold for establishing the existence of a dispute, on this basis, is low. It has also, however, been held that there was no dispute capable of being referred to arbitration where the parties had agreed that the works were complete and that the retention was due to the claimant<sup>71</sup> and on a separate occasion that there was no dispute capable of being referred to arbitration as the employer did not raise any claim to delay damages or any other claim at a handover meeting.<sup>72</sup>

The authority of a tribunal to determine these issues and other jurisdictional challenges which frequently arise in practice was addressed by the Abu Dhabi Court of Cassation in a judgment in 2009 as follows:

Accordingly, the courts of the state may not consider the jurisdiction of the arbitration tribunal before the latter has determined it. However, the courts of the state later determine the jurisdiction of an arbitral tribunal when they ratify an award handed down by the tribunal and determine a claim for rendering the award void, in accordance with Articles 215 and 216 of the Civil Procedure Code.<sup>73</sup>

It is, thus, for a tribunal rather than the domestic courts to determine whether a dispute falls within its jurisdiction,<sup>74</sup> though a final determination can only be made by the domestic courts.

## 24.6 Procedures and formalities

The extent and scope of the formalities and procedures for conducting arbitration in the Gulf states is paradoxically in the process of both converging and diverging. Thus, although a gap has opened up between those states that have adopted the UNCITRAL Model Law or arbitration laws derived from the UNCITRAL Model Law<sup>75</sup> and those that have not,<sup>76</sup> a reforming trend that will ultimately lead to convergence is clearly discernible.

In a manner that is consistent with this view, reform of the law governing arbitration has been under consideration in the United Arab Emirates for

<sup>71</sup> Dubai Cassation No. 295/1993 dated 30 January 1994.

<sup>72</sup> *Ibid.*

<sup>73</sup> Abu Dhabi Cassation No. 458/2009 dated 26 July 2009.

<sup>74</sup> A tribunal established pursuant to the Dubai International Arbitration Centre Arbitration Rules, Article 6, or the Abu Dhabi Commercial Conciliation & Arbitration Centre Regulations, Article 5, has authority to determine its own jurisdiction in the first instance.

<sup>75</sup> Oman, Bahrain and Saudi Arabia.

<sup>76</sup> Kuwait, Qatar and the United Arab Emirates.

many years.<sup>77</sup> Nevertheless, for the time being the conduct of arbitration in the United Arab Emirates, Kuwait and Qatar continues to be regulated by the same laws that regulate proceedings in the domestic courts.<sup>78</sup> These define the extent of arbitrators' powers and the parties' rights as well as imposing a number of procedural formalities. Any failure to observe these procedural formalities creates an opportunity for a challenge to an award.<sup>79</sup>

Despite the relatively straightforward nature of the legal framework governing arbitration, attacks on awards based on procedural defects are commonplace. Further, as arbitrators, unlike judges,<sup>80</sup> do not enjoy statutory immunity from claims arising from the conduct of arbitration<sup>81</sup> observance of any applicable procedures is a prudent precaution not only to ensure a valid award but also to protect against personal liability. The UNCITRAL Model Law does not make any provision for arbitrator immunity leaving this to be agreed by the parties, though notably in Bahrain an arbitrator's liability is limited to bad faith and manifest error.<sup>82</sup>

Possibly the most significant of the procedural requirements is that an award must be rendered within six months of the preliminary meeting:

If litigants do not stipulate in the agreement on arbitration a period for the award, the arbitrator must render his award within six months from the date of the arbitration hearing, otherwise those litigants who wish may file the dispute with the court or proceed with it if already filed.<sup>83</sup>

The corresponding periods for rendering an award in the other Gulf states in the absence of agreement to the contrary is twelve months in Oman and

<sup>77</sup> In 2008 the UAE Ministry of Economy published a draft Arbitration Law based on the UNCITRAL Model Law. By 2012, when a revised version of a draft Arbitration Law was published, the UNCITRAL Model Law had been supplemented with provisions drawn from other sources. Neither approach has been implemented to date.

<sup>78</sup> Kuwait Civil Procedure Code, Articles 173–188, Qatar Civil Procedure Code, Articles 190–210 and the UAE Civil Procedure Code, Articles 203–218.

<sup>79</sup> For a general discussion of procedural obstacles to the enforcement of an arbitration award see 'Some Road Signs for Arbitration Practitioners in the MENA Region: Conflicts between Local Laws and Institutional Rules in the Region', Shalaknay, Al-Sayed and El-Hakim, *Dispute Resolution International*, Vol. 8. No. 2 179.

<sup>80</sup> UAE Civil Procedure Code, Article 197 which limits claims to fraud, serious error or other express statutory liability.

<sup>81</sup> Dubai Cassation 225/2005 dated 12 December 2005. The claim against the tribunal for AED 75,000 for declining to suspend the arbitration proceedings, was dismissed. However, in Federal Supreme Court No. 219/18 dated 26 October 1997 a claim against the chairman of a tribunal arising from his resignation, was allowed. Immunity is granted by the DIAC Rules, Article 40 and by the ADCCAC Rules, Article 25. Also, DIFC Law No. 1/2008 (Arbitration Law) confers immunity on a tribunal save for damage caused by 'conscious and deliberate wrongdoing'.

<sup>82</sup> Bahrain Arbitration Law, Article 7 and Emiri Decree No. 30/2009, Article 36.

<sup>83</sup> UAE Civil Procedure Code, Article 210(1).

Saudi Arabia,<sup>84</sup> six months in Kuwait and three months in Qatar.<sup>85</sup> There is no mandated time limit for rendering an award in Bahrain.

If an award is not rendered before the expiry of the deadline the parties are no longer bound by the agreement to arbitrate and either party may commence proceedings in the domestic courts.<sup>86</sup>

A tribunal is required to set a date for the first session within thirty days from being constituted<sup>87</sup> and the period for rendering an award commences, accordingly, on the day of that first session. The period commences irrespective of the parties' attendance.<sup>88</sup>

The parties may agree to extend the time for the award before expiry, either explicitly or implicitly and may, likewise, authorise a tribunal to grant an extension.<sup>89</sup> The period may also be extended on an application to the court.<sup>90</sup> Continuing to participate in proceedings without objection after the statutory time period has passed constitutes implicit agreement.<sup>91</sup> Pursuant to the DIAC Rules, Article 36.3, the parties grant a tribunal power to extend the time for an award by six months. Thereafter the DIAC Executive Committee can extend the time further pursuant to a reasoned request. Due to an inconsistency between the Arabic and English versions of the DIAC Rules there are differing views on whether time can be extended more than once.

Pursuant to the ADCCAC Rules, Article 27.2, a tribunal may extend the time for an award by three months. Thereafter the Committee can extend the time further pursuant to a reasoned application from the tribunal or one of the parties.

The time for rendering an award is suspended during any interruption to the proceedings,<sup>92</sup> which includes a stay that shall be granted if:

- a primary matter beyond the tribunal's jurisdiction is submitted to the tribunal

<sup>84</sup> Oman Arbitration Law, Article 45 and KSA Arbitration Law, Article 40, subject to a power conferred on a tribunal to extend this by six months.

<sup>85</sup> Kuwait Civil Code, Article 181 and the Qatar Civil Procedure Code, Article 197.

<sup>86</sup> Dubai Cassation Nos. 141/2006 dated 10 October 2006, 216/2005 dated 26 June 2006 and 537/2003 dated 5 June 2004.

<sup>87</sup> Kuwait Civil Procedure Code, Article 179 and the UAE Civil Procedure Code, Article 208.

<sup>88</sup> Dubai Cassation No. 317/2009 dated 14 February 2009.

<sup>89</sup> Dubai Cassation Nos. 9/1996 dated 13 July 1996 and 537/1999 dated 1 April 2000 and Federal Supreme Court No. 640/22 dated 19 November 2002. In Dubai Cassation No. 573/2003 dated 5 June 2004 the court upheld the lower court's decision to decline to ratify despite an extension granted by the tribunal as, on a proper interpretation of the arbitration agreement, no such power had been conferred on the tribunal.

<sup>90</sup> Dubai Cassation No. 200/1998 dated 13 December 1998.

<sup>91</sup> Dubai Cassation Nos. 178/1996 dated 25 January 1997, 268/2007 dated 19 February 2008, 156/2009 dated 27 October 2009 and Abu Dhabi Cassation No. 873/3 dated 22 October 2009.

<sup>92</sup> Kuwait Civil Procedure Code, Article 181, Qatar Civil Procedure Code, Article 197 and the UAE Civil Procedure Code, Article 210(3).

- a forgery case is filed
- criminal proceedings are filed affecting the issues in the arbitration.<sup>93</sup>

The scope of a primary matter beyond a tribunal's jurisdiction is not defined and limited guidance is available on the circumstances in which a suspension is mandated. That a suspension is not mandated for every challenge to a tribunal's jurisdiction is supported by the following extract from a judgment of the Abu Dhabi Court of Cassation:

A primary matter, whatsoever it is, during arbitration being beyond the arbitrator's jurisdiction as provided by Article 209(2) of the Civil Procedure Code is different from the matter being submitted to the ordinary courts of law as provided by Article 102 of the said code which allows the court to stay a case pending the determination of another issue on which the judgment is dependent.<sup>94</sup>

The court, accordingly, reversed the appealed judgment that had concluded that determining whether a contract is valid is a primary matter beyond a tribunal's jurisdiction.<sup>95</sup>

In 2005 the Dubai Court of Cassation<sup>96</sup> held that pursuant to an analogous provision requiring civil proceedings to be stayed<sup>97</sup> a criminal complaint or investigation, rather than criminal proceedings, is not sufficient to cause a stay to be granted.

The domestic courts also retain some supervisory jurisdiction over arbitration proceedings. Specifically, the domestic courts can appoint arbitrators if the contractual appointment procedure breaks down,<sup>98</sup> order the precautionary preservation of assets as security for an arbitration award,<sup>99</sup> order a third party to produce documents in its possession that are necessary for reaching a decision and penalise a witness who refuses to cooperate with the tribunal.

<sup>93</sup> Kuwait Civil Procedure Code, Article 180, Qatar Civil Procedure Code, Article 199 and the UAE Civil Procedure Code, Article 209.

<sup>94</sup> Abu Dhabi Cassation No. 458/2009 dated 26 July 2009.

<sup>95</sup> Cf. Federal Supreme Court No. 35/16 dated 27 November 1994 and Abu Dhabi Cassation No. 58/2007 dated 30 October 2007. As the latter case involved a tenancy contract the court may have viewed the dispute as one concerning public order that is not arbitrable.

<sup>96</sup> Dubai Cassation No. 79/2005 dated 25 June 2006.

<sup>97</sup> UAE Penal Procedures Code, Article 28.

<sup>98</sup> UAE Civil Procedure Code, Article 204(1), Abu Dhabi Cassation 924/2009 dated 17 December 2009 and Dubai Cassation No. 471/2003 dated 17 April 2004.

<sup>99</sup> Dubai Cassation No. 194/1995 dated 9 March 1996, Federal Supreme Court No. 225/24 dated 26 September 2002 and Dubai Cassation No. 204/2005 dated 2 July 2005.



Subject to some mandatory formalities that can render an award invalid,<sup>100</sup> arbitrators are not otherwise constrained in the conduct of arbitration by any formal rules of procedure or evidence:

In principle, an arbitration award should be reasoned; however, it may not necessarily be bound by the form provided by the Civil Procedure Code as it may sufficiently record the statements and documents of the parties and the reasons on which the award is based provided that public order is not violated. The arbitration tribunal is not bound to apply the provisions of the law of pleading excluding the arbitration part provided by the Civil Procedure Code with respect to the procedures of summoning the parties, hearing their defence, and enabling them to submit their documents. This exclusion is also applicable to the procedures of proof either provided by the Civil Procedure Code or Civil Code or in an independent law.<sup>101</sup>

Although an arbitrator must follow the civil procedure rules applicable to summoning the parties, hearing submissions and submitting evidence to avoid breaching the 'principle of confrontation',<sup>102</sup> a tribunal is largely free to determine the procedures and rules of evidence to be applied. Exceptions may, depending on the jurisdiction, include the keeping minutes of meetings<sup>103</sup> and establishing terms of reference.<sup>104</sup>

A tribunal's powers are limited, however, to those conferred by an agreement to arbitrate, including any procedural rules that are incorporated by reference.<sup>105</sup> Well-established institutional rules, such as the BCDR-AAA Rules, DIAC Rules and the ADCCAC Rules, provide a procedural framework that must be observed where adopted.

A distinction is drawn between a private arbitration and a court conducted arbitration, the latter being subject to a modified supervision and procedural regime. Court conducted arbitration requires a court order recording an

<sup>100</sup> Chapter 24.8 [Arbitration: Enforcement of domestic awards].

<sup>101</sup> Dubai Cassation No. 269/1995 dated 11 February 1996. Also, Dubai Cassation No. 277/2002 dated 13 October 2002 and Abu Dhabi Cassation No. 519/2013 dated 2 July 2013.

<sup>102</sup> Dubai Cassation No. 133/2004 dated 27 March 2005.

<sup>103</sup> The requirement to keep minutes is one of the embellishments to the UNCITRAL Model Law added in Saudi Arabia, per the KSA Arbitration Law, Article 32(3).

<sup>104</sup> Abu Dhabi Cassation 924/2009 dated 17 December 2009 and Dubai Cassation Nos. 32/2009 dated 29 March 2009 and 268/2007 dated 19 February 2008. Cf. Federal Supreme Court No. 121/14 dated 27 December 1992 in which a failure by the tribunal to each sign minutes of meeting and relying on evidence that had not been translated into Arabic were construed as prejudicing the fairness of the proceedings.

<sup>105</sup> In Dubai Cassation No. 282/2012 dated 3 February 2013 the court refused to ratify an award of costs on the basis that this exceeded the power conferred on the tribunal by the DIAC Rules or at law.

agreement to submit to such arbitration via the court. An order appointing a tribunal pursuant to a standalone agreement or an exercise of analogous powers is provided by way of support for a private arbitration and does alter the status of resulting proceedings.<sup>106</sup>

The core requirement in either type of arbitration is that each party is given a full opportunity to make submissions and present any supporting evidence:

The criterion for the nullity of his award by reason of a breach of the procedures of litigation is that he has departed from the basic rules thereof, which guarantee the principle of the right of opposition and equality between the parties, and if he has breached the procedures agreed between the parties in that regard.<sup>107</sup>

A tribunal must safeguard the 'right of opposition and equality', also referred to as the 'principle of confrontation',<sup>108</sup> meaning a right to be heard and to be granted equal treatment before a tribunal. This is mirrored in a requirement that a tribunal must permit the parties to make submissions and to provide supporting documentary evidence.<sup>109</sup>

## 24.7 Challenging an arbitrator

The grounds for challenging an arbitrator in Kuwait, Qatar and the United Arab Emirates are the same as those for recusing a judge and must be made before an award is rendered:<sup>110</sup>

He may only be prevented from passing the award for reasons occurring or appearing after he has been appointed in person. Recusal shall be requested for the same reasons for which a judge is recused or by which he is considered disqualified from adjudicating. A recusal request shall be submitted to the originally competent court to hear the case within five days from notifying a litigant of the appointment of an arbitrator or from the date of the occurrence of the recusal cause or of his knowledge thereof if it follows his notification of the arbitrator's appointment. In any event, no recusal request shall be accepted if a court verdict is passed or the pleading in a case is closed.<sup>111</sup>

<sup>106</sup> Dubai Cassation No. 403/2003 dated 13 March 2004.

<sup>107</sup> Dubai Cassation No. 32/2009 dated 29 March 2009. See also Dubai Cassation No. 157/2009 dated 27 September 2009.

<sup>108</sup> Dubai Cassation No. 133/2004 dated 27 March 2005.

<sup>109</sup> UAE Civil Procedure Code, Article 212(1) and, for example, the KSA Arbitration Law, Article 27.

<sup>110</sup> Kuwait Civil Procedure Code, Article 178, Qatar Civil Procedure Code, Article 194 and the UAE Civil Procedure Code, Article 207(4).

<sup>111</sup> Dubai Cassation No. 220/2005 dated 17 October 2005.

In a judgment in 2001<sup>112</sup> the Dubai Court of Cassation rejected a challenge based on the appointment of the engineer as arbitrator on the basis that this was consistent with the agreement to arbitrate and, accordingly, the court was bound to enforce the agreement. The court considered that selecting the engineer was acceptable to the parties at the time of the agreement and that there is no prohibition on any such agreement.

In Bahrain and Oman the only basis on which an arbitrator may be challenged is that there are circumstances that give rise to serious doubts about his impartiality or independence.<sup>113</sup> A challenge in Saudi Arabia may similarly be made on grounds that give rise to serious doubts about an arbitrator's impartiality or independence but also on the same grounds as those for recusing a judge.<sup>114</sup>

## 24.8 Enforcement of domestic awards

An arbitration award takes effect immediately.<sup>115</sup> However, an award is not recognised for the purpose of implementing enforcement measures until ratified through proceedings in the domestic courts.<sup>116</sup>

### *Kuwait, Qatar and the United Arab Emirates*

In Kuwait, Qatar and the United Arab Emirates,<sup>117</sup> ratification proceedings must be commenced in the Court of First Instance and usually proceed thereafter through the two appellate courts. Subject to the satisfactory completion of the ratification procedure, a domestic arbitral award is enforceable in the same way as a judgment of the domestic courts.

On receipt of a ratification request, the domestic courts may correct any inadvertent typographical or arithmetical errors, either at a party's request or on its own initiative. The courts may also remit an award to a tribunal to clarify any element of the award or to express a decision upon any issue that has been overlooked.<sup>118</sup>

<sup>112</sup> Dubai Cassation No. 130/2001 dated 17 June 2001.

<sup>113</sup> Bahrain Arbitration Law by virtue of the adoption of the UNCITRAL Model Law, Article 12 and the Oman Civil Procedure Code, Article 18(1).

<sup>114</sup> KSA Arbitration Law, Article 16(2).

<sup>115</sup> Kuwait Civil Procedure Code, Article 183, Qatar Civil Procedure Code, Article 202, UAE Civil Procedure Code, Article 212(7) and Dubai Cassation No. 225/2005 dated 12 December 2005.

<sup>116</sup> Kuwait Civil Procedure Code, Article 185, Qatar Civil Procedure Code, Article 204 and the UAE Civil Procedure Code, Articles 213(3), 215(1) and 217(2).

<sup>117</sup> The DIFC has a separate and simpler recognition process.

<sup>118</sup> UAE Civil Procedure Code, Articles 214 and 215 and Federal Supreme Court No. 515/19 dated 27 June 1999 in which a calculation error was corrected by the court. Also, Kuwait Civil Procedure Code, Article 183 and the Qatar Civil Procedure Code, Article 209.

In parallel with the options available to the courts on a ratification request, the courts may, on the application of either party, annul an arbitral award, the prescribed grounds for which are:

- there is no arbitration agreement or the agreement is void or ineffective
- the award exceeds the authority conferred on an arbitrator by the arbitration agreement<sup>119</sup>
- the arbitrators are not appointed in accordance with the applicable legal requirements
- the award is rendered by some of the arbitrators without the others
- the subject matter of the dispute is not indicated in the award
- one of the parties lacks capacity to agree to arbitration
- the arbitrators lack capacity on any of the grounds applied by local law<sup>120</sup>
- the award or procedures are defective in a way that affects the award.<sup>121</sup>

These grounds for annulment are, in principle, exhaustive and, crucially, do not permit any review of the core factual or legal basis for an arbitral award, confining a review to procedural and jurisdictional aspects of an award, a demarcation that is consistently maintained.<sup>122</sup> Although in Qatar there is no explicit prohibition of an appeal or challenge based on grounds that go beyond those specifically identified<sup>123</sup> the courts, in practice, limit a challenge in this way.

The jurisdictional grounds for annulment are broad enough to permit annulment of an award that is based on an agreement signed by a party without capacity, that decides a dispute not covered by the arbitration agreement or that is based on an agreement that contravenes public order.

The procedural grounds for annulment produce a fairly broad range of potential challenges to an award partly because, in a manner consistent with a civil law approach, the grounds are widely construed in order to achieve the underlying purpose. The result is that even a failure to comply with some or all of the procedural formalities imposed by law can put an award at risk, even though procedural formalities are not included in the prescribed grounds for annulment.

<sup>119</sup> In Dubai Cassation No. 282/2012 dated 3 February 2013 the court refused to ratify an award of costs on the basis that this exceeded the power conferred on a tribunal by the DIAC Rules.

<sup>120</sup> UAE Civil Procedure Code, Article 206(1) which provides that an arbitrator must not be a minor, be 'placed under guardianship', be convicted of a criminal offence depriving him of his 'civil rights' or be an undischarged bankrupt. Also, Kuwait Civil Procedure Code, Article 174 and Qatar Civil Procedure Code, Article 193.

<sup>121</sup> Dubai Cassation No. 32/2009 dated 29 March 2009.

<sup>122</sup> UAE Civil Procedure Code, Article 217(1) explicitly excludes arbitration awards from 'any means of recourse' and Dubai Cassation No. 148/2008 dated 16 September 2009. Also, Kuwait Civil Procedure Code, Article 186.

<sup>123</sup> Qatar Civil Procedure Code, Article 207.

By way of illustration, although it is a procedural requirement that an award must include a copy of the applicable arbitration agreement<sup>124</sup> a failure to do so is not identified as a prescribed ground for annulment of an award. Nevertheless, there are numerous judgments annulling awards for a failure to adhere to this ostensibly non-mandatory procedural requirement. In a decision in 1997 the Dubai Court of Cassation allowed an appeal from the lower court's ratification of an award on the grounds that the award did not contain either the arbitration agreement or terms of reference.<sup>125</sup> This requirement has since been applied by the Federal Supreme Court as follows:

The lawmaker mandates that provisions relating to arbitration should be followed such as that the arbitration agreement must be attached to a copy of the award, with an addendum of the statements and documents of the parties, grounds, pronouncement, date and place of issue of the award and signatures of the arbitrators.<sup>126</sup>

It does not necessarily follow that an agreement to arbitrate must be physically appended to an award. Subsequent judgments, including a judgment of the Dubai Court of Cassation in 2002<sup>127</sup> suggest that compliance can be achieved by quoting the arbitration agreement in an award, rather than including a full copy. Nevertheless, failure to evidence an arbitration agreement provides grounds for a challenge:

This Court held pursuant to Article 212/5 of the Civil Procedure Code that the arbitral award should attach a copy of the arbitration agreement. By attaching the said statement to the award, the legislator intends to ensure that the award was rendered within the authority vested in the arbitrator as derived from the arbitration agreement. As such, this statement is essential as to the validity of the award and otherwise the award is invalid. However, the legislator does not intend that the award attaches a verbatim agreement on arbitration but the content therein is enough without deviating from its terms and the purpose of recording it in the award is attained by the said record because it enables the ratifying court to control the award once it has examined the record.<sup>128</sup>

Thus, the rationale for this requirement is that a court, in the exercise of its residual supervisory jurisdiction, must be able to ensure that the scope of an

<sup>124</sup> Qatar Civil Procedure Code, Article 202 and the UAE Civil Procedure Code, Article 212(5). In Kuwait the requirement is limited to providing a summary of the arbitration agreement.

<sup>125</sup> Dubai Cassation No. 173/1996 dated 16 March 1997. The court held that this was a breach of the requirements of UAE Civil Procedure Code, Article 212.

<sup>126</sup> Federal Supreme Court No. 449/21 dated 11 April 2001.

<sup>127</sup> Dubai Cassation Nos. 277/2002 dated 13 October 2002 and 32/2014 dated 31 March 2014.

<sup>128</sup> Dubai Cassation No. 282/2012 dated 3 February 2013.

arbitration agreement has not been exceeded,<sup>129</sup> one of the prescribed grounds for annulment.<sup>130</sup>

Although the requirement for a full copy of the arbitration agreement to be appended to an award has been relaxed the potential for general procedural deficiencies to provide a valid basis on which to annul an award remains. By way of illustration, a tribunal should admit oral testimony only after administering an oath in the prescribed form<sup>131</sup> to ensure that any false testimony constitutes perjury, failing which an award is voidable.<sup>132</sup>

On the other hand, there is no need to sign every page of the award, provided that reference in the relief is made to the reasons on which an award is based.<sup>133</sup> Neither does the absence from the country of a member of the tribunal when an award is issued necessarily place an award in jeopardy. Although each tribunal member should have an opportunity to participate in a decision a signed award is evidence that an award is issued jointly following a meeting to deliberate on the merits of the claim.<sup>134</sup> It is, nevertheless, common practice for a tribunal to sign an award in the country of the seat and to include an appropriate declaration to this effect at the end of an award.<sup>135</sup>

Notwithstanding these additional grounds for a challenge to an award the courts consistently maintain that no review of the merits of an award is permitted:

The trial court may not upon considering a claim for ratifying an arbitral award substantively consider it or whether or not the award is consistent with law.<sup>136</sup>

<sup>129</sup> Dubai Cassation No. 39/2005 dated 16 April 2005 in which the court allowed the appeal and reinstated the arbitration award on the basis that this recited the agreement to arbitrate, Dubai Cassation No. 486/2008 dated 30 October 2008 and Abu Dhabi Cassation No. 519/2013 dated 2 July 2013.

<sup>130</sup> Kuwait Civil Procedure Code, Article 186(a), Qatar Civil Procedure Code, Article 207(1) and the UAE Civil Procedure Code, Article 216(1)(a).

<sup>131</sup> Bahrain Law of Proof, Article 84, Kuwait Law of Proof, Article 44, Qatar Civil Procedure Code, Articles 284 and 286, UAE Civil Procedure Code, Article 211 and the UAE Law of Proof, Article 41(2).

<sup>132</sup> Dubai Cassation No. 503/2003 dated 15 May 2004 in which the court held that it was not sufficient that the tribunal issued witnesses with a warning of 'serious consequences' for failing to tell the truth and, accordingly, set the award aside relying on UAE Civil Procedure Code, Article 216(1)(c).

<sup>133</sup> Dubai Cassation Nos. 537/1999 dated 1 April 2000 and 233/2007 dated 13 January 2008. In Dubai Cassation No. 218/2006 dated 17 October 2006 the court upheld a decision of the lower court to decline ratification by reason of the arbitrator's failure to sign each page on the basis that the signed page did not include the reasoning for the award.

<sup>134</sup> Dubai Cassation No. 403/2003 dated 13 March 2004.

<sup>135</sup> This is consistent with UAE Civil Procedure Code, Article 212(4).

<sup>136</sup> Dubai Cassation No. 486/2008 dated 30 October 2008. Also Dubai Cassation Nos. 537/1999 dated 1 April 2000 and 435/2003 dated 13 March 2004 and Abu Dhabi Cassation No. 519/2013 dated 2 July 2013.

In essence, while the domestic courts resist interfering with an assessment of the substance of an award they are less reticent about allowing challenges based on seemingly innocuous procedural and jurisdictional grounds.

### *Bahrain, Oman and Saudi Arabia*

The competent court for the purpose of commencing recognition proceedings for an award issued under the auspices of the Bahrain Chamber for Dispute Resolution is the High Court of Appeal,<sup>137</sup> leapfrogging the High Court.

The grounds on which recognition of such an award may be refused are that:

- the arbitration agreement is invalid due to lack of capacity
- a respondent is not notified of the proceedings or otherwise is not given an opportunity to present a defence
- the composition of the tribunal or the procedures used are contrary to those agreed by the parties
- an issue is determined that is beyond the scope of the referred dispute
- an award contravenes public order.<sup>138</sup>

A challenge against an order recognising an award may be made to the High Court of Appeal within thirty days and, thereafter, a final challenge may be made to the Supreme Court. Recognition of an award issued in Bahrain other than one emanating from the Bahrain Chamber for Dispute Resolution is governed by the UNCITRAL Model Law.<sup>139</sup>

The recognition regime is similar in Oman. Thus, for an award issued in an international arbitration the competent court is the Court of Appeal in Muscat<sup>140</sup> and the grounds on which recognition may be refused are the same as in Bahrain but with the addition of a failure to apply the agreed law and, expanding those grounds significantly, that the proceedings are 'void in a manner affecting the award'.<sup>141</sup>

Likewise, in Saudi Arabia the competent court to hear an annulment is generally the Court of Appeal in Riyadh<sup>142</sup> and the grounds on which recognition may be refused are broadly the same as those applicable in Oman.<sup>143</sup>

<sup>137</sup> Emiri Decree No. 30/2009, Article 23. In relation to awards other than those issued through the Bahrain Chamber for Dispute Resolution, the Bahrain Arbitration Law, Article 3, designates the Supreme Court as the competent court, though not explicitly for the purpose of an application for recognition.

<sup>138</sup> Emiri Decree No. 30/2009, Article 24.

<sup>139</sup> Bahrain Arbitration Law by virtue of the adoption of the UNCITRAL Model Law, Article 36.

<sup>140</sup> Oman Arbitration Law, Article 9.

<sup>141</sup> Oman Arbitration Law, Article 53.

<sup>142</sup> KSA Arbitration Law, Article 8.

<sup>143</sup> KSA Arbitration Law, Article 50.

## 24.9 Enforcement of foreign awards

A right to enforce a foreign arbitration award in any of the Gulf states derives from provisions of domestic law and, separately, from international treaties.

### *Kuwait, Qatar and the United Arab Emirates*

In Kuwait, Qatar and the United Arab Emirates a foreign award is enforceable on principles of comity or reciprocity. Thus, it is provided in the United Arab Emirates that:

Judgments and orders delivered in foreign countries may be executed in the United Arab Emirates on the same basis as judgments and orders issued in the United Arab Emirates can be executed in that country.<sup>144</sup>

This provision applies notwithstanding that its primary purpose is the recognition and enforcement of foreign judgments rather than arbitral awards:

The provisions of the previous article shall apply to arbitration awards rendered in a foreign country. Such arbitration award shall be rendered in a matter that may be arbitrated according to the State law and enforceable in the country where it was rendered.<sup>145</sup>

No statutory guidance is provided on the proper approach to adapting the provision governing the enforcement of foreign judgments for use in this different context.

Significantly, the procedural requirements that are a notable feature of the enforcement regime for domestic awards are not directly applicable to the enforcement of foreign awards:

The above provisions collectively stipulate, as established in this Court, that domestic courts are only competent to ratify arbitral awards that are rendered inside, but not outside UAE. The same applies to awards that may be or may not be ratified in the state where they were rendered.<sup>146</sup>

<sup>144</sup> UAE Civil Procedure Code, Article 235(1). Also, Kuwait Civil Procedure Code, Article 199 and the Bahrain Civil Code, Article 379.

<sup>145</sup> UAE Civil Procedure Code, Article 236. Also, Bahrain Civil Code, Article 381, Kuwait Civil Procedure Code, Article 200 and the Qatar Civil Procedure Code, Article 381.

<sup>146</sup> Dubai Cassation No. 132/2012 dated 22 February 2012.



Ratification is, instead, reserved for a domestic award as are the conditions that accompany the review of a domestic award as part of the ratification process.

Recognition and enforcement of a foreign award is the subject of a separate regime, albeit that there are some common features of both. The Abu Dhabi Court of Cassation confirmed the position as follows:

If the UAE is not a party to an international convention or treaty made with the foreign state regarding the enforcement of judgments, orders or foreign arbitral awards, then the UAE courts shall confirm that the conditions set out in Article 235 above are met before ordering that these awards be enforced in the State.<sup>147</sup>

The scope and nature of these conditions is not specified. In combination with the expansive nature of the conditions imposed on the recognition and enforcement of foreign judgments this places a major constraint on the circumstances in which a foreign award is enforced.

Broadly, a foreign award is, as a result, subject in Kuwait, Qatar and the United Arab Emirates to the following conditions for enforcement:<sup>148</sup>

- reciprocal recognition and enforcement in the state of the arbitration seat of an award issued in the United Arab Emirates
- absence of original jurisdiction for the domestic courts over the dispute
- a final and enforceable award in the jurisdiction of origin
- parties were properly notified of the proceedings and represented.

Compatibility with public order, although not explicitly identified, is an additional factor. Thus, the procedural formalities that pose a threat to a domestic award are replaced by a set of conditions that are not easily satisfied.

Notwithstanding this, the Dubai Court of Cassation in 1994 partly enforced an arbitration award issued in London.<sup>149</sup> In contrast, the Dubai Court of Cassation declined four years later to enforce an arbitration award, also obtained in London, on the grounds that the necessary conditions, particularly the condition requiring reciprocity, was unproven.<sup>150</sup> Likewise, in 2005 the Dubai Court of Cassation declined to recognise an award rendered in London,

<sup>147</sup> Abu Dhabi Cassation No. 679/2010 dated 16 June 2011.

<sup>148</sup> Dubai Cassation No. 190/98 dated 10 November 1998.

<sup>149</sup> Dubai Cassation No. 267/1993 dated 16 January 1994.

<sup>150</sup> Dubai Cassation No. 190/98 dated 10 November 1998.

though on the different ground that the court lacked jurisdiction to consider a foreign award in the absence of an applicable treaty.<sup>151</sup>

### *Bahrain, Oman and Saudi Arabia*

In Bahrain, Oman and Saudi Arabia recognition and enforcement of a foreign award is governed either directly by the UNCITRAL Model Law or by provisions based thereon.

In Oman and Saudi Arabia a foreign award is, in principle, afforded the same recognition as a domestic award provided that this arises out of an international commercial arbitration.<sup>152</sup>

In Bahrain, by virtue of the wholesale adoption of the UNCITRAL Model Law an award shall be recognised 'irrespective of the country in which it was made'.<sup>153</sup>

## **24.10 New York Convention**

Although a foreign award is, in principle, enforceable notwithstanding the absence of an international treaty the existence of a treaty presents a more realistic prospect of recognition and enforcement. Treaties take precedence over domestic civil procedure rules on the basis that they are considered to be equivalent to specific domestic legislation.<sup>154</sup>

If a convention or an agreement is signed between the UAE and other countries on the execution of foreign judgments, the provisions of that convention or agreement shall supersede and be enforced rather than the provisions of the local law in this regard.<sup>155</sup>

It is well-established that treaty obligations are, in effect, incorporated directly as part of domestic law and take precedence over any overlapping or

<sup>151</sup> Dubai Cassation No. 218/2004 dated 15 May 2005.

<sup>152</sup> Oman Arbitration Law, Article 1 and the KSA Arbitration Law, Article 2. Also, KSA Royal Decree No. M/53 dated 13/8/1433H, Article 11 which imposes conditions similar to those applicable in Kuwait, Oman and the United Arab Emirates.

<sup>153</sup> Bahrain Arbitration Law by virtue of the adoption of the UNCITRAL Model Law, Article 35.

<sup>154</sup> Dubai Cassation No. 30/2007 dated 25 March 2007. Special laws take precedence over general laws: Dubai Cassation Nos. 29/1992 dated 25 October 1992 and 30/2007 dated 25 March 2007.

<sup>155</sup> Federal Supreme Court No. 366/21 dated 20 March 2001 in which the court accepted a judgment rendered in Kuwait. Also Dubai Cassation No. 175/2005 dated 18 December 2005 in which the court accepted a judgment rendered in Lebanon.

inconsistent elements of domestic law. Such domestic procedures are subordinate to any applicable international treaties:

The rules provided for in the previous Articles shall be without prejudice to the provisions of treaties between the State and other countries in this regard.<sup>156</sup>

The role of the courts is limited to verifying whether or not the conditions stipulated in the applicable treaty have been satisfied. As a result, domestic enforcement procedures have become largely redundant in the context of foreign arbitration awards since the Gulf states acceded to the New York Convention.<sup>157</sup>

The New York Convention addresses the demand among businesses for internationally enforceable remedies in disputes arising from commercial transactions. The courts of a New York Convention state are required, subject to certain conditions, to enforce an award made in the courts of another convention state. A party against whom enforcement is sought can object to the enforcement by submitting proof of one of the limited grounds for refusal of enforcement<sup>158</sup> or a court may on its own motion refuse enforcement for reasons of public order.<sup>159</sup>

In 2012 the Dubai Court of Cassation ratified an award issued in London pursuant to the New York Convention citing with approval the following conclusion of the Court of Appeal:

When hearing a claim to recognize and enforce a foreign arbitral award, judicial supervision over such award shall be limited to verifying that it is not in violation of the Federal Decree that stipulated the accession of the UAE to New York Convention by making sure that such award meets the formal and substantive requirements of an award stipulated in Article (4) and (5) pursuant to the concerned Decree.<sup>160</sup>

The courts confirmed that they are concerned not with the satisfaction of conditions imposed by domestic law but with the satisfaction of treaty requirements.

<sup>156</sup> Bahrain Civil Procedure Code, Article 255, Kuwait Civil Procedure Code, Article 203, Oman Civil Procedure Code, Article 383, Qatar Civil Procedure Code, Article 383 and the UAE Civil Procedure Code, Article 238. Pursuant to the UAE Constitution, Article 47(4), international treaties must be ratified by federal decree.

<sup>157</sup> Bahrain (1988), Kuwait (1978), Oman (1999), Qatar (2002), Saudi Arabia (1994) and the United Arab Emirates (2006).

<sup>158</sup> New York Convention, Article V(1).

<sup>159</sup> New York Convention, Article V(2).

<sup>160</sup> Dubai Cassation No. 132/2012 dated 22 February 2012.

In contrast, the Dubai Court of Cassation declined, in a judgment in 2014,<sup>161</sup> to recognise and enforce an award made in London as the arbitration award did not include the arbitration agreement and that there was no other proof of the existence of an arbitration agreement. Likewise, the Dubai Court of Cassation opted in 2013 to uphold the lower court's refusal to recognise an award issued in Paris on the grounds that, in the absence of jurisdiction over either the award debtor or the subject matter, the domestic courts are not competent to render judgment pursuant to the New York Convention.<sup>162</sup> This result is difficult to reconcile with the purpose of the New York Convention, which is to facilitate the recognition and enforcement of arbitral awards made in other convention states, or with the principle that international treaties take precedence over inconsistent domestic laws.

Since these two judgments refusing recognition, the Dubai Court of Cassation has rendered a judgment reiterating that the New York Convention is binding and that the grounds for declining recognition are limited to those enumerated in the New York Convention.<sup>163</sup> Despite some indications to the contrary and notwithstanding the absence of a formal system of binding precedent, the latest judgment of the Dubai Court of Cassation indicates that a settled position is on its way to being established in accordance with the principle of *jurisprudence constante*.

In addition to the New York Convention there are a number of multiparty treaties for the enforcement of arbitral awards to which the Gulf states have acceded, notably the Riyadh Convention<sup>164</sup> and the GCC Convention.<sup>165</sup> Judgments recognising and enforcing an award pursuant to either the Riyadh Convention or the GCC Convention are, however, scarce, in part due to the requirement that a party demonstrates that an award has not only been recognised in the originating jurisdiction but also that the award has become enforceable. The Federal Supreme Court, in 2005, declined to ratify an award issued in Libya due to the absence of evidence that the award had been ratified in Libya and become final.<sup>166</sup> In contrast, several foreign judgments have been upheld pursuant to the Riyadh Convention.

In addition to these multiparty treaties there are a number of bilateral treaties in the Gulf that provide for the mutual recognition and enforcement

<sup>161</sup> Dubai Cassation No. 32/2014 dated 31 March 2014.

<sup>162</sup> Dubai Cassation No. 156/2013 dated 18 August 2013.

<sup>163</sup> Dubai Cassation No. 434/2014 dated 23 November 2014.

<sup>164</sup> Riyadh Convention for Judicial Cooperation among Arab States (1983). Ratified by way of UAE Federal Decree No. 53/1999.

<sup>165</sup> Convention on Enforcement of Judgments, Requests for Legal Assistance and Service of Judicial Documents Among the States of the Gulf Cooperation Council (1996), Article 12. Ratified by way of Federal Law No. 41/1996.

<sup>166</sup> Federal Supreme Court No. 320/2005 dated 12 December 2005.

of arbitral awards. The United Arab Emirates, for example, has in place, such treaties with France<sup>167</sup> and India.<sup>168</sup> In common with multilateral treaties these, in effect, are part of domestic legislation and ought not only to be respected by the courts but to take precedence over any inconsistent principles of domestic legislation applicable to the recognition and enforcement of a foreign award.

<sup>167</sup> Ratified by UAE Federal Law No. 31/1992. The treaty covers arbitration awards in addition to court judgments. In Supreme Court No. 764/24 dated 7 June 2005 the court declined to ratify an award issued in Paris due to the absence of evidence that the award had been ratified in France and had become final.

<sup>168</sup> Ratified by UAE Federal Decree No. 33/2000.



# 25

## Key Features and Differences

As stated at the beginning of this book, no clear separation exists between construction law and the general legislative framework applicable in the Gulf states. The preceding chapters have, therefore, focused on the law as it applies to the issues that typically arise on construction projects in the region.

In many instances the application of the region's laws produces a similar result to that under common law, even if in some cases the route by which the result is reached differs. This is no coincidence, as the origins of both common law and civil law can be traced to Roman times.

However, it is also clear from the preceding chapters that there are significant differences between both the analysis and the result of applying common law and the Gulf's laws to some of the key issues that arise on construction projects. Reflecting one of the stated goals of this work this final chapter aims to isolate and consider these key differences.

### 25.1 Key features of Islamic civil law

In the order in which they have been addressed in the preceding chapters, the notable ways in which construction law pursuant to the Islamic civil law model in the Gulf differs from common law are listed briefly below.

- The Islamic Shari'ah is formally recognised as a source of legislation and of judicial decision-making in the Gulf states. In consequence, the Islamic Shari'ah directly influences legal issues as diverse as prescription periods,

awards of interest and liability for building defects and has a subtler influence on others. The Islamic Shari'ah is applied directly in Saudi Arabia to the extent that no relevant temporal laws exist.

- At the core of each Gulf legal system, with the exception of Saudi Arabia, is a civil code that provides a comprehensive source of provisions governing all aspects of civil obligations. In contrast, legislation in a common law jurisdiction is carefully circumscribed and precisely drafted in order to limit the need and scope for judicial interpretation.
- There is no system of binding precedent or *stare decisis*, leaving the courts with greater judicial discretion than their common law counterparts. However, the doctrine of *jurisprudence constante* is applied, allowing the courts to establish a consistent approach to recurring legal issues and reducing some of the uncertainty that is sometimes attributed to the legal environment of the Gulf.
- A distinction is drawn between nominate and innominate contracts which, in turn, determines the provisions of the applicable civil code relevant to each. A construction contract or rather a contract for the provision of materials and work – a *muqawala* – is categorised as a nominate contract.
- A further distinction is drawn between commercial transactions and civil transactions, the categorisation of which may influence, among other things, the applicable prescription periods and the recovery of interest. A construction contract is a commercial transaction.
- Each civil code includes a variety of mandatory provisions related to public order by which the parties are bound irrespective of any contrary agreement.
- Parties are required to perform their respective obligations in good faith. Examples of the direct application of the duty of good faith by domestic courts to determine the outcome of a dispute are rare in a construction context.
- There is no practice in the Gulf legal systems of supplementing a construction contract, whether by custom or otherwise, with a stock of commonly implied terms established pursuant to a long and distinguished line of domestic court judgments.
- Health, safety and welfare are governed predominantly by employment legislation. In consequence, notwithstanding the influence exerted by the International Labour Organisation among others and the region's increasing prioritisation of health, safety and welfare in the construction sector, the focus remains on occupational aspects of health and safety.
- There are few, if any, standalone health and safety laws acknowledging the roles of all project participants in health and safety in a construction project nor is there a consolidated regulatory regime incorporating an independent



supervisory body whose functions include education, investigation and prevention.

- A fixed monetary amount, known as *diya* or blood money, is payable for taking a life and a sliding scale of fixed compensation or *arsh* is payable for lesser personal injury. *Diya* and *arsh* are generally payable in lieu of compensation for non-pecuniary loss.
- Engineers and other design professionals are, in the absence of agreement, subject to an obligation of result rather than a common law duty of care.
- A contractor and a designer are strictly liable for a period of ten years following handover of a building for any partial or total collapse or any serious defect threatening the stability or safety of a building or structure.
- There is little or no jurisprudence on causation which is, instead, treated as part of a discretionary assessment of damages undertaken by the Court of Merits.
- Notwithstanding any agreement of the parties on the method for calculating damages (notably delay damages), a court may adjust any damages so that these are equal to the amount of the actual loss.
- Failure to honour a cheque is a criminal offence.
- An agreement on interest is unenforceable to the extent that this constitutes *riba* and is contrary to the Islamic Shari'ah. Some forms of interest are expressly permitted, except in Saudi Arabia, by law.
- A party is permitted to suspend performance of a contractual obligation if a counterparty fails to perform a corresponding obligation.
- Cancellation of a construction contract is permitted, in the absence of agreement, only by a court order. The permitted form and timing of both an agreement and a court order are matters of controversy.
- The starting point for dealing with a breach of a contract is that a party is entitled to compel performance.
- For the purpose of assessing damages, especially indirect and consequential damages, consideration is given to the seriousness of any breach or failure to perform.
- There is no explicit recognition of a duty to mitigate loss.
- Documentary evidence is the primary source of proof in a commercial dispute, not first-hand witness testimony. In consequence, there is no tradition of 'discovery', the process in a common law jurisdiction by which each party is required to list and then produce or disclose all relevant documents, whether helpful or harmful, in its possession or control.
- Proceedings conducted in the domestic courts are inquisitorial rather than adversarial in nature. One consequence is that in a construction dispute involving any significant issues of fact reliance is invariably placed on an investigation and report prepared by a court appointed technical expert or experts.

- Each party is entitled to appeal a judgment of the civil courts through all three tiers of the courts as of right, a right that is, in practice, commonly exercised.
- Conduct of legal proceedings requires each party's representative to prove their authority by the production of a notarised power of attorney.
- The domestic courts have a very limited role in promoting mediation, adjudication or other alternative dispute resolution methods.
- Capacity to execute a valid arbitration agreement requires specific authority, most commonly in the form of a special power of attorney.
- A statutory time limit, ranging from three to six months, commonly applies to the conclusion of arbitration proceedings. Failure to comply or validly to extend this statutory period causes jurisdiction to revert to the domestic court of competent jurisdiction.
- An arbitration award is not subject to a review of the merits, including findings of fact and law.
- An arbitration award may be annulled for non-compliance with mandatory procedural requirements, including, for example, a failure to include evidence of the arbitration agreement in an award.

## 25.2 FIDIC Conditions

Contracts used on construction projects in the Gulf do not necessarily fully reflect the above differences.

The FIDIC Conditions, which have become an almost ubiquitous feature of construction projects in the region, were originally drafted and developed for use in common law jurisdictions. Despite undergoing adaptation for use internationally, common law language and principles that betray their common law origin have survived. Indeed, such language continues to be introduced.

By way of illustration, the FIDIC Conditions, Sub-Clause 7.1 [Manner of Execution] introduced an obligation on the Contractor to execute the Works in a 'proper workmanlike and careful manner', phrasing lifted straight from common law precedents and which has no direct equivalent under the laws or judgments of the Gulf.

The common law origin of the FIDIC Conditions is also apparent in subtler ways. By way of illustration, mitigation, causation, liability for delay caused by a nominated subcontractor, liability for defects and the framing of termination are areas where civil law (as applied in the Gulf) and common law diverge significantly but on which the FIDIC Conditions offer no explicit guidance.

Further, the limited attempts by the FIDIC drafting committee to adapt the FIDIC Conditions for international use may, in some instances, have introduced

more conflict than they resolve. Replacing a right to interest with a right to financing charges,<sup>1</sup> for example, is unnecessary in those Gulf states that permit the enforcement of agreements on interest in a commercial contract<sup>2</sup> but introducing an explicit reference to such financing charges being compounded creates a real possibility that this provision contravenes public order and is, thus, invalid.

While it is understandable and even beneficial that readily available, familiar and widely accepted standard form contracts are put into use in the local market there is little indication that the FIDIC Conditions are drafted with any specific regard to the legal framework applicable in the Gulf.

### **25.3 Gulf states contrasted**

In contrast to the differences between common law and Islamic civil law there is considerable similarity not only between the respective civil codes of the Gulf states but also other key legislation.

Saudi Arabia is a notable exception, mainly due to the greater reliance placed on the direct application of the Islamic Shari'ah and the absence of a civil code. But notwithstanding the similarities between the remainder of the GCC states there are some areas in which the applicable laws diverge.

Listed below, in the order in which they have been addressed in the preceding chapters, are the key differences between the laws of the Gulf states.

- Saudi Arabia, unlike the other Gulf states, does not have a formal written constitution. The constitution of Saudi Arabia is declared, pursuant to the Basic Law of Governance, to be the Qur'an and the Sunnah.
- Uniquely, among the Gulf states, the United Arab Emirates is a federal state and, in consequence, the legal framework comprises both federal laws which apply nationally and any laws issued by each Emirate individually, the application of which is confined to the territory of each Emirate.
- As a concession to the widespread use of common law in global trade and commerce a parallel jurisdiction has been created in each of Abu Dhabi, Dubai and Qatar, the laws of which are modelled on those applicable in common law jurisdictions. Independent courts within these jurisdictions facilitate the application of such laws.
- Saudi Arabia, unlike each of the other Gulf states, has no civil code. As a civil code forms the cornerstone of the legal regime governing civil and

<sup>1</sup> Sub-Clause 14.8 [Delayed Payment].

<sup>2</sup> Bahrain, Kuwait, Oman, Qatar and the United Arab Emirates. Interest provisions are unenforceable pursuant to the laws applicable in Saudi Arabia.

commercial obligations in a civil law jurisdiction, the legal regime in Saudi Arabia does not bear a particularly close resemblance to those of the remainder of the Gulf states.

- In Kuwait and Oman a separate branch of the civil courts has jurisdiction over disputes arising from administrative contracts.
- There is a requirement in Bahrain for offer and acceptance to be accompanied by payment or the transfer of some form of consideration failing which a contract is void. A bare promise is sufficient to give rise to a binding contract elsewhere in the Gulf provided that this is the parties' mutual intention.
- In the United Arab Emirates 'words and form' are said to be subordinate to 'intentions and meanings' in interpreting a contract, though clear words must still be given their true meaning. In Bahrain, Kuwait, Oman and Qatar the parties' intentions are relevant only for the resolution of ambiguity or uncertainty.
- In Bahrain, Kuwait and Qatar a subcontractor has a direct right of action against an employer. In Oman and the United Arab Emirates a subcontractor's rights are explicitly confined to a claim against a contractor.
- In contrast with Bahrain, Kuwait, Qatar and the United Arab Emirates there is no explicit duty to perform a contract in a manner consistent with the requirements of good faith in the Oman Civil Code.
- In Bahrain, Kuwait and Qatar price only fluctuations are explicitly excluded from the doctrine of *imprévision* or unforeseen circumstances.
- All Gulf states, with the exception of Oman, have adopted the ILO Labour Inspection Convention and have thereby committed themselves to securing enforcement of the applicable domestic laws relating to conditions of work, including health and safety, and have subjected themselves to the ILO's monitoring and reporting regime.
- Only Bahrain has adopted the ILO Occupational & Safety Health Convention (1981).
- In Bahrain and Kuwait only, it is explicitly provided in the applicable civil code that the consequence of a failure to agree on the quality of materials is that they must be fit for their intended purpose and be free of latent defects.
- The period of strict liability for the collapse of a building or a serious structural defect is ten years throughout the Gulf states except in Bahrain where the applicable period is five years.
- In Bahrain and Qatar only a statutory right of termination exists for a delay in commencing the works or progressing the works such that it is clear that completion will not take place within the contract period.
- The validity of an agreement on the payment of interest differs among the Gulf states, though, in practice, simple interest is generally recoverable except in Saudi Arabia.

- An employer has an explicit statutory right to terminate a construction contract at will in Bahrain, Kuwait and Qatar only.
- In the United Arab Emirates and Oman an innominate contract may not be terminated except by mutual consent, by court order or at law.
- In Bahrain, Kuwait and Qatar an entitlement to recover loss of profit in the assessment of damages is recognised expressly, whereas in the United Arab Emirates and Oman a party is entitled instead to the loss 'in fact suffered at the time of the occurrence thereof'.
- In Bahrain, Kuwait and Qatar damages are limited by statute to that which could normally have been anticipated at the time the contract was made in the absence of any fraud or serious fault. No explicit statutory provision to this effect exists in the United Arab Emirates and Oman.
- The Court system in Saudi Arabia comprises, mainly, the Board of Grievances which has jurisdiction over commercial and administrative disputes and the general Islamic Court which retains a residual jurisdiction over all other disputes. A specialist committee hears and decides banking and insurance disputes. Shari'ah courts in the other Gulf states have jurisdiction over personal status cases, including probate, matrimonial and other family matters.
- There is no designated court, circuit or list dedicated to hearing construction or any other particular types of dispute.
- Bahrain, Oman and Saudi Arabia have, to varying degrees, issued laws governing arbitration based on the UNCITRAL Model Law. In the United Arab Emirates, Kuwait and Qatar arbitration is governed by the applicable Civil Procedure Code.
- In all Gulf states, with the exception of Bahrain, an arbitration agreement requires evidence, usually in the form of a special power of attorney, of capacity to dispose of the right to have disputes determined in the domestic courts.
- An arbitration award must be issued within three months in Qatar; six months in the United Arab Emirates and Kuwait; twelve months in Oman and Saudi Arabia; and is not subject to any express time constraint in Bahrain.
- Proceedings to recognise an arbitration award in Bahrain, Oman and Saudi Arabia are commenced in the court of appeal or equivalent. In Kuwait, Qatar and the United Arab Emirates, proceedings must be commenced in the first instance court.



# Commentary: FIDIC Conditions

Conditions of Contract for Construction for Building and Engineering Works  
Designed by the Employer

## Interpretation and application under the laws of the United Arab Emirates

Clause	Title/Abstract	Commentary
1.1	<b>Definitions</b>	
1.1.2.6	Employer's Personnel 'Employer's Personnel' includes the Engineer and all staff and employees of the Engineer.	As a result of the inclusion of the Engineer's staff and employees in the definition of Employer's Personnel, the Contractor has an express entitlement to an extension of the Time for Completion for any delay, impediment or prevention caused by the Engineer's staff by virtue of Sub-Clause 8.4(e) [Extension of Time for Completion]. Liability for the acts of those under the Employer's control or supervision is consistent with Sub-Clause 3.1(a) [Engineer's Duties and Authority] and the principle of vicarious liability. <sup>1</sup>
1.1.3.9	Year 'year' means 365 days.	A year, therefore, is to be reckoned by reference to the Gregorian calendar which, in any event, is consistent with commercial custom to be applied by virtue of the UAE Code of Commercial Practice, Article 2(2) and also with the UAE Civil Code, Article 9 and the UAE Civil Procedure Code, Article 11(6). There is no definition of a month, despite the likelihood that this is where the difference between the Gregorian and Hijri calendars is of greatest practical significance. References to a month are found at Sub-Clauses 4.21 [Progress Reports], 6.10 [Records of Contractor's Personnel and Equipment], 13.8 [Adjustment for Changes in Cost], 14.3 [Application for Interim Payment Certificates], 14.8 [Delayed Payment] and 20.1 [Contractor's Claims].

<sup>1</sup>UAE Civil Code, Article 313(b).

Clause	Title/Abstract	Commentary
1.1.4.2	Contract Price 'Contract Price' means the price defined in Sub-Clause 14.1 [The Contract Price], and includes adjustments in accordance with the Contract.	<p>The definition redirects the user to Sub-Clause 14.1 [The Contract Price] which, in turn, redirects the Parties to Sub-Clause 12.3 [Evaluation].</p> <p>The Contract Price is, in consequence, established by applying the measurement agreed or determined pursuant to the Contract and the appropriate rate or price. The reference to price serves the important purpose of recording the Contractor's entitlement to have a lump sum element of the Works included in the Contract Price notwithstanding the remeasurement nature of the FIDIC Conditions.</p>
1.1.4.3	Cost 'Cost' means all expenditure reasonably incurred (or to be incurred) including overhead and similar charges, but does not include profit.	<p>This defined term appears throughout the Contract, most notably in the context of the Contractor's entitlement to be compensated for certain events, the risk of which is carried by the Employer or that constitute a breach of the Employer's obligations.<sup>2</sup></p> <p>The references to off Site expenditure and overhead suggest a broad interpretation that would extend to time related cost incurred by virtue of a delay to the Works.</p> <p>The definition of Cost, excludes profit. The Contractor is entitled to Cost 'plus reasonable profit' only in the case of an entitlement to reimbursement pursuant to Sub-Clause 1.9 [Delayed Drawings or Instructions], Sub-Clause 2.1 [Right of Access to the Site], Sub-Clause 4.7 [Setting Out], Sub-Clause 7.4 [Testing], Sub-Clause 10.3 [Interference with Tests on Completion], Sub-Clause 16.3 [Payment on Termination] and Sub-Clause 17.4 [Consequences of Employer's Risks] (in respect of Sub-Clause 17.3 (f) and (g) only).</p>
1.1.5.6	Section 'Section' means part of the Works specified in the Appendix to Tender as a section (if any).	<p>The definition anticipates that a Section will be a physically separable or separately identifiable portion of the Works. Thus, completion of a Section, pursuant to Sub-Clause 8.2 [Time for Completion] requires the passing of Tests on Completion of that portion of the Works. Further, a Taking Over Certificate can be requested in respect of any Section that is complete and ready for taking over, pursuant to Sub-Clause 10.1 [Taking Over of the Works and Sections], resulting in responsibility for the care of that portion reverting to the Employer pursuant to Sub-Clause 17.2 [Contractor's Care of the Works].</p> <p>The designation of a physical part of the Works as a Section is compatible with this regime; the designation of a time or progress related stage or phase of the Works is not. For example, designation of the introduction of wild air as a Section may result, on a literal interpretation of the Conditions, in responsibility for the care of the Works reverting to the Employer, long before the Taking Over Certificate is issued.</p>

<sup>2</sup> A list of the applicable Sub-Clauses is contained in the commentary to Sub-Clause 8.4(b) [Extension of Time for Completion].



Clause	Title/Abstract	Commentary
1.1.6.1	Contractor's Documents 'Contractor's Documents' means documents of a technical nature (if any) supplied by the Contractor under the Contract	<p>This defined term is used frequently throughout the Conditions, including in some significant clauses such as Sub-Clause 11.9 [Performance Certificate] which provides for the Performance Certificate to be issued only after the Contractor has supplied all the Contractor's Documents.</p> <p>Reference to documents of a technical nature distinguishes these from commercial documents such as a tender breakdown or programme. The characteristics of such Contractor's Documents is further qualified by reference to those '(if any) supplied by the Contractor under the Contract', a phrase that contemplates the possibility of there being no Contractor's Documents.</p> <p>It is unlikely that there would ever be no Contractor's Documents if the definition includes shop drawings, method statements and the like, which might otherwise fall within the definition of technical documents, suggesting a narrower class of documents. Further, the phrase suggests an obligation to supply the Contractor's Documents, which is mirrored in the ongoing obligation that the Contractor has pursuant to Sub-Clause 4.1 [Contractor's General Obligations] to provide the Contractor's Documents specified in the Contract and the entitlement to payment for the production of Contractor's Documents pursuant to Sub-Clause 14.3(a) [Application for Interim Payment Certificates]. Ideally, the Contract should, to be clear, call for the supply of those technical documents that are to qualify as Contractor's Documents.</p> <p>Whether Contractor's Documents are limited to those arising from a design obligation should be considered in the context of Sub-Clause 1.10 [Employer's Use of Contractor's Documents] which refers, in relation to copyright and other intellectual property rights, to 'Contractor's Documents and <i>other design documents</i>',<sup>3</sup> Sub-Clause 8.3 [Programme] which sets out a chronological sequence of activities with the production of Contractor's Documents placed between design and procurement and, most significantly, Sub-Clause 4.1(a), which requires the Contractor to submit the Contractor's Documents for any part of the Works designed by the Contractor.</p>
1.1.6.5	Laws 'Laws' includes regulations and bylaws of any legally constituted public authorities	<p>There are a number of legally constituted public authorities in the United Arab Emirates. For example, by Abu Dhabi Law No. 2/1998, Article 3, the Abu Dhabi Electricity &amp; Water Authority is a wholly government owned public organisation. By Dubai Law No. 1/1992, Article 2, Dubai Electricity &amp; Water Authority is constituted as an independent public authority. By UAE Federal Law No. 31/1999, Article 2, the Federal Water &amp; Electricity Authority is constituted as a public department having an independent legal personality. A change of any regulations or bylaws by statutory authorities, including these utility providers, will, therefore, constitute a change in legislation for the purpose of Sub-Clause 13.7, though obtaining evidence of such change can be problematic.</p>

<sup>3</sup> The same wording is used at Sub-Clause 15.2 [Termination by Employer].

Clause	Title/Abstract	Commentary
1.1.6.8	Unforeseeable 'Unforeseeable' means not reasonably foreseeable by an experienced contractor	<p>This defined term is used not only in the context of Unforeseeable physical conditions at Sub-Clause 4.12 [Unforeseeable Physical Conditions] but also in other important provisions, such as Sub-Clause 4.6 [Cooperation], 8.4(d) [Extension of Time for Completion], 8.5 [Delays Caused by Authorities] and 17.3 [Employer's Risks].</p> <p>Although the definition ensures that the test of foreseeability is an objective one, judged against the yardstick of an experienced contractor, the addition of a reasonableness qualification does not fully clarify the degree of foreseeability that is expected of an experienced contractor for an event or circumstance to be designated as foreseeable. As foreseeability encompasses a wide spectrum of contingencies, from something anticipated but not certain to something conceivable but improbable (the balance of probability falling somewhere in the middle), an experienced contractor could place an event anywhere in this wide spectrum and still be within the meaning of foreseeability. As the intention is presumably to establish a shared understanding between the Contractor and the Employer as to which of them is bearing the risk of a contingent event, the definition might more helpfully have included reference to a reasonable contractor foreseeing an event with sufficient certainty that it would be prudent for the Contractor to make allowance in the Contract Price for such contingency.</p> <p>The rules of interpretation applicable by virtue of local law require this ambiguity to be resolved based on the common intention of the parties derived from industry practice and balancing the parties' respective interests, a formula that could support a number of different outcomes. However, basing the definition on a prudent approach to pricing is consistent with the requirement imposed on the Contractor at Sub-Clauses 4.10 [Site Data] and 4.11 [Sufficiency of the Accepted Contract Amount] to have obtained and based the Accepted Contract Amount on all necessary information as to risks, contingencies and other circumstances which may affect the Works.</p>
1.1.6.9	Variation 'Variation' means any change to the Works which is instructed under Clause 13	<p>A Variation must be a change to the Works and be instructed or approved pursuant to Clause 13 [Variations and Adjustments] for this definition to be satisfied. Approval is a reference to the value engineering mechanism at Sub-Clause 13.2 [Value Engineering]. An instruction fulfils this definition and constitutes a Variation if it involves a change to the Works regardless of any label or categorisation ascribed to the instruction by the Engineer at the relevant time.</p>
1.2	<b>Interpretation</b> 'Written' or 'in writing' mean hand-written, type- written, printed or electronically made and resulting in a permanent record.	<p>Because a permanent record, whether handwritten, type written, printed or made electronically is treated as being 'written' or 'in writing' an extensive list of exchanges on a typical project satisfies the requirement for these to be in writing. Thus, in addition to letters and emails (irrespective of whether email is an agreed system of transmission in accordance with Sub-Clause 1.3(a) [Communications]) that qualify as being in writing, RFIs, submittals, programmes, progress reports as per Sub-Clause 4.21 [Progress Reports], annotations on documents and the like satisfy a requirement for these to be in writing.</p>

Clause	Title/Abstract	Commentary
1.3	<p><b>Communications</b> Communications shall be in writing.</p> <p>General requirement for communications, including the requirement that approvals, certificates, consents and determinations not be unreasonably withheld or delayed.</p>	<p>The overarching requirement for approvals, certificates, consents, determinations, requests and, most importantly, notices to be given in writing eliminates the need for repetition of this requirement throughout the FIDIC Conditions and the potential for inconsistency between the various provisions requiring notice.</p> <p>However, this centralised approach gives rise to a potential controversy in relation to the consequence of a failure to communicate in the manner required because the consequence of a failure to communicate in the manner required is not specified. In particular, there is no indication that the existence of a communication delivered in breach of the requirements of this Clause, is ineffective. In the absence of an agreed remedy, a breach of contract results in an entitlement to damages.<sup>4</sup> A right, on the other hand, can be established by any means of proof.<sup>5</sup></p> <p>An expressly agreed departure from this default position is found in Sub-Clause 20.1 [Contractor's Claims]. Whereas Sub-Clause 20.1 contains a strict barring provision in respect of any claim for which notice is not given within 28 days, there is, however, no explicit bar to a claim if the Contractor commits a breach of Sub-Clause 1.3 by delivering notice verbally, to the wrong address or not copying a notice to the correct party. The Contractor may advance a case that provided actual notice is given, whether verbally or in writing, it is the final paragraph of Sub-Clause 20.1 that operates in respect of this breach, resulting in an adjustment of the Contractor's entitlement based on the prejudice suffered by the Employer as a consequence of such breach rather than the strict barring provision contained in the second paragraph of Sub-Clause 20.1. The Employer can be expected to respond with a submission that the requirement for a notice is for a notice that conforms with the requirements of Sub-Clause 1.3.</p> <p>If Sub-Clause 20.1 imports the requirement of Sub-Clause 1.3 for notice to be given in writing, a Contractor (and Employer, pursuant to Sub-Clause 2.5 [Employer's Claims]) should similarly be bound by and strictly observe the requirements for delivery and for duplicates to avoid, by extension, the application of harsh consequences for any failure to do so as there is no obvious reason to sever the requirement for notice to be in writing from the other requirements imposed by Sub-Clause 1.3.</p> <p>As the Contractor's rights are, in many cases, crystallised by means of approvals, certificates, consents and determinations to be issued by the Engineer, any delay by the Engineer in performing this duty has various implications, as recognised by the inclusion of an explicit obligation at Sub-Clause 1.3 for these not to be unreasonably withheld or delayed. As the Engineer is deemed, pursuant to Sub-Clause 3.1(a) [Engineer's Duties and Authority], to act for the Employer any delay or withholding constitutes a breach by the Employer of the Contract.</p>

<sup>4</sup> Chapter 19 [Damages].

<sup>5</sup> Chapter 20 [Evidence].

Clause	Title/Abstract	Commentary
1.4	<p><b>Law and Language</b></p> <p>The Contract shall be governed by the law of the country (or other jurisdiction) stated in the Appendix to Tender.</p>	<p>If the Parties fail to include a designation of the applicable law in the Appendix to Tender the Contract is governed, as a general rule, by the law of the place in which the Parties are resident or, if they are resident in different places, by the law of the place where the Contract is made.<sup>6</sup></p> <p>Even within the United Arab Emirates there are a variety of possibilities for the governing law that can either be chosen or that can apply by default. A choice of the law applicable in a specific emirate includes Federal law as this applies in all seven emirates. Choosing the law of the United Arab Emirates without reference to a specific emirate is likely to result in the application of the laws of the emirate in which the project is located in addition to Federal law.</p> <p>Within Dubai and Abu Dhabi, the applicable law may also be that of a financial free zone within which Federal law does not apply<sup>7</sup> either by choice or by virtue of other factors such as the location of the project.</p> <p>Selection of the applicable law does not necessarily extend to the entirety of the Contract. Specifically, the law applicable to an agreement to arbitrate and the arbitration proceedings themselves is generally the law of the seat or place of arbitration unless the Parties otherwise agree.<sup>8</sup> Therefore, if the Parties intend to apply the law selected pursuant to Sub-Clause 1.4 to the arbitration agreement and to the arbitration proceedings but the seat or place of the arbitration differs from that of the chosen law, it is prudent to make this clear by explicit agreement.</p>
1.5	<p><b>Priority of Documents</b></p> <p>If an ambiguity or discrepancy is found the Engineer shall issue any necessary clarification or instruction.</p>	<p>The Engineer has an obligation to resolve an ambiguity or discrepancy in the documents forming the Contract. As the Engineer has no authority either at law or pursuant to the Contract (which explicitly excludes any such power at Sub-Clause 3.1 [Engineer's Duties and Authority]) to amend the Contract, an instruction resolving an ambiguity or discrepancy constitutes a Variation if it results in a change to the Works, an issue to be determined initially by the Engineer and finally, if there is a dispute, pursuant to Clause 20 [Claims, Disputes and Arbitration].</p>
1.7	<p><b>Assignment</b></p> <p>Neither party may assign the whole or any part of the Contract or any benefit under the Contract without consent except as security in favour of a bank or financial institution.</p>	<p>The prohibition on assignment reverses the position at law.<sup>9</sup> In general, assignment of the benefit of crystallised debts is permitted, including an assignment of a claim by the Contractor to a Subcontractor of a debt due from the Employer. Indeed, such an assignment is specifically contemplated by the UAE Civil Code, Article 891.</p>

<sup>6</sup> UAE Civil Code, Article 19(1).

<sup>7</sup> Chapter 1.6 [Overview: Financial free zones].

<sup>8</sup> For further commentary on this issue refer to Sub-Clause 20.6 [Arbitration].

<sup>9</sup> Assignment is discussed at Chapter 5.4 [Contractual principles: Subcontractors].

Clause	Title/Abstract	Commentary
1.9	<p><b>Delayed Drawings or Instructions</b></p> <p>The Contractor shall give notice whenever the Works are likely to be delayed or disrupted if any necessary drawing or instruction is not issued within a specified reasonable time.</p>	<p>The Contractor is required to give a notice in anticipation of delay or disruption that is likely to be suffered if any necessary drawing or instruction is not issued within a particular time and, thereafter, to give a 'further' notice pursuant to Sub-Clause 20.1 [Contractor's Claims] if the information is not forthcoming within the specified time and causes delay for which the Contractor seeks an extension of the Time for Completion. The risks of any failure by the Engineer to issue design information and any consequences, such as delay or additional Cost, are thus transferred to the Contractor if such early warning is not given. The main beneficiary of this risk transfer is the Engineer.</p> <p>As the Conditions are intended for 'building and engineering works designed by the Employer' the transfer of a significant portion of the risk of delays and disruption caused by late information issued by the Engineer, who is deemed pursuant to Sub-Clause 3.1(a) [Engineer's Duties and Authority] to act for the Employer, to the Contractor is not easily reconciled with the Parties' respective roles. FIDIC, a body representing the global consulting engineering industry, explains the reasoning behind such a provision by reference to the possibility of there being a requirement for information that the Engineer has not anticipated or has been prevented from issuing.<sup>10</sup> The Contractor's obligation and the consequences of a failure to give the required notices, however, are not limited to circumstances in which the Engineer is blameless.</p> <p>An early warning is not required in respect of all drawings or instructions but only those that are 'likely to have the effect of delaying or disrupting the works' if not provided within the specified reasonable time. There is no express exemption in respect of circumstances that are Unforeseeable, though a subjective test of likelihood may apply in practice. An RFI should be sufficient to comply with the formalities (i.e. notice in writing) provided supporting details are given together with a specified reasonable period within which the information is required. Fulfilling the requirement for the period of advance notice to be reasonable will depend on the particular circumstances.</p>
1.10	<p><b>Employer's Use of Contractor's Documents</b></p> <p>The Contractor shall be deemed to give the Employer a non-terminable transferable non-exclusive royalty free licence in the Contractor's Documents.</p>	<p>There is an assumption underlying the drafting of this Sub-Clause that copyright in design prepared by the Contractor is vested in the Contractor.</p> <p>Copyright is governed by the provisions of UAE Federal Law No. 7/2002, which designates architectural and engineering drawings and plans, illustrations, sketches and three-dimensional works relating to architectural designs as copyright works.</p> <p>As a general rule, copyright vests automatically in the author of a work and remains with the author unless and until copyright is assigned in accordance with the provisions of the applicable law. There is no provision automatically granting an employer copyright in works created by an employee during the course of employment. The assumption that the Contractor is the copyright owner and is entitled to grant a copyright licence in the Contractor's Documents may not, therefore, always be correct.</p>

<sup>10</sup> FIDIC (2000) *FIDIC Contracts Guide*, 1st Edition, Geneva: FIDIC, p. 66.

Clause	Title/Abstract	Commentary
		<p>As an exception to the general rule a juridical person may exercise the rights of the author where a collective work has been created by multiple authors under the juridical person's direction. Also, the Contractor can arrange for copyright to be assigned from the author so that the Contractor is able to grant a licence to the Employer. For an assignment of copyright to be valid, it must comply with a prescriptive set of statutory requirements and is subject to limits, for example, on the assignment of future copyright works.</p> <p>By virtue of Sub-Clause 17.5 [Intellectual and Industrial Property Rights] the Contractor indemnifies the Employer against any claim arising out of or in relation to any design for which the Contractor is responsible.</p>
1.11	<p><b>Contractor's Use of Employer's Documents</b></p> <p>The Employer shall retain copyright in the Specification and Drawings made by or on behalf of the Employer. The Contractor may use these documents for the purposes of the Contract.</p>	<p>To the extent that the Specification, Drawings and other design materials are prepared by a consultant copyright in these may, for the reasons described in the commentary above, remain with that consultant or with the individual author or authors.</p> <p>Although, in contrast to the preceding Sub-Clause, the Employer does not grant the Contractor a licence in any copyright work, the Contractor has the benefit of an indemnity by virtue of Sub-Clause 17.5 [Intellectual and Industrial Property Rights] for any claims arising from copyright infringement which is an unavoidable result of complying with the Contract.</p>
1.14	<p><b>Joint and Several Liability</b></p> <p>Each party in a joint venture or consortium shall be jointly and severally liable to the Employer for the performance of the Contract.</p>	<p>The contractual rights and liabilities of multiple obligors are not joint in the absence of agreement or a statutory provision to the contrary.<sup>11</sup> In consequence, a consortium or joint venture member's rights and liabilities ought, in principle, to be limited to a share unless there is an agreement to the contrary.<sup>12</sup> In other words, a consortium member is a co-obligor, not a joint obligor.</p> <p>Sub-Clause 1.14 constitutes an agreement altering this statutory arrangement but as to liabilities only. One possible effect of this is that each member of a consortium is liable to the full extent of any rights accruing to the Employer but has only a share of the corresponding rights in return. In this scenario, if any consortium member pursues its claims independently of the other it is limited to a share of the rights but may be presented with the entirety of the liabilities. However, if the share of each consortium member is not defined and cannot be ascertained it is treated as indivisible and either consortium member may claim the rights in full.<sup>13</sup></p>

<sup>11</sup> UAE Civil Code, Article 439 (rights) and 450 (obligations). Cf. UAE Code of Commercial Practice, Article 72, which applies to liability for a commercial debt.

<sup>12</sup> UAE Civil Code, Article 442.

<sup>13</sup> UAE Civil Code, Article 466(1).

Clause	Title/Abstract	Commentary
2.1	<p><b>Right of access to the Site</b></p> <p>The Employer shall give the Contractor right of access to, and possession of, all parts of the Site within the time or times stated in the Appendix to Tender. If no such time is stated the Employer shall provide such access as may be required to enable the Contractor to proceed in accordance with the programme.</p>	<p>As an obligation cannot be imposed on a non-party, this Sub-Clause only binds a consortium member that executes the Contract. A limited exception applied prior to the UAE Commercial Companies Law coming into effect in July 2015 in the case of a sharikat al muhasa, a business form created pursuant to the now supeceded Commercial Companies Law, Article 56.</p> <p>It is important to note that this Sub-Clause does not address the liability of joint tortfeasors or liability for the breach of independent contractual obligations that cause or contribute to the same loss or damage. Unlike in common law jurisdictions liability in such circumstances is not joint and several in the absence of agreement or a statutory provision to the contrary.<sup>14</sup> This has a practical impact on issues such as liability for design, for which liability may have to be apportioned between the Engineer and the Contractor, leaving the Employer with separate claims against each for their respective shares. An example of a statutory exception to this apportionment approach is the liability for serious structural defects imposed by the UAE Civil Code, Article 880.</p> <p>The Employer is required to provide the Contractor with access to, and possession of, the Site at such times and in such a manner as shall allow the Contractor to proceed with the Works in accordance with the programme. This means that the obligation continues throughout the duration of the Works, except as set out in the Appendix to Tender.</p> <p>Although the right of possession is not stated to expire once the Taking Over Certificate has been issued it is most likely intended that possession and responsibility for the care of the Works are co-terminus. This is consistent with the granting of a separate right of access, unaccompanied by a right of possession, to the Contractor by Sub-Clause 11.7 [Right of Access] for the purpose of executing any work that is outstanding after the Taking Over Certificate is issued.</p> <p>The Contractor has an explicit entitlement to additional time and Cost plus reasonable profit if the Employer fails to provide access to and possession of the Site at such times as is required to enable the Contractor to proceed with the Works in accordance with the programme. The obligation is qualified by any contrary arrangement expressed in the Appendix to Tender or elsewhere in the Contract.</p> <p>Further, the Contractor is entitled to an extension of the Time for Completion by reason of any delay, impediment or prevention caused by or attributable to the Employer, pursuant to Sub-Clause 8.4(e) [Extension of Time for Completion]. Delays caused by denial of access or possession of the Site, including delays caused by the presence of other contractors are likely, unless otherwise agreed, to constitute a delay, impediment or prevention attributable to the Employer.</p>

<sup>14</sup> Chapter 7.7 [Design and supervision: Joint liability].

Clause	Title/Abstract	Commentary
	<p>Access to and possession of the site may not be exclusive to the Contractor.</p>	<p>As the entitlement to access is not exclusive and is tied to the programme, the Employer is entitled to rely on the programme to arrange for the Site to be used by others in a manner that should not interfere with the Contractor with or without any provision for such access being made in the Appendix to Tender. This is confirmed at Sub-Clause 8.3 [Programme], which expressly entitles the Employer's Personnel to rely on the programme when planning their activities. However, there would appear to be nothing to prevent the Contractor from updating the programme as necessary and thereby requiring the Employer to fit around the actual progress of the Works. Indeed, as the programme must be updated whenever this ceases to reflect actual progress or the Contractor's obligations, which include the obligation to complete the Works by the Time for Completion, the programme is not intended to be static.</p>
		<p>The Engineer can override the programme by issuing an instruction pursuant to Sub-Clause 4.6 [Cooperation] requiring the Contractor to afford the Employer's Personnel or other contractors an opportunity to carry out work on or near the Site. This constitutes a Variation if the instruction gives rise to Unforeseeable Cost.</p>
		<p>The Engineer can also instruct the Contractor to change the timing or sequence of the execution of the Works pursuant to Sub-Clause 13.1 [Right to Vary] for the purpose, among other things, of permitting access for the Employer's Personnel to the Site.</p>
	<p>The Employer may withhold any such right or possession until the Performance Security has been received.</p>	<p>As the Performance Security is due, pursuant to Sub-Clause 4.2 [Performance Security], within 28 days after receiving the Letter of Acceptance whereas the Commencement Date can occur any time up to 42 days after the Letter of Acceptance, subject to receipt by the Contractor of 7 days' notice from the Engineer, the Contractor may suffer delay if the Employer exercises the right to withhold access or possession until the Performance Security has been received. If the Engineer issues a notice triggering the Commencement Date within less than 21 days after the Letter of Acceptance while withholding access until the Performance Security is provided and the Contractor provides the Performance Security on the 28th day following the Letter of Acceptance both Parties will have conducted themselves in accordance with the express terms of the Contract but the Contractor will have been delayed if the Contractor was ready to commence on the Site before the 28th day. The closing wording of Sub-Clause 2.1 which provides that the Contractor shall not be entitled to any extension of time, Cost or Profit in the event that a denial of access or possession was caused by any 'error or delay' by the Contractor, does not, it is submitted, assist in resolving this apparent conflict.</p>



Clause	Title/Abstract	Commentary
2.5	<p><b>Employer's Claims</b></p> <p>The Employer's entitlement to set off or make deductions from the amount certified or to otherwise claim against the Contractor is limited to claims notified in accordance with Sub-Clause 2.5.</p>	<p>The Employer's entitlement to make deductions from an amount certified for payment is restricted to amounts in respect of which notice has been given and a favourable determination made by the Engineer in accordance with Sub-Clause 2.5. This modifies the rights of set off that the Employer would otherwise enjoy under local law.<sup>15</sup></p> <p>No exception is made for delay damages and, therefore, the Employer must give notice of a claim in order to have an entitlement to make any deduction for delay damages from any amount included in an Interim Payment Certificate.</p> <p>Other provisions requiring the Employer to give notice of a claim are Sub-Clause 4.19 [Electricity, Water and Gas], Sub-Clause 4.20 [Employer's Equipment and Free-Issue Material], Sub-Clause 7.5 [Rejection], Sub-Clause 7.6 [Remedial Work], Sub-Clause 8.6 [Rate of Progress], Sub-Clause 9.4 [Failure to Pass Tests on Completion], Sub-Clause 11.3 [Extension of Defects Notification Period], Sub-Clause 11.4 [Failure to Remedy Defects], Sub-Clause 15.4 [Payment after Termination], Sub-Clause 18.1 [General Requirements for Insurances], and Sub-Clause 18.2 [Insurance for Works and Contractor's Equipment].</p> <p>Significantly, Sub-Clause 16.2(c) [Termination by Contractor] confers on the Contractor an entitlement to issue a notice of termination if an amount due under an Interim Payment Certificate is not paid within the prescribed time, except for amounts that have been deducted in accordance with Sub-Clause 2.5. Thus, in making any deduction other than in respect of amounts notified and determined by the Engineer the Employer is exposed to the risk of a notice of termination from the Contractor.</p> <p>Establishment by the Employer of an entitlement to a payment from the Contractor determined under Sub-Clause 2.5 is also one of only four grounds permitting a claim under the Performance Security, pursuant to Sub-Clause 4.2 [Performance Security].</p> <p>Ordinarily, the Employer is entitled, in addition to or instead of exercising a set off to advance the same entitlement as a counterclaim. The Employer is not permitted, however, by virtue of Sub-Clause 2.5, to 'otherwise claim against the Contractor' in respect of any matter otherwise than in accordance with Sub-Clause 2.5. This potentially extends the prohibition on any set off against an Interim Payment Certificate to a counterclaim unless this has first been determined by the Engineer pursuant to Sub-Clause 3.5. The imposition of preconditions on the referral of claims to arbitration, including a requirement for a prior decision of the Engineer, has been upheld in a number of decisions of the highest courts of the United Arab Emirates.<sup>16</sup></p>

<sup>15</sup> Chapter 18.5 [Self-help remedies: Set off].

<sup>16</sup> Chapter 24.5 [Arbitration: Jurisdiction and powers].

Clause	Title/Abstract	Commentary
3.1	<p><b>Engineer's Duties and Authority</b></p> <p>The Engineer shall have no authority to amend the Contract.</p>	<p>Although the Engineer may exercise the authority as specified in, or necessarily to be implied from, the Contract this authority does not extend to an amendment of the Contract itself and the extent to which the Engineer acts as the Employer's agent is limited accordingly. Any amendment to the Contract requires the agreement of the Employer and the Contractor. As the Engineer's authority derives from the Contract the source for any instruction issued by the Engineer must always be traceable to an authority specified in, or necessarily to be implied from, the Contract.</p> <p>In consequence, an effective instruction of the Engineer<sup>17</sup> that results in a change of the Works constitutes a Variation notwithstanding that the Engineer characterises the instruction as requiring performance of the Contractor's existing obligations and the Contractor is required in such circumstances to follow the procedure for claims arising from a Variation. This is recognised and confirmed explicitly in the context of Engineer's instructions at Sub-Clause 3.3 [Instructions of the Engineer].</p> <p>The Engineer is deemed to act for the Employer. As a result, the Employer is liable for acts and defaults of the Engineer provided that the Engineer is acting within the scope of the Engineer's actual or implied authority. The relevant provisions of the UAE Civil Code dealing with agency which govern the nature and extent of the Engineer's liability, if any, to the Contractor arising from the administration of the Contract and the Employer's liability for the Engineer's conduct are Articles 924–961 and by virtue of Article 953, the provisions applicable to contracting by proxy at Articles 149–156.</p> <p>It has been held, irrespective of the express confirmation in Sub-Clause 3.1, by the domestic courts that the Engineer acts for the Employer with the result that the Employer is bound by decisions and certificates issued by the Engineer in the absence of evidence of fraud or collusion.<sup>18</sup></p>
3.3	<p><b>Instructions of the Engineer</b></p> <p>The Engineer may issue to the Contractor (at any time) instructions and additional or modified Drawings which may be necessary for the execution of the Works and the remedying of any defects, all in accordance with the Contract. The Contractor is required to comply with the instructions given by the Engineer on any matter related to the Contract.</p>	<p>Although wide, the Engineer's authority is not entirely unfettered. The peculiarity of the drafting of Sub-Clause 3.3 is that while the Contractor is required to comply with the Engineer's instructions 'on any matter related to the Contract' the Engineer is only entitled to issue instructions 'which may be necessary for the execution of the Works and the remedying of any defects', phrases that must be read together.</p> <p>Further, the Engineer has no authority beyond that conferred by Sub-Clause 3.1 [Engineer's Duties and Authority] which provides that the Engineer 'may exercise the authority attributable to the Engineer as specified or necessarily to be implied from the Contract' but which also makes clear that the Engineer shall have no authority to amend the Contract.</p> <p>The Contractor is likely to conclude that the Engineer's authority is limited to those powers expressly conferred such as the power to order the Contractor to remove personnel from the Site pursuant to Sub-Clause 6.9 [Contractor's Personnel] or to suspend progress of part or all of the Works pursuant to Sub-Clause 8.8 [Suspension of Work] and a limited number additional powers that are necessarily implied. The Contractor is not required to comply with instructions that the Engineer has no authority to issue.</p>

<sup>17</sup> Sub-Clause 3.3 [Instructions of the Engineer].

<sup>18</sup> Chapter 14.2 [Payment: payment certificates].

Clause	Title/Abstract	Commentary
3.5	<p><b>Determinations</b></p> <p>The Engineer shall make a fair determination in accordance with the Contract taking due regard of all relevant circumstances.</p>	<p>Taking this approach, the Engineer would have no authority, for example, to require the Contractor to accelerate the progress of the Works to recover delay for which the Contractor is entitled to an extension of the Time for Completion or as is otherwise caused by the circumstances described at Sub-Clause 8.4 [Extension of Time for Completion] as this power does not expressly arise pursuant to the Contract and does not necessarily have to be implied or to remove personnel from Site pursuant to Sub-Clause 6.9 [Contractor's Personnel] except on the agreed grounds.</p> <p>An instruction that would otherwise appear to be authorised is not authorised if it does not relate to the Contract. In other words, an instruction must be both authorised and related to the Contract.</p>
4.1	<p><b>Contractor's General Obligations</b></p> <p>The Contractor shall design (to the extent specified in the Contract), execute and complete the Works in accordance with the Contract and with the Engineer's instructions.</p>	<p>The Engineer, while acting for the Employer in accordance with Sub-Clause 3.1 [Engineer's Duties and Authority], has the task of determining the Contractor's entitlement to additional time and money and must do so fairly, in accordance with the Contract taking account of all relevant circumstances. Such determinations may be referred by either party to the DAB.</p> <p>The requirement for the Engineer to make determinations fairly replaces the requirement in the FIDIC Conditions, 4th Edition, to perform the corresponding function impartially. Although both fairness and impartiality impose an obligation on the Engineer not to favour one party over the other, fairness imports a broader concept than impartiality alone. Impartiality and fairness are both conceptually difficult to reconcile with the Engineer being the paid agent of the Employer, a point acknowledged by the inclusion for the first time in the FIDIC Conditions of a DAB.</p> <p>Although the FIDIC Conditions are intended for use on projects where the design has been prepared by or on behalf of the Employer, the opening words at Sub-Clause 4.1 contemplate and provide for the possibility that the Contractor is required to undertake the design of portions of the Works. Much of Sub-Clause 4.1 is devoted to the Contractor's responsibility for such design.</p> <p>Due to restrictions on combining design activities with general contracting activities on a commercial licence in the United Arab Emirates few contractors are licensed to undertake design work, presenting a constraint on the effective use of contractors in the design process.</p> <p>As the opening words of Sub-Clause 4.1 require any element of design to be specified in the Contract any design obligation must, if it is submitted, be explicit, in the absence of which the Contractor's working drawings, shop drawings and the like do not constitute design and, accordingly, must be undertaken only to the standard set out at Sub-Clause 7.1(b) [Manner of Execution]. As an exception, the Contractor shall be responsible for such design of each item of Plant and Materials as is required for the item to be in accordance with the Contract.</p> <p>If and to the extent that the design of any part of the Permanent Works is specified in the Contract, Sub-Clauses 4.1(a) – (d) govern the obligations of the Contractor in relation to such design.</p>

Clause	Title/Abstract	Commentary
	<p>The Contractor must 'execute and complete the Works in accordance with the Contract and with the Engineer's written instructions, and shall remedy any defects in the work.'</p>	<p>By virtue of Sub-Clause 13.2 [Value Engineering], if the Contractor proposes a Variation which includes a change in the design of any part of the Permanent Works the Contractor is responsible for designing such parts and must do so also in accordance with Sub-Clause 4.1 (a) – (d).</p> <p>The authority of the Engineer and the Contractor's obligation to act on the Engineer's instructions are specifically addressed at Sub-Clauses 3.1 [Engineer's Duties and Authority] and 3.3 [Instructions of the Engineer] respectively. There is no indication that Sub-Clause 4.1 confers on the Engineer any additional authority. The Engineer, pursuant to Sub-Clause 3.1, has no authority to amend the Contract.</p> <p>Accordingly, the obligation to remedy any defects should be read in the context of the Contractor's obligations in relation to the quality of the Works and the scope of the powers vested in the Engineer by Sub-Clauses 7.5 [Rejection], 7.6 [Remedial Work] and 11 [Defects Liability]. The Contractor does not necessarily have an obligation to remedy all defects at the Contractor's own expense. Specifically, references to 'defects' elsewhere, such as at Sub-Clauses 11.2 [Cost of Remedying Defects] and 11.8 [Contractor to Search], which entitle the Contractor to additional Cost notwithstanding the presence of defects suggest that defects and liability for the cost of rectification are separate issues.</p> <p>Applying the UAE Civil Code, particularly Article 266(1),<sup>19</sup> it is unlikely that the obligation in this Sub-Clause to remedy defects constitutes a warranty that the Works will be free of defects, requiring the Contractor, for example, to remedy defects attributable to the design, in the absence of any custom or practice to support such a broad interpretation. Therefore, although the Contractor has an obligation to remedy defects as per Clause 11 [Defects Liability] the responsibility for the cost of doing so must be determined by reference to this and other relevant provisions of the Contract.</p>
	<p>The Contractor shall be responsible for such design of each item of Plant and Materials as is required for the item to be in accordance with the Contract.</p>	<p>As all items of Plant and Materials are required, by virtue of Sub-Clause 7.1 [Manner of Execution], to be executed, manufactured and produced in accordance with the Contract the imposition of design responsibility for Plant and Materials is, presumably, intended to impose an additional obligation on the Contractor.</p>

<sup>19</sup> Chapter 4.3 [Interpretation: resolution of ambiguity].

Clause	Title/Abstract	Commentary
		<p>It is not entirely clear what such design responsibility involves. Specifically, the distinction between design on the one hand and the implementation of design on the other is not always readily apparent. Thus, the selection of materials and preparation of method statements often requires specialist knowledge and the exercise of significant technical skill and experience but would not necessarily be characterised as part of the design. Although the submittal process allows the Engineer to continue to develop and refine the design, a process facilitated by the Contractor and specialist subcontractors, the Contractor would maintain that this process does not constitute design by the Contractor but is rather part of the interface between design and implementation or workmanship. This is a significant distinction as implementation is governed by Sub-Clause 7.1(b) [Manner of Execution] and accordingly subject to a 'proper workmanlike' test and a 'recognised good practice' standard, whereas design by the Contractor is generally governed by Sub-Clause 4.1(c) which requires that the Works are fit for the intended purposes.</p> <p>In general, an item of Plant or Materials is 'in accordance with the Contract' if that item meets the description given in the Contract. The Contractor's responsibility for 'such design of each item of Plant and Materials as is required for the item to be in accordance with the Contract' is only engaged, therefore, if the Contract requires something more than the supply and installation of the specified item. For example, the Contract may require compliance with a specified building code, a performance specification or similar. In such a situation the design obligation in this Sub-Clause is engaged. Despite thereby making the Contractor responsible, in some circumstances, for completing or verifying the design of Plant and Materials prepared by the Engineer neither the effect of any additional or modified design nor the division of responsibility between the Engineer and the Contractor for the adopted design is addressed in Sub-Clause 4.1.</p> <p>As, by virtue of the Civil Code, Article 450, in the absence of agreement or a statutory provision, liability is not joint and several an apportionment of liability at law between the Engineer and the Contractor may, if a defect is discovered, have to be undertaken.</p> <p>The Contractor is 'not otherwise responsible' for the design or specification of the Works, an explicit recognition that except for specified design scope, value engineering proposals and items of Plant and Materials, design is the responsibility of the Employer. This is reflected in Sub-Clause 17.3(g) [Employer's Risks], which places the risk of loss of or damage to the Works from design by the Employer's Personnel on the Employer.</p>

Clause	Title/Abstract	Commentary
	Any part of the Works designed by the Contractor (whether such design is specified in the Contract or imported by reason of a Contractor's value engineering proposal) is required to be 'fit for such purposes for which the part is intended as are specified in the Contract.'	<p>Sub-Clause 4.1(c) requires that any part of the Works designed by the Contractor (whether such design is specified in the Contract or imported by reason of a Contractor's value engineering proposal) is required to be 'fit for such purposes for which the part is intended as are specified in the Contract'. If no such purposes are specified it is likely that these will be confined, by implication, to the purpose for which such part would ordinarily be intended. This obligation is not very different from the Engineer's <i>obligation de résultat</i> (an obligation to achieve a result) that appears to have been imported into the law of the United Arab Emirates from France.<sup>20</sup></p> <p>In addition, the Contractor indemnifies the Employer, pursuant to Sub-Clause 17.1 [Indemnities], for any injury, illness or death arising out of or by reason of the design except to the extent that such injury, illness or death is attributable to the negligence, wilful act or breach of the Contract by the Employer, the Employer's Personnel or their agents. Accordingly, the Contractor is potentially liable to the Employer not merely during the Works but thereafter for accidents caused by the Contractor's design, such as, for example, accidents due to lack of adequate access for cleaning and maintenance or other precautionary measures.</p>
4.2	<p><b>Performance Security</b></p> <p>The Contractor shall obtain at his own cost a Performance Security for proper performance.</p> <p>The Employer shall not make a claim under the Performance Security, except for amounts to which the Employer is entitled under the Contract.</p>	<p>As the Accepted Contract Amount covers all the Contractor's obligations under the Contract including, therefore, the obligation to obtain a Performance Security, express provision that this must be obtained at the Contractor's own cost is unnecessary.</p> <p>A bank guarantee is governed by the UAE Code of Commercial Practice, Articles 411–414. Further, the general characteristics of a guarantee are established in the UAE Civil Code, Articles 1056 and 1061.</p> <p>Failure to provide the Performance Security in accordance with Sub-Clause 4.2 entitles the Employer to withhold access to the Site pursuant to Sub-Clause 2.1 [Right of Access to the Site], to withhold payment pursuant to Sub-Clause 14.6 [Issue of Interim Payment Certificates] and, importantly, to issue a notice of termination pursuant to Sub-Clause 15.2(a) [Termination by Employer].</p> <p>The prohibition on a claim under the Performance Security except for amounts to which the Employer is entitled under the Contract is relatively restrictive even if the terms of the Performance Security are not. Specifically, the circumstances in which the Employer is entitled to make a demand are regulated by the Contract itself.</p> <p>In many cases the Employer's entitlement will not arise under the Contract until an Engineer's certificate or determination or even a decision of the DAB have been issued and an earlier demand in such circumstances risks triggering the indemnity (see below).</p>

<sup>20</sup> Chapter 7 [Design and supervision].

Clause	Title/Abstract	Commentary
		<p>In practice, however, the Contractor has limited control over the Employer's use of the Performance Security. The UAE Central Bank has indicated that any attempt by a bank in the United Arab Emirates to avoid payment risks damaging confidence in the financial system and, accordingly, will be met with 'appropriate action'<sup>21</sup> against any bank that is perceived to be avoiding such exposure. A bank might delay payment after receipt of a demand but is usually forthcoming within a matter of days.</p>
		<p>The principal recourse in the event of a wrongful call on the Performance Security pending a claim under the indemnity is, therefore, to the domestic courts. Pursuant to the UAE Code of Commercial Practice, Article 417(2), the domestic courts may, in exceptional cases, impose an attachment, analogous to an injunction in some jurisdictions, on the Performance Security preventing the issuing bank from making payment.<sup>22</sup></p>
	<p>The Contractor shall ensure that the Performance Security is valid and enforceable until the Contractor has executed and completed the Works and remedied any defects.</p>	<p>As a consequence of the requirement that the Performance Security remains in place until the Contractor has executed and completed the Works and remedied any defects, the Employer has the benefit of both the Performance Security and half of the Retention for the duration of the Defects Liability Period.</p>
	<p>The Employer shall indemnify and hold the Contractor harmless against all damages, losses and expenses (including legal fees and expenses) resulting from a wrongful claim</p>	<p>The inclusion of an indemnity for a wrongful claim overcomes the difficulty that can arise when seeking to identify a cause of action for a wrongful demand where the contractual relationship under the Performance Security is between the Employer and the bank, not between the Employer and the Contractor.</p> <p>No exclusion from the limitation of liability pursuant to Sub-Clause 17.6 [Limitation of Liability] is made for losses from a wrongful demand. As it is conceivable that financing charges which, apart from the principal sum, are a common component of a claim for a wrongful demand, constitute 'indirect' or 'consequential' losses, it is possible that the absence of a carve out substantially reduces the benefit of the indemnity. Other losses flowing from the loss of opportunity to bid for other work, which are, in principle, recoverable,<sup>23</sup> may also be affected by the limitation on liability.</p>

<sup>21</sup> Central Bank letter dated 2 November 1998 issued to all banks in the United Arab Emirates.

<sup>22</sup> Chapter 22.6 [Litigation: summary actions].

<sup>23</sup> Chapter 19 [Damages].

Clause	Title/Abstract	Commentary
	The Employer shall return the Performance Security to the Contractor within 21 days after receiving a copy of the Performance Certificate.	<p>Return of the Performance Security is triggered by the Employer's receipt of the Performance Certificate, which is itself triggered, pursuant to Sub-Clause 11.9 [Performance Certificate], by the expiry of the Defects Notification Period or provision of the Contractor's Documents and remedying all defects, whichever is the later.</p> <p>The Employer is required to return the Performance Security sooner than following receipt of the Performance Certificate if a notice of termination is issued by the Contractor pursuant to Sub-Clause 16.4 [Payment on Termination]. Also, return of the Performance Security is a precondition for a notice of termination for convenience issued by the Employer to take effect pursuant to Sub-Clause 15.5 [Employer's Entitlement to Termination].</p> <p>There is no corresponding provision for the Performance Security to be returned after a notice of termination for default given by the Employer even if an amount is due to the Contractor after the completion account has been prepared as prescribed by Sub-Clause 15.4 [Payment after Termination]. There are additional circumstances in which the return of the Performance Security is not addressed by the FIDIC Conditions, specifically the Contract being terminated by reason of Force Majeure pursuant to Sub-Clause 19.6 [Optional Termination, Payment and Release] and termination at will pursuant to Sub-Clause 15.2 [Termination by Employer].</p>
4.4	<p><b>Subcontractors</b></p> <p>The Contractor shall be responsible for the acts or defaults of any Subcontractor, his agents or employees, as if they were the acts or defaults of the Contractor.</p>	<p>This wording is consistent with the UAE Civil Code, Article 890(2), which provides that the Contractor shall remain liable to the Employer for the performance of the Contract notwithstanding that part of the Works is subcontracted.</p> <p>The absence of any explicit reference to nominated Subcontractors in Sub-Clause 4.4 raises a separate issue regarding the scope of its application in this respect. Sub-Clause 5.1 [Definition of 'nominated Subcontractor'] purports to define the phrase 'nominated Subcontractor', albeit separately from the definitions clause. If this definition means that a nominated Subcontractor is a Subcontractor for the purpose of the Contract, Sub-Clause 4.4 will operate to make the Contractor liable for a nominated Subcontractor's default. If it does not, it will not necessarily follow that this is the result in any event.<sup>24</sup> This is because the domestic courts have, on occasion, declined to impose liability on the Contractor pursuant to the UAE Civil Code, Article 890(2), in the event of delays or defects attributable to a nominated Subcontractor.<sup>25</sup></p>

<sup>24</sup> For further discussion refer to the narrative on Sub-Clause 5.2 [Extension of time].

<sup>25</sup> Chapter 11.2 [Time for completion: Extension of time].



Clause	Title/Abstract	Commentary
4.5	<p><b>Assignment of benefit of Subcontract</b></p> <p>Prior to expiry of the Defects Liability Period the Engineer may instruct the Contractor to assign the benefit of a Subcontractor's obligations to the Employer.</p>	<p>The Contractor is not required to procure any direct agreement or collateral warranty from any of the Subcontractors or to provide a collateral warranty or direct agreement to third party beneficiaries of the Works, such as funders or purchasers. Nor is the Contractor or any Subcontractor required to provide any rights to third parties, such as a subsequent owner, as permitted by UAE Civil Code, Article 252. Instead, the Employer has a limited right to take an assignment of the benefit of a subcontract provided that this is requested before the expiry of the Defects Notification Period.</p> <p>An assignment, if effective, replaces the Employer's rights against the Contractor with rights against the Subcontractor. The Employer is also entitled to take an assignment of any subcontract pursuant to Sub-Clause 15.2 [Termination by Employer].</p>
4.6	<p><b>Cooperation</b></p> <p>The Engineer may require the Contractor to provide the Employer's Personnel, other contractors engaged by the Employer and personnel of any public authorities the appropriate opportunities to carry out work on or near the Site.</p> <p>Any such instruction shall constitute a Variation if and to the extent that it causes the Contractor to incur Unforeseeable Cost.</p>	<p>This right mirrors Sub-Clause 2.1 [Right of Access to the Site], which provides that access is not exclusive and overlaps with the right at Sub-Clause 13.1(f) [Right to Vary], which allows the Engineer to change the sequence or timing of the execution of the Works. It is anticipated that others shall be allowed to execute work on or near the Site either as specified in the Contract or as subsequently instructed by the Engineer. The work that can be so specified or instructed is, however, restricted to work that is not included in the Contract. Work cannot be omitted in order for this to be executed by others by virtue of Sub-Clause 13.1(d) [Right to Vary].</p> <p>The Contractor will be entitled, in principle, to an extension of the Time for Completion pursuant to Sub-Clause 8.4(e) [Extension of Time for Completion] for any delay caused by the work of others.</p> <p>In the absence of an explicit entitlement to additional Cost, as provided for in other Sub-Clauses, it is unclear how the Contractor is expected to recover the Unforeseeable Cost incurred as a Variation. Treatment of an instruction as a Variation may not result in the Contractor recovering the Unforeseeable Cost as there is no express entitlement to Cost resulting from a Variation where this does not also result in measurable work.<sup>26</sup></p>

<sup>26</sup> The recovery of time related Cost is dealt with further in the commentary on Sub-Clauses 12.3 [Evaluation] and 13.1 [Right to Vary].

Clause	Title/Abstract	Commentary
4.10	<p><b>Site Data</b></p> <p>To the extent which was practicable (taking account of cost and time), the Contractor shall be deemed to have obtained all necessary information and to have inspected and examined the Site, its surroundings and other available information before submitting the Tender.</p>	<p>Because the Contractor shall be deemed to have inspected and examined the Site to the extent practicable and to have based the Accepted Contract Amount on such inspection and examination, pursuant to Sub-Clause 4.11 [Sufficiency of the Accepted Contract Amount], the Contractor will not be entitled to additional time or payment for circumstances that would have been revealed by such inspection and examination. The extent to which it is practicable (taking account of cost and time) for the Contractor to inspect and examine the Site and its surroundings can, therefore, significantly affect the Contractor's entitlement to additional time and/or payment. Surrounding land, in an urban setting at least, will usually be under third party ownership and/or occupied by existing structures often rendering inspection and examination costly, time consuming and even impossible.</p> <p>In practice, climatic conditions, the extent and nature of the work, Laws, procedures and labour practices and the requirement for access, accommodation, power and other facilities will in most circumstances be relatively easy to investigate and establish. An inspection and examination to establish the subsurface or hydrological conditions of the Site and its surroundings on the other hand, will in many cases involve significant expense and inconvenience if each bidder is expected to undertake its own such inspection and examination, as well as being unnecessary if the Contract either provides for such investigation to be undertaken as part of the Works or provides information on subsurface and hydrological conditions at the time of tender.</p>
4.11	<p><b>Sufficiency of the Accepted Contract Amount</b></p> <p>The Contractor shall be deemed to have satisfied himself as to the correctness and sufficiency of the Accepted Contract Amount.</p>	<p>This provision is concerned predominantly with ensuring that the Contractor provides an all-inclusive price. Imposing a requirement on the Contractor to include in the Accepted Contract Amount for items of work that are not specifically identified in the Contract but which are necessary for the proper execution of the Works is consistent with the UAE Civil Code, Articles 887 and 246(2),<sup>27</sup> though these provisions apply to contracts awarded on a lump sum basis. If a dispute arises over whether the Accepted Contract Amount includes items that, for example, are shown on the Drawings or described in the Specification but are not included in the Bill of Quantities the all-inclusive effect of Sub-Clause 4.11 has to be reconciled with the entitlement to measurement of net actual quantities as per Sub-Clause 12.2 [Method of Measurement]. The Bill of Quantities and any agreed method of measurement may clarify the position.</p>

<sup>27</sup> Chapter 13.6 [Price: variations].

Clause	Title/Abstract	Commentary
4.12	<p><b>Unforeseeable Physical Conditions</b></p> <p>The Contractor is entitled to additional time and payment if the Contractor encounters physical conditions which are Unforeseeable.</p>	<p>The loose definition of 'Unforeseeable' introduces a significant element of discretion into an assessment of a claim pursuant to this Sub-Clause. Physical conditions that would have been revealed to the Contractor by any inspection and examination of the Site or its surroundings required pursuant to Sub-Clause 4.10 [Site Data] will be foreseeable. The element of practicality which forms part of the determination of what is required by way of inspection or examination adds a further layer of subjectivity to the application of this Sub-Clause.</p> <p>The Contractor's entitlement is limited to Cost, the definition of which does not include profit.</p>
4.14	<p><b>Avoidance of Interference</b></p> <p>The Contractor shall indemnify and hold the Employer harmless against and from all damages, losses and expenses resulting from any unnecessary or improper interference.</p>	<p>The indemnity is not one of those carved out from the limitation of liability at Sub-Clause 17.6 [Limitation of Liability] and, therefore, the Contractor's liability pursuant to the indemnity is limited to direct loss or damage suffered by the Employer. In jurisdictions, such as the United Arab Emirates, where the distinction between direct and indirect loss is greater than it is in England and Wales, this limitation is likely to curtail quite significantly the scope of the Employer's potential recovery, much of which could be considered indirect.</p>
4.18	<p><b>Protection of the Environment</b></p> <p>The Contractor shall take all reasonable steps to protect the environment and to limit damage and nuisance resulting from pollution, noise and other results of his operations.</p>	<p>There is no specific indemnity provided by the Contractor for environmental damage, nor any carve out from the exclusion of consequential loss and cap on liability pursuant to Sub-Clause 17.6 [Limitation of Liability] for any failure to take reasonable steps to protect the environment.</p> <p>Noise pollution is governed by UAE Federal Law No. 24/1999, Article 54, which provides for the imposition by Executive Regulations of limits for the volume and duration noise from construction activities. Ministerial Decision 37/2001 sets out the allowable noise limits.</p>
4.21	<p><b>Progress Reports</b></p> <p>Monthly progress reports shall be prepared by the Contractor and submitted to the Engineer</p>	<p>A monthly progress report is required as one of the supporting documents to be submitted with a Statement pursuant to Sub-Clause 14.3 [Application for Interim Payment Certificates]. Without this the Engineer may be entitled to decline to issue a Payment Certificate and, in turn, the Contractor is denied an entitlement to suspend the Works pursuant to Sub-Clause 16.1 [Contractor's Entitlement to Suspend Work] or to issue a notice of termination pursuant to Sub-Clause 16.2 [Termination by Contractor].</p> <p>Submission of a monthly progress report which includes the details enumerated, particularly the details of delay events, will in many cases be sufficient notice of a claim for additional time under the Clause 20 [Claims, Disputes and Arbitration].</p>

Clause	Title/Abstract	Commentary
5.1	<p><b>Definition of 'nominated Subcontractor'</b></p> <p>'Nominated Subcontractor' means a Subcontractor who is stated in the Contract as being a nominated Subcontractor or whom the Engineer under Clause 13 [Variations and Adjustments] instructs the Contractor to employ as a Subcontractor</p>	<p>By defining a nominated Subcontractor as a Subcontractor – but one that is selected by a process over which the Contractor has limited control – it can be inferred that a nominated Subcontractor is a Subcontractor for the purpose of the definition which is found at Sub-Clause 1.1.2.8. This, in turn, imports the liability provision at Sub-Clause 4.4 [Subcontractors], making the Contractor vicariously liable for the acts and defaults of nominated Subcontractors. However, it is not clear that all provisions of the Contract that govern Subcontractors apply equally to nominated Subcontractors. For example, although no exception is made to the requirement, pursuant to Sub-Clause 4.4(b) [Subcontractors], for the Contractor to obtain the prior consent of the Employer to appoint a Subcontractor it is doubtful that this requirement applies when such appointment is imposed on the Contractor by virtue of either an explicit provision of the Contract or an instruction issued by the Engineer pursuant to Clause 13 [Variations and Adjustments].</p> <p>The Contractor might argue that the special privileges enjoyed by nominated Subcontractors such as the right to certification of amounts due under the subcontract or direct payment as per Sub-Clause 5.4 [Evidence of Payments], set them apart not only in relation to the requirement for prior consent but also other aspects of Sub-Clause 4.4, particularly vicarious liability. As the domestic courts have, on occasion, declined to impose liability on a contractor pursuant to the UAE Civil Code, Article 890(2), in the event of delays or defects attributable to a nominated Subcontractor<sup>28</sup> a court would need to decide whether the opening words of this Sub-Clause are sufficient to bring a nominated Subcontractor within Sub-Clause 4.4.</p>
5.2	<p><b>Objection to Nomination</b></p> <p>The Contractor shall not be under any obligation to employ a nominated Subcontractor against whom the Contractor raises a reasonable objection.</p>	<p>If no right of objection was conferred on the Contractor nor any opportunity to negotiate the applicable terms, the resulting Subcontract might be classified as a contract of adhesion with the attendant consequences for any unfair contract terms.<sup>29</sup></p> <p>As the right of objection applies to any nominated Subcontractor without exception this extends to a Subcontractor 'stated in the Contract as being a nominated Subcontractor' not merely to a nominated Subcontractor that is imposed by a subsequent instruction of the Engineer pursuant to Sub-Clause 13.5 [Provisional Sums].</p>

<sup>28</sup> Chapter 11.2 [Time for completion: extension of time].

<sup>29</sup> Chapter 5.9 [Contractual principles: unfair contract terms].

Clause	Title/Abstract	Commentary
	<p>An objection shall be deemed reasonable if it arises from (among other things) any of the listed matters, unless the Employer agrees to indemnify the Contractor against and from the consequences of the matter.</p>	<p>What constitutes a reasonable objection is left largely undefined, though an objection is deemed reasonable if it arises from one of the grounds non-exhaustively set out at Clause 5.2(a) – (c). The objection loses the benefit of deemed reasonableness if the Employer offers to indemnify the Contractor against the consequences of the matter raised as an objection.</p> <p>Although an objection shall no longer be deemed to be reasonable if the Employer offers an indemnity it does not necessarily follow that the offer of an indemnity renders an objection unreasonable. The Contractor can maintain the objection notwithstanding an agreement to indemnify but would not have the benefit of that objection being deemed reasonable. If the objection was reasonable irrespective of the deeming mechanism the offer of an indemnity would appear to make little difference to the Contractor’s exemption from the obligation to employ a nominated Subcontractor.</p>
	<p>An objection shall be deemed reasonable if it arises from reasons to believe that the Subcontractor does not have sufficient competence, resources or financial strength.</p>	<p>The existence of ‘reasons to believe that the Subcontractor does not have sufficient competence, resources or financial strength’ is identified at Sub-Clause 5.2(a) as a matter that is deemed to give rise to a valid objection. Provided that the supporting particulars required to be provided by the Contractor demonstrate the existence of reasons to believe (on the balance of probabilities)<sup>30</sup> that the nominated Subcontractor lacks sufficient competence, resources or financial strength this should be sufficient for an objection to be deemed reasonable irrespective of a different conclusion reached by the Engineer.</p>
	<p>An objection shall be deemed reasonable if it arises from the subcontract not providing the Contractor with an indemnity for any negligence or misuse of the Goods or from the subcontract not requiring the nominated Subcontractor to undertake back to back obligations.</p>	<p>The additional objections at Sub-Clause 5.2(b) and (c) contemplate that the Contractor will be presented with a form of Subcontract on which to appoint the nominated Subcontractor. This is a common but not universal practice. As the list of grounds for objection at Sub-Clause 5.2(a) – (c) is not exhaustive the Contractor is entitled to object to the terms, if any, on which the Contractor is instructed to employ a nominated Subcontractor or on which the nominated Subcontractor is willing to be employed, giving rise to a potential standoff between the Contractor and the Engineer. This can be avoided by incorporating the Subcontract terms with the Contract.</p>

<sup>30</sup> UAE Law of Proof, Article 1(1).

Clause	Title/Abstract	Commentary
5.3	<p><b>Payments to nominated Subcontractors</b></p> <p>The Contractor shall pay the amounts which the Engineer certifies to be due under the subcontract. These amounts shall be included in the Contract Price except as stated in Sub-Clause 5.4 [Evidence of Payments].</p>	<p>The Contractor is not prohibited pursuant to Clause 5 [Nominated Subcontractors], from terminating a nominated Subcontractor's employment and, in practice, a nominated subcontract often includes termination provisions, yet Sub-Clause 5.2 does not address re-nomination in such (or any) circumstances. As the Contractor may only use a Provisional Sum in respect of the work to be undertaken by a nominated Subcontractor 'in accordance with the Engineer's instructions' pursuant to Sub-Clause 13.5 [Provisional Sums] the Contractor probably requires an instruction in order to appoint a replacement and to proceed with the work covered by the Provisional Sum. Failure to issue an instruction re-nominating a Subcontractor to expend a Provisional Sum may entitle the Contractor to an extension of time pursuant to Sub-Clause 8.4(e) [Extension of Time for Completion] and to an extension of time and additional payment pursuant to Sub-Clause 1.9 [Delayed Drawings or Instructions].</p> <p>The role of the Engineer in certifying amounts due to a nominated Subcontractor is likely to make it more difficult for the Employer to persuade a domestic court to apply the UAE Civil Code, Article 890(2), to liability incurred by the Contractor due to the actions of a nominated Subcontractor.</p>
5.4	<p><b>Evidence of Payments</b></p> <p>The Engineer may request the Contractor to provide reasonable evidence that a nominated Subcontractor has received all amounts due in accordance with previous certificates. The Employer may pay the nominated Subcontractor directly all or part of the amount previously certified.</p>	<p>Despite the expectation created by this provision there is no explicit reference in Sub-Clause 5.4 [Evidence of Payments] or elsewhere to a right to exclude from the Contract Price amounts that the Engineer certifies as due to a nominated Subcontractor and that are paid directly in accordance with the subcontract.</p> <p>This provision entitles the Employer, in the specified circumstances, to pay an amount certified as due to a nominated Subcontractor to that nominated Subcontractor directly. This option is triggered if the Contractor fails to provide evidence of payment to the nominated Subcontractor of a certified amount or to persuade the Engineer that the Contractor has a right to withhold that payment and has notified the nominated Subcontractor of that right. There is no corresponding right to intervene in the payment process for the benefit of a domestic Subcontractor.</p> <p>The Employer must, it would seem, proceed in accordance with Sub-Clause 2.5 [Employer's Claims] to make a claim for any direct payment made pursuant to this provision before exercising the right to set this off from the amount due to the Contractor. Failure to follow the correct procedure may give the Contractor rights pursuant to Clause 16 [Suspension and Termination by Contractor].</p>

Clause	Title/Abstract	Commentary
6.4	<p><b>Labour Laws</b> The Contractor shall comply with all relevant Labour Laws relating to employment, health, safety and welfare.</p>	<p>This provision overlaps with Sub-Clause 1.13 [Compliance with Laws].</p> <p>The applicable regulations range from generic provisions contained in the UAE Labour Law to specific provisions governing collective labour accommodation and a prohibition on working in direct sun during July and August.<sup>31</sup> An obligation imposed by the Contract or by an Engineer's instruction that requires the Contractor to breach any of these provisions is ineffective both pursuant to Sub-Clause 19.7 [Release from Performance under the Law] and at law.</p> <p>Although the Engineer is entitled to require the Contractor to maintain and submit reports 'concerning health safety and welfare' as per Sub-Clause 6.7 [Health and Safety] there are no sanctions for non-compliance beyond those found at Clause 15 [Termination by Employer].</p>
6.9	<p><b>Contractor's Personnel</b> The Engineer may require the Contractor to remove any person employed on the Site or the Works</p>	<p>The right to order removal is vested in the Engineer, not the Employer. Removal for this purpose probably extends beyond physical removal from the Site by virtue of the reference not only to any person employed on Site but also to any person employed on the Works. The latter reference would be redundant if all that is intended is physical removal from the confines of the Site.</p> <p>As the Engineer cannot amend the Contract, and the Engineer's power to order removal is limited to the listed grounds for removal, the Engineer cannot issue a valid instruction for removal on any other grounds. As the listed circumstances must exist as a matter of fact rather than as a matter of the Engineer's opinion, the Engineer cannot issue a valid instruction in the absence of such circumstances. This gives rise to a potential standoff between the Engineer and the Contractor which may need to be referred to and resolved by the DAB appointed as contemplated by Clause 20 [Claims, Disputes and Arbitration] if there is disagreement as to the existence of the necessary circumstances.</p>
7.1	<p><b>Manner of Execution</b> The Contractor shall carry out the execution of the Works in the manner specified and in a proper workmanlike and careful manner, in accordance with recognised good practice.</p>	<p>The obligations contained at Sub-Clause 7.1 are additional to those at Sub-Clause 4.1 [Contractor's General Obligations] and have been expanded from the FIDIC Conditions, 4th Edition, most notably, by the introduction of an obligation to execute the Works 'in a proper workmanlike and careful manner, in accordance with recognised good practice'. This better reflects the international nature of the FIDIC Conditions and their application in jurisdictions, including the United Arab Emirates, where the implication of terms dealing with the quality of the work and materials cannot be taken for granted.</p>

<sup>31</sup> Chapter 6.1 [Health, safety and welfare: construction safety].

Clause	Title/Abstract	Commentary
7.5	<p data-bbox="284 1082 383 1103"><b>Rejection</b></p> <p data-bbox="284 1110 323 1130">The</p> <p data-bbox="265 1138 455 1448">Engineer may reject any Plant, Materials or workmanship that is found to be defective or otherwise not in accordance with the Contract as a result of an examination, inspection, measurement or test.</p>	<p data-bbox="484 255 1070 412">The absence of any guidance on what constitutes a proper workmanlike and careful manner in the FIDIC Conditions leaves a gap to be filled by applicable law. Based on the general principles of interpretation of contracts, this should result in the application of a standard of workmanship derived from custom and practice, as applied to the particular circumstances.<sup>32</sup></p> <p data-bbox="484 419 1070 676">The absence of any reference to the quality of Materials, other than in the context of production and manufacture, may reflect the origin of the FIDIC Conditions and the nature of civil engineering works. Detailed requirements are often contained in the Specification or other Contract Documents, obviating the need for generic standards in the General Conditions. However, as the title of the FIDIC Conditions promotes their use for building as well as engineering projects, a requirement for the Contractor to use materials that are new, suitable for use in the works and of satisfactory quality might have been added.</p> <p data-bbox="484 683 1070 1077">In the absence of any detailed requirements the Employer can seek assistance from other Sub-Clauses. Thus, the Contractor is required, pursuant to Sub-Clause 1.13 [Compliance with Laws], to comply with applicable Laws in performing the Contract, which include, for example, the UAE Civil Code, Article 875.<sup>33</sup> Materials will, as a minimum, have to conform to the applicable building codes and standard specifications adopted at both Federal and Emirate level.<sup>34</sup> Pursuant to Sub-Clause 4.1 [Contractor's General Obligations] the Contractor is responsible for the design of each item of Plant and Materials as is required for the item to be in accordance with the Contract.<sup>35</sup> There are also various provisions requiring the Contractor to replace Materials found to be defective or otherwise not in accordance with the Contract such as Sub-Clause 7.5 [Rejection], Sub-Clause 7.6 [Remedial Work] and Sub-Clause 11.2 [Cost of Remedying Defects].</p> <p data-bbox="484 1084 1070 1241">Although similar in effect to Sub-Clause 7.6 [Remedial Work], rejection arises as a result of an examination, inspection, measurement or test conducted pursuant to the preceding Sub-Clauses and is, accordingly, directed at Plant, Materials and workmanship during fabrication and prior to installation or completion on Site.</p> <p data-bbox="484 1249 1070 1504">Rejection is permitted only if Plant or Materials are 'defective or otherwise not in accordance with the Contract'. However, although it is axiomatic that Materials must be in accordance with the Contract there is no explicit obligation to supply Plant and Materials that are free of defects. The UAE Civil Code, Article 542(1) provides that in a contract of sale, not a <i>muqawala</i>, goods must be free of defects and the FIDIC Conditions do not plug this gap. The Contractor's obligations, therefore, must be derived from a combination of Sub-Clauses 4.1 [Contractor's General Obligations] and 7.1 [Manner of Execution].</p>

<sup>32</sup> Federal Supreme Court No's. 446 and 541/21 dated 15 May 2001.

<sup>33</sup> Chapter 8.1 [Defects: materials].

<sup>34</sup> Adopted in Abu Dhabi by virtue of Abu Dhabi Law No. 4/1983 (amended) and Abu Dhabi Law No. 9/2007 and in Dubai by virtue of Dubai Administrative Decision No. 125/2001.

<sup>35</sup> The effect of this requirement is discussed in the commentary for Sub-Clause 4.1.



Clause	Title/Abstract	Commentary
		<p>As there is scope for different views on what constitutes defective Plant or Materials an explicit obligation on the Contractor to supply Plant and Materials free of defects, together with some elaboration of the scope of this obligation, would assist with understanding the extent of the Engineer's power to reject. In particular, an item can itself be defective or can be defective only as a result of its selection or application.</p> <p>Given that the Contractor's obligations pursuant to Sub-Clause 7.1 are directed at the production and manufacturing process and at workmanship and that pursuant to Sub-Clause 4.1 [Contractor's General Obligations] the Contractor is exempted from liability for the design, Sub-Clause 7.5 is limited, it is submitted, to the rejection of Materials that are themselves defective due, for example, to a failure in the production or manufacturing process or due to a breach of Sub-Clause 4.1(i). Clear words would be required, it is submitted, to permit the Engineer to exercise the right of rejection in any other circumstances. Even then, distinguishing a defect from an undesirable characteristic or imperfection involves a substantial element of subjectivity that may lead to a difference of opinion between the Contractor and the Engineer.</p> <p>The Employer retains a separate right to reject the whole of the Works or any major part pursuant to Sub-Clause 11.4(c) [Failure to Remedy Defects]. Once the Performance Certificate has been issued the Works are deemed to be accepted, pursuant to Sub-Clause 11.9 [Performance Certificate], causing the right of rejection to lapse. Thereafter, the Employer retains, by virtue of Sub-Clause 11.10 [Unfulfilled Obligations], a cause of action for any breach of the Contract but not a right of rejection.</p> <p>In addition, the Engineer is entitled to reject Plant, Materials or workmanship that is not in accordance with the Contract. The Engineer can thus reject Plant, Materials or workmanship that is not defective but does not comply with the Contract, for example, due to the selection by the Contractor of materials from a prohibited country of origin. Plant, Materials or workmanship will not, however, be defective for the purpose of triggering a rejection entitlement merely by virtue of the Engineer's preference for a different product or by virtue of the imposition of selection criteria that are not specified in the Contract.</p>

Clause	Title/Abstract	Commentary
	The Contractor shall promptly make good the defect and ensure that the rejected item complies with the Contract.	Rejection by the Engineer in the absence of an entitlement could be referred to the DAB or may in certain circumstances be treated as a Variation. Adopting the latter approach has the merit of avoiding a confrontation between the Contractor and the Engineer over the latter's authority to reject Plant, Materials and workmanship. This is a high stakes issue as any failure by the Contractor to comply with a notice issued in accordance with Sub-Clause 7.5, without reasonable excuse, entitles the Employer to issue a notice of termination pursuant to Sub-Clause 15.2(c) [Termination by Employer]. Although rejection without a valid contractual basis would clearly constitute a reasonable excuse for the Contractor to decline to make good a defect a reasonable excuse is capable of including other grounds. As a result, the Engineer may need to engage with the Contractor to consider and address any reasonable excuse that the latter raises.
7.6	<b>Remedial Work</b> If the Contractor fails to comply with an instruction to remove and re-execute any defective work the Employer shall be entitled to employ and pay others to carry out the Works.	<p>Once installed on Site, any Plant, Materials or workmanship which is not in accordance with the Contract must be removed and replaced or re-executed on the Engineer's instructions and, pursuant to Sub-Clause 14.6 [Issue of Interim Payment Certificates], the cost of rectification or replacement may be withheld from an Interim Payment Certificate.</p> <p>Unlike the right of rejection at Sub-Clause 7.5 [Rejection] this right does not explicitly extend to Plant, Materials and workmanship that is found to be defective but is otherwise in accordance with the Contract. Without prejudice to the Contractor's obligation pursuant to Sub-Clause 4.1 [Contractor's General Obligations] to remedy any defects in the Works, the Engineer's right to order removal and/or re-execution and to back charge the Contractor for any failure to do so is, therefore, conditional on the Engineer identifying a specific non-conformance rather than a defect. For example, a fire resistant coating or grade of aggregate may be unsuitable for the particular surface application. This may, in turn, result in delamination or pitting without the coating or aggregate itself being defective. If such Materials are specified in the Contract the Contractor has supplied Materials that are in accordance with the Contract and the right to instruct removal and replacement will not arise pursuant to this Sub-Clause notwithstanding that from the Employer's perspective the Materials are defective. An instruction to remove or re-execute work may, however, be issued as a Variation pursuant to Sub-Clause 13.1(b) [Right to Vary] if the Engineer cannot demonstrate the source of the non-conformance on which the instruction is based.</p>

Clause	Title/Abstract	Commentary
	<p>If the Contractor fails to comply with the instruction the Employer shall be entitled to employ and pay others to carry out the work.</p>	<p>The Employer is required to give the Contractor an opportunity to undertake the remedial work before employing others to do so. This is consistent not only with the required failure but also with the Contractor's obligation to rectify defects pursuant to Sub-Clause 4.1 [Contractor's General Obligations]. The Employer's recovery in respect of such remedial work, if the Contractor is not given an opportunity to remove and replace or re-execute, is limited to the amount that such remedial work would have cost the Contractor if the proper opportunity to undertake remedial work had been given.</p> <p>If the Engineer discovers anything supplied or work done that is not in accordance with the Contract before certifying the value of that item of work the estimated cost of the required remedial work may be deducted from an Interim Payment Certificate, as permitted pursuant to Sub-Clause 14.6 [Issue of Interim Payment Certificates]. Credit will need to be given for the amount so deducted once the defect has been rectified by the Contractor or by others and notice should be given of any difference due to the Employer (i.e. if the estimate is exceeded) for this to be deductible as a set-off pursuant to Sub-Clause 2.5 [Employer's Claims].</p> <p>Failure by the Contractor, without reasonable excuse, to comply with a notice issued in accordance with Sub-Clause 7.6 also entitles the Employer to issue a termination notice pursuant to Sub-Clause 15.2(c) [Termination by Employer]. A similar right is conferred by the UAE Civil Code, Article 877, but as the remedies for defective workmanship are addressed specifically and as Article 877 is not mandatory,<sup>36</sup> Sub-Clause 15.2(c) prevails.</p>
7.7	<p><b>Ownership of Plant and Materials</b></p> <p>Ownership passes on the earlier of delivery to the Site or when the Contractor is entitled to payment.</p>	<p>Ownership of Plant and Materials passes, to the extent consistent with the Laws of the Country, at the earlier of delivery of such Plant and Materials to the Site or when the Contractor is entitled to payment for such Plant and Materials. Thus, title transfers independently of payment. The Contractor, nevertheless, remains liable for any loss or damage to Plant and Materials until the Taking Over Certificate is issued, pursuant to Sub-Clause 17.2 [Contractor's Care of the Works] despite ownership having passed to the Employer.</p> <p>The default position under Federal law is that ownership passes when the agreement for sale is reached and that risk transfers on delivery.<sup>37</sup></p> <p>However, as the relevant provisions of applicable law are not mandatory, they are displaced by Sub-Clauses 7.7 and 17.2.</p>

<sup>36</sup> Construction contracts are nominate contracts and, accordingly, the applicable terms in the absence of express agreement are generally prescribed in greater detail than in the case of innominate contracts. This more prescriptive approach does not, however, signal an intention that the prescribed terms are mandatory, as discussed at Chapter 2.1 [Construction law: *Muqawala*].

<sup>37</sup> UAE Code of Commercial Practice, Article 103 and the UAE Civil Code, Article 496. Under English law risk generally passes with ownership and, therefore, goods or materials are held at a buyer's risk from the conclusion of a sale, unless there is a contrary agreement: Sale of Goods Act 1979, section 20(1).

Clause	Title/Abstract	Commentary
8.1	<p data-bbox="265 255 458 303"><b>Commencement of Works</b></p> <p data-bbox="265 310 458 624">The Engineer shall give the Contractor at least seven days' notice of the Commencement Date. The Commencement Date shall be within 42 days after the Contractor receives the Letter of Acceptance.</p> <p data-bbox="265 898 458 1023">The Contractor shall proceed with the Works with due expedition and without delay.</p>	<p data-bbox="484 255 1079 436">The Commencement Date is triggered by the Engineer giving a minimum of 7 days' notice thereof. The Commencement Date must, unless otherwise stated be within a window of 42 days following receipt by the Contractor of the Letter of Acceptance meaning that the Engineer must issue the notice no later than 35 days after receipt of the Letter of Acceptance by the Contractor.</p> <p data-bbox="484 443 1079 624">As, pursuant to Sub-Clause 1.1.3.3 [Dates, Tests, Periods and Completion], the Time for Completion starts from the Commencement Date there is no need for an extension of the Time for Completion if the notice is late but the Contractor may seek compensation for any costs or losses incurred for the duration of the delay relying on a breach of the obligation to trigger the Commencement Date pursuant to Sub-Clause 8.1.</p> <p data-bbox="484 632 1079 705">As the Time for Completion runs from the Commencement Date, establishing the former with certainty presents a challenge if no notice is given by the Engineer.</p> <p data-bbox="484 713 1079 894">Work on Site should mark the latest Commencement Date as, in principle, access should not be given prior to the Commencement Date. Identifying any earlier Commencement Date is a matter of establishing the date by which the Engineer gave a sufficiently clear and demonstrable indication that the Contractor could proceed for this to be relied upon as the basis for commencing the Works.</p> <p data-bbox="484 901 1079 1023">The obligation on the Contractor to proceed with due expedition and without delay is subject to the entitlement of the Contractor to reduce the rate of work, pursuant to Sub-Clause 16.1 [Contractor's Entitlement to Suspend Work] and to an extension of the Time for Completion.</p> <p data-bbox="484 1031 1079 1424">With the exception of delay as a result of Force Majeure, for which there is an explicit duty to mitigate delay imposed by Sub-Clause 19.3 [Duty to Minimise Delay], the Contractor has no contractual obligation to adopt measures to reduce delay for which the Contractor is entitled to an extension of time. Further, in the absence of any stock of implied terms or a recognised duty of mitigation under the UAE Civil Code no such duty arises at law. The Employer could try to rely on the generic obligation to proceed with due expedition and without delay as well as the interpretation of contracts to hold the Contractor accountable for any avoidable delay but the absence of a generic duty to mitigate in the FIDIC Conditions may well limit the scope of any such accountability, especially as the Contractor's obligation to recover delay is explicitly circumscribed pursuant to Sub-Clause 8.6 [Rate of Progress].</p>

Clause	Title/Abstract	Commentary
8.2	<p><b>Time for Completion</b></p> <p>The Contractor shall complete the whole of the Works and each Section within the Time for Completion.</p>	<p>The definition of a Section anticipates that this will be a physically separable or separately identifiable portion of the Works. Applying Sections to a time or progress related stage or phase of the Works, as sometimes occurs, risks creating a conflict with the tests for achievement of completion applied at Sub-Clause 8.2 and Sub-Clause 10.1 [Taking Over of the Works and Sections] which are directed at putting the Works or any Section into use. Any such conflict will have to be resolved if the Employer intends to levy delay damages for failure to complete a Section on time by applying the rules of interpretation contained in the UAE Civil Code,<sup>38</sup> including Article 266(1) which provides that any doubt should be resolved in favour of the 'obligor'.</p>
8.3	<p><b>Programme</b></p> <p>Unless the Engineer, within 21 days after receiving a programme, gives notice to the Contractor stating the extent to which it does not comply with the Contract, the Contractor shall proceed in accordance with the programme, subject to his other obligations under the Contract.</p> <p>The Employer's Personnel shall be entitled to rely upon the programme when planning their activities.</p>	<p>The Engineer's objections to a programme must be directed at a failure of the programme to comply with the Contract, specifically the formalities identified at Sub-Clause 8.3(a) – (d) and any other requirements of the Contract. Subject to these conditions, the content of the programme (including the planning and sequencing of the Works) is under the control and at the discretion of the Contractor.</p> <p>There is no express obligation on the Contractor to submit a revised programme taking account of any objections raised by the Engineer either within a specified time or at all. The Engineer might be entitled to rely on the general powers conferred pursuant to Sub-Clause 3.3 [Instructions of the Engineer] to compel the Contractor to modify and resubmit the programme. But if the Contractor maintains that the programme complies with the Contract a reference to the DAB may be necessary to resolve a difference over the programme for the Works. As there is no specific provision prescribing the consequences of a failure to overcome an objection to the programme the only contractual remedy available is for the Engineer to issue a notice to correct pursuant to Sub-Clause 15.1 [Notice to Correct].</p> <p>The absence of an agreed programme will, in practice, hinder the Engineer's ability to operate Sub-Clause 8.6 [Rate of Progress] and may create difficulties for any other contractors with whom the Contractor is required to share the Site.</p> <p>As the Contractor is not granted exclusive access to the Site the Employer is entitled to rely on the programme to arrange for the Site to be used by others in a manner that should not interfere with the Contractor whether or not any provision for such access is made in the Appendix to Tender as envisaged by Sub-Clause 2.1 [Right of Access to the Site]. However, although the Contractor is required to 'proceed in accordance with the programme' there would appear to be nothing to prevent the Contractor from updating the programme as necessary, thereby requiring the Employer to fit around the actual progress of the Works. Indeed, as the programme must be updated whenever this ceases to reflect actual progress or the Contractor's obligations, which include the obligation to complete the Works by the Time for Completion, the programme is not intended to be immutable.</p>

<sup>38</sup> Chapter 4.3 [Interpretation: Resolution of ambiguity].

Clause	Title/Abstract	Commentary
8.4	<p data-bbox="265 550 387 624"><b>Extension of Time for Completion</b></p> <p data-bbox="265 630 455 861">The Contractor shall be entitled to an extension of the Time for Completion if and to the extent that completion is or will be delayed by any of the following causes.</p>	<p data-bbox="484 255 1076 541">The Engineer can override the programme by issuing an instruction pursuant to Sub-Clause 4.6 [Cooperation] requiring the Contractor to afford the Employer's Personnel or other contractors an opportunity to carry out work on or near the Site. The Engineer can also instruct the Contractor to change the timing or sequence of the execution of the Works pursuant to Sub-Clause 13.1 [Right to Vary] for the purpose, among other things, of permitting access for the Employer's Personnel to the Site. Both of these options provide the Contractor with an entitlement to additional time and payment by way of the Variation provisions of the Contract.</p> <p data-bbox="484 547 1076 676">The element of fairness, present in the FIDIC Conditions, 4th Edition, has been moved from this Sub-Clause to Sub-Clause 3.5 [Determinations], which has the effect of emphasising the causal connection between the delay and the grounds permitting the Contractor an extension of time.</p> <p data-bbox="484 681 1076 811">As the trigger for an entitlement to an extension of time is that 'completion is or will be delayed' the entitlement to claim arises either upon it becoming apparent that delay will occur or upon such delay actually occurring.<sup>39</sup> This potentially impacts the timing of a notice required pursuant to Sub-Clause 20.1.</p> <p data-bbox="484 816 1076 1103">The Engineer is not given any guidance on how to deal with overlapping causes of delay, including concurrent delay. The assessment of causation is left to the discretion of the Engineer. The UAE Civil Code devotes scant attention to the topic of causation which is treated as a matter of fact rather than law and, therefore, is to be determined by the Court of Merits with minimal interference from the Court of Cassation.<sup>40</sup> A non-prescriptive, fact based approach that balances the competing interests of the parties is not only consistent with a civil law philosophy but is also consistent with the contractual requirement that a determination should be fair.</p> <p data-bbox="484 1108 1076 1289">This Sub-Clause also does not deal with the Contractor's entitlement, if any, to recover the time related costs arising in consequence of an event giving rise to an extension of the Time for Completion. The source and nature of the entitlement to recover additional time related costs is located elsewhere in the Conditions and is considered separately in the context of each of the causes permitting an extension of time below.</p>

<sup>39</sup> In *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* [2014] EWHC 1028 (TCC) the High Court of England and Wales held that this phrase should not be read to mean that the entitlement arises on whichever is the earlier.

<sup>40</sup> Chapter 11.5 [Time for completion: Concurrent delay].

Clause	Title/Abstract	Commentary
	<p>The causes for which the Contractor is entitled to an extension of the Time for Completion include:</p> <p>(a) a Variation or other substantial change in the quantity of an item of work.</p>	<p>The entitlement to an extension in respect of a Variation or other substantial change in the quantity of an item of work included in the Contract reflects the nature of a remeasurement contract, which does not require a Variation instruction in order for the Contractor to suffer a delay by reason of a substantial increase in the quantity of work. Of course, the quantities set out in the Contract are estimated quantities only, pursuant to Sub-Clause 14.1(c) [The Contract Price] but the 'substantial change' referred to at Sub-Clause 8.4(a) presumably refers to a change from such estimated quantities.</p> <p>The Contractor may have some difficulty identifying when a change in such quantities becomes 'substantial' so as to trigger the requirement for notice within 28 days thereafter, pursuant to Sub-Clause 20.1.</p>
	<p>(b) a cause of delay giving an entitlement to an extension of time under any Sub-Clause of the Conditions.</p>	<p>The requirement for the change to be 'substantial' not only creates some potential for differences of opinion but also means, by inference, that delays caused by changes in quantities that are not substantial do not trigger an entitlement to an extension of the Time for Completion.</p> <p>Pursuant to Sub-Clause 13.3 [Variation Procedure] each Variation is valued in accordance with Clause 12 [Measurement and Evaluation] which, in turn, provides that Variations are valued in accordance with Sub-Clause 12.3 [Evaluation]. The effect of these provisions is that a Variation is valued in accordance with the agreed rates and prices unless there is no rate or price specified or no specified rate or price is appropriate due to changed circumstances. No explicit provision is made at Sub-Clause 12.3 for the time related costs of a Variation to be added to the valuation.</p> <p>Any time related costs of a Variation are, nevertheless, payable under this regime and should be claimed accordingly. In particular, a Variation or a substantial increase in the quantity of an item of work that results in work (or the Works) being performed over a longer period than planned may qualify for an adjustment to the applicable rates or prices (including preliminaries) for the varied work, to reflect a change in the duration or other circumstances of execution.</p> <p>The Sub-Clauses giving rise to an entitlement to an extension of time are Sub-Clause 1.9 [Delayed Drawings or Instructions], 2.1 [Right of Access], 4.7 [Setting Out], 4.12 [Unforeseeable Physical Conditions], 4.24 [Fossils], 7.4 [Testing], 8.5 [Delays Caused by Authorities], 8.9 [Suspension], 10.3 [Interference with Tests on Completion], 13.7 [Changes in Legislation], 16.1 [Contractor's Entitlement to Suspend Work], 17.4 [Employer's Risks] and 19.4 [Consequences of Force Majeure]. Other Sub-Clauses may also give rise to an entitlement, though not expressly, such as the indemnities provided by the Employer in favour of the Contractor at Sub-Clauses 1.13(a) [Compliance with Laws], 4.2 [Performance Security], 5.2 [Objection to Nomination], 17.1 [Indemnities] and 17.5 [Intellectual and Industrial Property Rights].</p>

Clause	Title/Abstract	Commentary
	(c) exceptionally adverse climatic conditions.	<p>Each of these Sub-Clauses, with the exception of Sub-Clause 8.5 [Delays Caused by Authorities] gives the Contractor an entitlement to any Cost incurred by virtue of the event giving rise to an extension of time. Cost is defined at Sub-Clause 1.1.4.3 [Money and Payments] and is capable of including time related costs. The Contractor is entitled, in addition, to reasonable profit pursuant to Sub-Clauses 1.9 [Delayed Drawings or Instructions], 2.1 [Right of Access], 4.7 [Setting Out], 7.4 [Testing], 10.3 [Interference with Tests on Completion] and 16.1 [Contractor's Entitlement to Suspend Work].</p> <p>Climatic conditions may also give rise to an entitlement to an extension of time as one of the Employer's Risks, pursuant to Sub-Clause 17.3(h) [Employer's Risks], provided the result is physical loss or damage to the Works or as Force Majeure pursuant to Sub-Clause 19.1 [Definition of Force Majeure].</p> <p>Adverse climatic conditions do not give rise to an entitlement to additional cost, at least not explicitly. Even if the climatic conditions are sufficient to constitute Force Majeure there is no entitlement, pursuant to Sub-Clause 19.4(b) [Consequences of Force Majeure], to recover Cost. However, if the climatic conditions result in damage to the Works and the Contractor incurs delay or cost from rectifying this damage, these are recoverable by virtue of Sub-Clause 17.4 [Consequences of Employer's Risks].</p>
	(e) any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel or the Employer's other contractors.	<p>This wording replaces the looser phrase 'other special circumstances' used in the FIDIC Conditions, 4th Edition and narrows the cause further by requiring that the delay, impediment or prevention is attributable to the Employer rather than as in the FIDIC Conditions, 4th Edition, that the special circumstances are not attributable to a breach by the Contractor. For this purpose, the activities of the Engineer are attributable to the Employer by virtue of the inclusion of the Engineer within the definition of the Employer's Personnel.</p> <p>The inclusion of this cause is the minimum required to avoid offending the prevention principle which, at common law, would place the Employer at risk of putting time 'at large' by an act of delay, impediment or prevention.<sup>41</sup> The approach of civil law, at least in the United Arab Emirates, to acts of prevention absent the safety valve of an explicit entitlement to an extension of time, is not to dispense with the faulty mechanics of the contract but instead to find a solution derived from principles of contractual interpretation and the discretionary powers vested in the domestic courts. This is likely to result in the preservation of the contractual framework governing the time for completion and delay penalties rather than putting time at large.</p> <p>Sub-Clause 8.4 notably does not give the Contractor an entitlement to recover any time related costs accompanying an extension of time for any delay, impediment or prevention caused by or attributable to the Employer. The Contractor must, instead, seek to recover any such time related costs pursuant to any of the Sub-Clauses that confer an explicit right to an extension of the Time for Completion accompanied by an entitlement to Cost, as a component of a valuation of a Variation, as damages for breach of Contract or at law.</p>

<sup>41</sup> Chapter 11.4 [Time for completion: Time at large].



Clause	Title/Abstract	Commentary
	When determining each extension of time under Sub-Clause 20.1 the Engineer may increase but shall not decrease any previous determinations of an entitlement to an extension of time.	Although reference is made to the Engineer making a determination in accordance with Sub-Clause 20.1 [Contractor's Claims] this is most likely a drafting slip and should refer, instead, to Sub-Clause 3.5 as Sub-Clause 20.1 does not empower the Engineer to make a determination. In contrast to the entitlement of the Engineer to make any correction or modification to a Payment Certificate pursuant to Sub-Clause 14.6 [Issue of Interim Payment Certificates], the Engineer is not entitled to decrease the total extension of time. The same restriction is not imposed on a tribunal which has full power to open up, review and revise any certificate or determination of the Engineer pursuant to Sub-Clause 20.6 [Arbitration]. A tribunal is likely, however, to be reluctant to take an extension of time away from the Contractor where the Engineer, acting for the Employer in accordance with Sub-Clause 3.1(a) [Engineer's Duties and Authority], has seen fit to grant an extension on which the Contractor can reasonably be expected to have relied when planning and programming the Works, decisions which cannot be changed retrospectively.
8.6	<b>Rate of Progress</b> The Engineer may instruct the Contractor to issue a revised programme showing how the Contractor proposes to expedite progress to recover a delay other than delay that has occurred as a result of a cause listed in Sub-Clause 8.4. The Contractor must implement such proposals unless the Engineer tells the Contractor not to do so.	<p>The Engineer does not have any power to bring forward the Time for Completion as this would involve an amendment to the Contract, which is expressly proscribed by Sub-Clause 3.1 [Engineer's Duties and Authority]. Similarly, the Engineer has no power to instruct the Contractor to recover delay that is the result of a cause identified in Sub-Clause 8.4 [Extension of Time for Completion]<sup>42</sup> even if the Employer is willing to reimburse the Contractor for doing so.</p> <p>The difficulty that arises is that the Engineer and the Contractor may have a difference of opinion as to whether any delay that the Engineer wishes the Contractor to recover is attributable to a cause listed in Sub-Clause 8.4. The Contractor may be reluctant to submit a revised programme as, having done so, the Contractor is obligated to adopt the proposed recovery methods unless instructed not to do so by the Engineer.</p> <p>If the Engineer issues an instruction requiring the Contractor to submit a revised programme but the Contractor declines to do so on the grounds that the delay is attributable to a cause listed in Sub-Clause 8.4 this deadlock is one for resolution by the DAB.</p> <p>Alternatively, the Contractor may choose to produce a revised programme, implement the Engineer's instruction and submit a claim for additional costs.</p> <p>Irrespective of the Contractor's obligation to comply with an instruction to submit a revised programme setting out the methods to be adopted to expedite progress the Contractor must still submit a revised programme in accordance with Sub-Clause 8.3 [Programme] showing the projected time for completion without the adoption of acceleration measures.</p>

<sup>42</sup> For a discussion of the Contractor's duty to mitigate such delays see Sub-Clause 8.1 [Commencement of Work].

Clause	Title/Abstract	Commentary
8.7	<p><b>Delay Damages</b>            Delay damages are payable for a failure to comply with Sub-Clause 8.2, which sets out the Contractor's obligation to complete the Works within the Time for Completion.</p> <p>Delay damages shall be the only damages due for such default, other than in the event of termination under Sub-Clause 15.2 prior to completion of the Works.</p>	<p>The term 'delay damages' replaces 'liquidated damages' used in the FIDIC Conditions, 4th Edition, a term that has a close association with the long line of authorities on similar provisions under common law. The essence of the provision remains unchanged, however, which is that the parties agree in advance on the level of compensation for a breach of the requirement to complete the Works by the Time for Completion.</p> <p>Although the domestic courts share common law's compensatory philosophy there is no corresponding tradition of rendering void provisions that seek to penalise rather than compensate the Employer. Indeed, in the case of administrative contracts it is recognised that there is no requirement for the delay damages to reflect actual damage at all as administrative contracts are based on the delivery of a public benefit that cannot be quantified in financial terms.<sup>43</sup></p> <p>However, rather than refusing to enforce a penalty clause as in common law jurisdictions, all agreements on compensation are subject to a mandatory power of adjustment by virtue of the UAE Civil Code, Article 390. In consequence, all aspects of levying a penalty are subject to scrutiny by the courts and to their overriding power to intervene to prevent injustice.</p> <p>The default for which delay damages are the sole remedy is a failure to complete the Works by the Time for Completion. This will not necessarily be the only default, however, if the Contractor is in delay. Specifically, the Contractor is required, pursuant to Sub-Clause 8.1 [Commencement of Works] to proceed with the Works with 'due expedition and without delay', breach of which will give rise to a cause of action that will generally exist in parallel with the cause of action for failure to complete by the Time for Completion. Adopting an interpretation that reflects the common intention of the parties and custom and practice delay damages are, it is submitted, the sole remedy for failure to complete by the Time for Completion and any failure to proceed with due expedition and without delay that underlies such failure.</p> <p>This is also consistent with the exception to delay damages being the sole remedy for a failure to complete by the Time for Completion. Delay damages are not the sole remedy in the event of termination under Sub-Clause 15.2 [Termination by Employer] prior to completion of the Works. It appears that 'completion' in this context refers to completion required to trigger the Taking Over Certificate. Following a termination prior to the Taking Over Certificate being issued the Employer is entitled, pursuant to Sub-Clause 15.4(c) [Payment after Termination], to recover any losses and damages incurred and any extra costs of completing the Works.<sup>44</sup></p>

<sup>43</sup> Chapter 12.4 [Delay damages and other remedies: administrative contracts].

<sup>44</sup> Sub-Clause 15.4(b) contemplates an entitlement to 'damages for delay in Completion (if any)', though this wording is not repeated in Sub-Clause 15.4(c).

Clause	Title/Abstract	Commentary
		<p>This could mean that:</p> <ul style="list-style-type: none"> <li>• delay damages are displaced by an entitlement to general damages even if, as is often the case, the Time for Completion has passed and an entitlement to delay damages has accrued by the time that notice of termination is given, or</li> <li>• the Employer has a claim for delay damages in addition to losses and damages caused by a failure to complete by the Time for Completion, or</li> <li>• delay damages remain the only remedy for a failure to complete the Works by the Time for Completion but that an entitlement to any other damages arising from the termination is preserved.</li> </ul> <p>The first interpretation permits the Employer to elect either to retain the Contractor and the entitlement to delay damages or to give a notice of termination and thereby replace delay damages with actual damages. This interpretation must be reconciled with Sub-Clause 15.2 [Termination by Employer], which provides that termination shall not prejudice any rights of the Employer under the Contract or otherwise, which include an accrued entitlement to delay damages.</p> <p>Issuing a notice of termination in this scenario has the advantage that it allows the Employer to circumvent the cap on delay damages but it has the drawback that the losses must be proved and are limited by Sub-Clause 17.6 [Limitation of Liability].</p> <p>The second interpretation, if it permits a double recovery, is at odds with the compensatory philosophy of both common law and civil law jurisdictions which may ultimately be resolved, even if correct, by the application of the UAE Civil Code, Article 390.</p> <p>The third interpretation avoids this outcome by restricting any damages awarded pursuant to Sub-Clause 15.2 to those caused by termination only, and not for delay that pre-dates termination (which is covered by a separate award of delay damages). Although the exception to the exclusive nature of delay damages is tied specifically to the Contractor's default, being a failure to complete the Works by the Time for Completion, the third interpretation is, it is submitted, likely to be closest to the common intention of the parties and custom and practice.</p> <p>If termination occurs after completion the Employer has no recourse other than for delay damages for a failure to complete by the Time for Completion. The Employer retains any accrued entitlement to delay damages, which is the sole remedy for the Contractor's failure to complete by the Time for Completion and an entitlement pursuant Sub-Clause 15.4 to losses and damages, which include the extra cost of employing another contractor to complete the outstanding works. Although the Employer is generally unlikely to terminate after the Works have been taken over, especially as there is an express entitlement to employ another contractor to complete the outstanding works pursuant to Sub-Clause 11.4 [Failure to Remedy Defects] without the requirement to issue a notice of termination, this remains an option if the Contractor is unable to remedy any defects and complete any outstanding work due, for example, to insolvency.</p>

Clause	Title/Abstract	Commentary
	The Contractor shall subject to Sub-Clause 2.5 [Employer's Claims] pay delay damages.	<p>The requirement for the Employer to give notice of a claim for delay damages was introduced in the FIDIC Conditions. Previously, under the FIDIC Conditions, 4th Edition the Employer was permitted to deduct liquidated damages (as they were then called) from any amount due to the Contractor under an interim certificate.</p> <p>The Employer should give notice of an entitlement to delay damages and obtain an Engineer's determination in respect thereof before withholding payment. A set off or deduction of delay damages from an amount due for payment under an Interim Payment Certificate without notice pursuant to Sub-Clause 2.5 [Employer's Claims] and a favourable determination by the Engineer risks triggering the Contractor's rights pursuant to Sub-Clauses 16.1 [Contractor's Entitlement to Suspend Work] and 16.2 [Termination by Contractor].</p> <p>As the Contractor's liability to pay delay damages is explicitly subject to Sub-Clause 2.5, the Engineer should not pre-empt this contractual process by deducting delay damages from a Payment Certificate before notice has been given.</p>
9.1	<p><b>Tests on Completion</b></p> <p>The Contractor shall carry out the Tests on Completion in accordance with Sub-Clause 7.4 [Testing] after providing the documents in accordance with Sub-Clause 4.1(c) [Contractor's General Obligations].</p>	<p>Prior to the Tests on Completion, which are not to be confused with Tests after Completion, the Contractor is required, by virtue of Sub-Clause 4.1(d) [Contractor's General Obligations] to supply the as-built documents and operation and maintenance manuals. Unless such part of the Works is minor and does not substantially affect the use of the Works, the Taking Over Certificate will not be due until the as-built documents and operation and maintenance manuals are submitted. However, this obligation applies only to any part of the Works designed by the Contractor.</p>
9.3	<p><b>Retesting</b></p> <p>If the Works or a Section fails a Test on Completion the Engineer may require the failed tests to be retaken.</p>	<p>Tests on Completion are defined at Sub-Clause 1.1.3.4 [Dates, Tests, Periods and Completion] as the tests that are specified in the Contract or agreed by both parties or instructed by a Variation. As with Sub-Clauses 7.5 [Rejection] and 7.6 [Remedial Work] the testing regime does not permit the Engineer to alter the Contractor's obligations, a power that is explicitly denied to the Engineer by virtue of Sub-Clause 3.1 [Engineer's Duties and Authority].</p>

Clause	Title/Abstract	Commentary
10.1	<p><b>Taking Over of the Works and Sections</b></p> <p>The Works shall be taken over when the conditions set out in Sub-Clause 8.2 [Time for Completion] have been satisfied, when the Works have been completed in accordance with the Contract save for any minor outstanding work or defects that do not substantially affect the use of the Works and the Taking Over Certificate has been issued.</p>	<p>Essentially, three conditions must be fulfilled in order for the Employer to be required to take over the Works:</p> <ul style="list-style-type: none"> <li>• passing of the Tests on Completion, except those for parts that do not substantially affect the Employer's use of the Works</li> <li>• completion of the Works except for any minor work and defects that do not substantially affect the use of the Works</li> <li>• issuance of a Taking Over Certificate by the Engineer.</li> </ul> <p>If the Engineer rejects the Contractor's application for the Taking Over Certificate the Engineer must provide the reasons and a list of the work to be completed to enable the Taking Over Certificate to be issued. In contrast, there is no obligation on the Engineer to provide a list of outstanding work to be performed during the Defects Notification Period if the Taking Over Certificate is issued.</p> <p>The issuing or deemed issuing of the Taking Over Certificate has a number of significant consequences. First, the Contractor ceases to be responsible for the care of the Works as per Sub-Clause 17.2 [Contractor's Care of the Works], risk passing back to the Employer. The Contractor, nevertheless, must maintain the insurance for the Works, pursuant to Sub-Clause 18.2 [Insurance for Works and Contractor's Equipment], until the Performance Certificate is issued unless otherwise agreed. Therefore, the Contractor ceases, in general, to be liable for damage to the Works but remains liable for a failure to procure and maintain insurance that complies with the Contract. This includes liability for loss or damage to the Works if the insurance fails to provide an indemnity by reason of the Contractor's breach of the insuring obligations.</p> <p>Second, the Contractor ceases to have possession of the Site. The entitlement to possession conferred by virtue of Sub-Clause 2.1 [Right of Access to the Site] is replaced, though not explicitly, with such right of access as is reasonably required to complete the outstanding work after the Works are taken over pursuant to Sub-Clause 11.7 [Right of Access]. The right of possession and, in particular, the effect of taking over is relevant to any possessory lien vested in the Contractor as the lien is extinguished when the Site passes out of the Contractor's possession.<sup>45</sup></p> <p>Third, by virtue of the opening words of Sub-Clause 13.1 [Right to Vary] the Engineer loses the right to initiate a Variation of the Works except for the purpose of remedying defects or damage pursuant to Sub-Clause 11.2 [Cost of Remedying Defects].</p> <p>Fourth, the first moiety of the Retention Money falls due pursuant to Sub-Clause 14.9 [Payment of Retention Money].</p> <p>In contrast, the Taking Over Certificate does not constitute acceptance of the Works by the Employer. Only the Performance Certificate, by virtue of Sub-Clause 11.9 [Performance Certificate] signals the Employer's acceptance of the Works which can, in principle, still be rejected after being taken over.<sup>46</sup></p>

<sup>45</sup> Chapter 18.2 [Self-help remedies: possessory lien].

<sup>46</sup> Further commentary on acceptance and rejection is provided at Sub-Clause 11.4 [Failure to Remedy Defects].

Clause	Title/Abstract	Commentary
	<p>If the Engineer fails to issue the Taking Over Certificate or to reject the Contractor's application and if the Works are substantially in accordance with the Contract the Taking Over Certificate shall be deemed to be issued.</p>	<p>Establishing that 'the Works are substantially in accordance with the Contract' is a lower threshold than the threefold test to be applied by the Engineer for issuance of the Taking Over Certificate. Thus, if the Engineer fails to issue the Taking Over Certificate or to reject the application within 28 days the Works may be deemed to be taken over in circumstances where the Contractor's application could have been rejected.</p>
10.2	<p><b>Taking Over of Parts of the Works</b> The Employer shall not use any part of the Works unless and until the Engineer has issued a Taking Over Certificate for this part.</p>	<p>If, in breach of Sub-Clause 10.2, the Employer uses any part of the Works prior to the Taking Over Certificate being issued such part is deemed to be taken over. In addition, the Contractor is entitled, subject to Sub-Clause 20.1 [Contractor's Claims], to any Cost plus reasonable profit incurred as a result of this breach.</p> <p>It follows that if the Employer uses the whole of the Works prior to the Taking Over Certificate being issued the same rights and remedies apply. In such circumstances, the Engineer is required, if so requested, to issue the Taking Over Certificate which, pursuant to Sub-Clause 1.3 [Communications], must not be unreasonably withheld or delayed. The Taking Over Certificate, in turn, triggers the release of the first moiety of the Retention Money pursuant to Sub-Clause 14.9 [Payment of Retention Money] and a pro rata reduction of delay damages.</p>
11.1	<p><b>Completion of Outstanding Work and Remedying Defects</b> The Contractor shall complete the outstanding work and remedy all defects and damage notified by or on behalf of the Employer on or before the expiry of the Defects Notification Period.</p>	<p>Although, in practice, the Engineer often prepares a list of outstanding work and defects when issuing the Taking Over Certificate there is no explicit obligation to do so. It may, however, be inferred from Sub-Clauses 10.1(a) and (b) [Taking Over of the Works and Sections], 11.1(a) [Completion of Outstanding Works and Sections], 11.4 [Failure to Remedy Defects] and 14.9 [Payment of Retention Money] that the Engineer must notify the Contractor of any such incomplete work or defects. If the absence of any such notice denies the Contractor a proper opportunity to complete outstanding work or to remedy a defect the Employer is likely to be limited to recovering the saving made by the Contractor from not having to undertake the work instead of the cost incurred by the Employer.</p> <p>Additionally, the Employer has until the expiry of the Defects Notification Period to notify defects and damage that the Employer requires remedied, liability for the cost of which is allocated in accordance with Sub-Clause 11.2 [Cost of Remedying Defects]. As, pursuant to Sub-Clause 17.2 [Contractor's Care of the Works], the Employer assumes the risk of any damage to the Works following the Works being taken over, the Contractor is not, in general, liable to repair, at the Contractor's own cost, damage to the Works that occurs after taking over.</p>

Clause	Title/Abstract	Commentary
11.2	<p data-bbox="314 574 430 648"><b>Cost of Remedying Defects</b></p> <p data-bbox="314 654 503 1264">The Contractor shall be responsible for remedying defects or damage occurring during the Defects Notification Period if attributable to any design for which the Contractor is responsible, Plant Materials or workmanship not being in accordance with the Contract, or a failure by the Contractor to comply with any other obligations. Otherwise, the Contractor shall be entitled to be paid for such rectification work as a Variation.</p>	<p data-bbox="535 255 1134 569">The use of the phrase the ‘Defects Notification Period’ in place of the ‘Defects Liability Period’ employed in the FIDIC Conditions, 4th Edition, avoids the misleading implication from the latter that liability for defects is confined to the period during which the Contractor is required to attend to outstanding work after taking over.<sup>47</sup> The Defects Notification Period is a contractual device that allows the Employer to use the Works prior to completion of the Contractor’s obligations while retaining many of the rights that normally subsist during the performance phase of a contract, including, completion, repair and rejection of parts of the Works.<sup>48</sup></p> <p data-bbox="535 574 1134 731">Although the Contractor is required to repair any defect or damage notified during the Defects Notification Period such repairs shall only be undertaken at the Contractor’s expense in the specified circumstances. Essentially, a breach of the Contract is required, not merely dissatisfaction of the Engineer or the Employer with some aspect of the Works.</p> <p data-bbox="535 737 1134 894">As any part of the Works designed by the Contractor is required, pursuant to Sub-Clause 4.1(c) [Contractor’s General Obligations] to be fit for its intended purpose the threshold for imposing the costs of any defect in such a part of the Works on the Contractor, is lower than it is for any other part of the Works.</p> <p data-bbox="535 899 1134 1057">Establishing liability for the costs of repairing defects in parts of the Works for which the Contractor does not have design liability requires an assessment of the Contractor’s obligations under the Contract and, in particular, the Contractor’s obligations pursuant to Clause 7 [Plant, Materials and Workmanship].</p> <p data-bbox="535 1062 1134 1264">Responsibility for damage is dealt with separately to responsibility for defects. As the Contractor is not responsible for the care of the Works after the Taking Over Certificate is issued (or is deemed to be issued), damage to the Works is generally to be repaired at the Employer’s expense. This includes wear and tear by virtue of the express exclusion at Sub-Clause 11.1 [Completion of Outstanding Work and Remedying Defects].</p> <p data-bbox="535 1269 1134 1424">The Contractor is not, therefore, required to bear the cost of general repair and maintenance unconnected with a breach of the Contract during the Defects Notification Period but is required to remedy any defects or damage as may be notified by the Employer subject to being entitled to be paid for this remedial work in accordance with the Variation procedure.</p>

<sup>47</sup> Further commentary on the duration of the parties’ liabilities is provided at Sub-Clause 11.10 [Unfulfilled Obligations].

<sup>48</sup> Further commentary on acceptance and rejection is provided at Sub-Clause 11.9 [Performance Certificate].

Clause	Title/Abstract	Commentary
11.4	<p><b>Failure to Remedy Defects</b></p> <p>If the Contractor fails to remedy any defect or damage by a reasonable notified date the Employer can undertake the work at the Contractor's expense or deduct a reasonable valuation for such work from the Contract Price or if the defect deprives the Employer of substantially the whole benefit of the Works terminate all or part of the Contract and recover any amounts paid for the Works or such part plus financing and other associated costs.</p>	<p>The enumerated options are only available to the Employer if the defect or damage is attributable to the causes set out at Sub-Clause 11.2 [Cost of Remedying Defects]. These require a breach of the Contract by the Contractor or for the defect or damage to be attributable to design for which the Contractor is responsible. The options are not applicable for a failure to perform work which the Contractor is not required to execute at the Contractor's own expense. The Contractor is, nevertheless, required to rectify defects or damage, if so notified. Although a failure to execute such repair work does not give rise to the options described, the remedies for a failure to execute the notified remedial works include a notice to correct followed by a notice of termination, pursuant to Sub-Clause 15.2 [Termination by Employer].</p> <p>The implication of the options specified at Sub-Clause 11.4(a) and (b) – which, unlike elsewhere in the Conditions including Sub-Clause 11.4(c), are not expressed to be without prejudice to any other rights – is that the Employer is not entitled to exercise them unless the Contractor has first had an opportunity to remedy under Sub-Clause 11.1 [Completion of Outstanding Work and Remedying Defects] and then has had reasonable notice of a further fixed date by which the work shall be executed. This is consistent with the Contractor having a right as well as an obligation to execute, complete and remedy defects in the Works. The same philosophy underpins the prohibition against Variations that omit any part of the Works for the purpose of awarding these to others (Sub-Clause 13.1(d) [Right to Vary]) and a similar restriction in relation to the Employer's right to terminate for convenience (Sub-Clause 15.5 [Employer's Entitlement to Termination]). Any failure to permit the Contractor to remedy a defect or any damage constitutes a breach of the Contract. If the Employer procures remedial work otherwise than in accordance with this procedure the Contractor might, accordingly, resist any recovery of any additional costs of doing so.<sup>49</sup></p> <p>The Employer's right, under Sub-Clause 11.4(c), to reject the whole or any major part of the Works if the defect deprives the Employer of substantially the whole benefit of the Works is made possible because, despite the Employer taking over the Works, which would ordinarily constitute acceptance, the parties explicitly agree by virtue of Sub-Clause 11.9 [Performance Certificate] that only the Performance Certificate constitutes acceptance. Rejection following the Works being taken over is likely, however, to trigger an examination of a number of principles of applicable law including waiver (noting that the proviso that no approval, examination, inspection, test or similar act by the Engineer shall relieve the Contractor from any responsibility under the Contract, is limited to acts of the Engineer not the Employer) and the statutory rights of a contractor to compensation for the benefits conferred by the attachment of a building or facility to the land.<sup>50</sup></p>

<sup>49</sup> In *Woodlands Oak Limited v Conwell* [2011] EWCA Civ 254 the English Court of Appeal reached a similar conclusion on the Employer's obligation to mitigate any loss.

<sup>50</sup> UAE Civil Code, Articles 1270 and 1271 as examined at Chapter 18.1 [Self-help remedies: Retention of ownership].



Clause	Title/Abstract	Commentary
11.7	<p><b>Right of Access</b></p> <p>The Contractor shall have such right of access as is reasonably required to remedy defects and damage until the Performance Certificate is issued.</p>	<p>If, under Sub-Clause 11.4(c), the Employer exercises the option of terminating the Contract, the entitlement to recover all sums paid plus financing costs, the costs of dismantling the Works, clearing the site and returning Plant and Materials to the Contractor are stated to be 'without prejudice to any other rights, under the Contract or otherwise' and, therefore, are not exhaustive. The scope of the Employer's entitlement to compensatory damages for breach of the Contract – specifically contemplated by inclusion of 'or otherwise' – will, however, be subject to the limitations imposed by Sub-Clause 17.6 [Limitation of Liability].</p> <p>Termination pursuant to Sub-Clause 11.4(c) is not linked to notice of termination pursuant to Clause 15 [Termination by Employer] and, in consequence, does not address issues such as the role of the Engineer in determining the value of any part of the Works rejected, the use of Contractor's Documents in respect of such part, the return of the Performance Security and the ongoing liability of the Contractor for the consequences of the rejection of any part or the whole of the Works, all of which will, in consequence, have to be determined initially by the DAB if the parties cannot otherwise agree.</p> <p>The Employer is required, pursuant to Sub-Clause 2.1 [Right of Access to the Site] to provide the Contractor with access to, and possession of, the Site at such times and in such a manner as shall allow the Contractor to proceed with the Works in accordance with the programme. This means that the obligation continues throughout the duration of the Works, except as set out in the Appendix to Tender.</p>
11.8	<p><b>Contractor to Search</b></p> <p>Unless the defect is to be remedied at the Contractor's cost, the Contractor is entitled to the Cost of the search plus reasonable profit, which shall be determined by the Engineer if not agreed, in accordance with Sub-Clause 3.5 and be included in the Contract Price.</p>	<p>The separate right of access, unaccompanied by a right of possession, granted to the Contractor by Sub-Clause 11.7 for the purpose of executing any work that is outstanding after the Taking Over Certificate is issued, replaces the general right of possession and access.</p> <p>Unlike at Sub-Clause 2.1, there is no explicit entitlement to additional Cost in the event that access as 'reasonably required' is not provided, but any such failure will constitute a breach of the Contract and will give rise to an entitlement to damages instead.</p> <p>As per Sub-Clause 11.2 [Cost of Remedying Defects] and notwithstanding the general obligation to remedy defects pursuant to Sub-Clause 4.1 [Contractor's General Obligations] the Contractor does not warrant that the Works will be free of defects and, therefore, is entitled to be reimbursed the cost of searching for defects for which the Contractor is not liable.</p> <p>In contrast to other provisions of the Contract, the Contractor's entitlement to Cost plus reasonable profit is not expressly subject to Sub-Clause 20.1 [Contractor's Claims]. The Engineer is obligated to make an assessment of the Cost and reasonable profit and to reflect this in an Interim Payment Certificate or the Final Payment Certificate by adjusting the Contract Price.</p>

Clause	Title/Abstract	Commentary
11.9	<p><b>Performance Certificate</b></p> <p>Performance of the Contractor's obligations shall not be considered to have been completed until the Engineer has issued the Performance Certificate to the Contractor.</p> <p>Only the Performance Certificate shall be deemed to constitute acceptance of the Works.</p>	<p>Both the Contractor and the Employer have obligations after the Performance Certificate is issued, including, in the case of the latter, payment of any balance due under the Final Payment Certificate, but the Performance Certificate signals the end of the Contractor's right and obligation to perform the Works and to remedy defects and damage.<sup>51</sup> Other obligations that cease on the Performance Certificate being issued include the provision of insurance for the Works, pursuant to Sub-Clause 18.2 [Insurance for Works and Contractor's Equipment] and for third party property pursuant to Sub-Clause 18.3 [Insurance Against Injury to Persons and Damage to Property].</p> <p>The Employer is required to return the Performance Security within 21 days after receiving the Performance Certificate. The Employer may demand that the Performance Security be extended pursuant to Sub-Clause 4.2 [Performance Security] if the defects notification period is within 28 days of expiring and Contractor has not become entitled to receive the Performance Certificate.</p> <p>Agreement that only the Performance Certificate constitutes acceptance of the Works is probably intended to preserve the Employer's right to reject the whole of the Works until the Performance Certificate is issued. The Employer's right to reject the Works is, nevertheless, conditional on the Employer being deprived of 'substantially the whole benefit of the Works' and the Contractor having an opportunity, within a reasonable time, to remedy the defect or damage that is the cause thereof, pursuant to Sub-Clause 11.4 [Failure to Remedy Defects]. The reference to acceptance is closely associated with the common law remedy of repudiation. Although rejection of work or materials is recognised as a remedy in the UAE Civil Code, for example at Articles 237 and 877, there is no direct counterpart in civil law to the common law remedy of repudiation nor the loss of this remedy by virtue of acceptance. The Employer may, in any event, have an obligation to compensate the Contractor for the value of the work performed by virtue of the UAE Civil Code, Articles 1270 and 1271.<sup>52</sup></p>
11.10	<p><b>Unfulfilled Obligations</b></p> <p>Each Party remains liable for obligations that are unfulfilled at the date on which the Performance Certificate is issued, for which purpose the Contract is deemed to remain in force.</p>	<p>This Sub-Clause should be read together with Sub-Clause 14.14 [Cessation of Employer's Liability] which provides that the Employer is relieved of liability for any matter or thing not included in the Statement at Completion and/or the Final Statement.</p> <p>The Contractor has no further obligations to perform the Works or to remedy defects after the Performance Certificate has been issued but both Parties remain liable for any unfulfilled obligations, including in the case of the Contractor, any unfulfilled obligation to execute the Works in accordance with the Contract.</p> <p>The duration of each Party's liability is determined by the relevant statutory time limits and will, accordingly, depend on the nature of the obligation.<sup>53</sup> Common claims such as non-payment and latent defects are governed by the UAE Code of Commercial Practice, Article 95, which imposes a ten year prescription period running from the due date for performance.</p>

<sup>51</sup> This mirrors the UAE Civil Code, Article 892 as discussed in Chapters 16 [Suspension] and 17 [Termination].

<sup>52</sup> Chapter 18.1 [Self-help remedies: Retention of ownership].

<sup>53</sup> Chapter 21 [Prescription].

Clause	Title/Abstract	Commentary
12.1	<p><b>Works to be Measured</b></p> <p>The Works shall be measured and valued for payment in accordance with this Clause.</p>	<p>Pricing based on unit rates or, in other words, remeasurement of the Works, rather than a lump sum, is recognised as a pricing method in the UAE Civil Code at Article 886(1) but as this is not a mandatory provision the measurement provisions of the Contract will take precedence.</p> <p>Notwithstanding this remeasurement pricing philosophy the Contract contemplates, at Sub-Clause 14.1(d) [The Contract Price], the inclusion of lump sums for elements of Works, and permits the Engineer to take account of a breakdown of any such lump sum element when preparing a Payment Certificate. The method of valuing such elements is not, however, expressly prescribed.</p> <p>The law applicable to contracts with the Government of Dubai provides that construction contracts are not to be concluded on a lump sum basis unless it is impossible to measure and value the works.<sup>54</sup> The procurement regulations applicable to Abu Dhabi government projects appear not to contemplate the use of remeasurement contracts as quantities are fixed, subject to being adjusted by a variation with the 'mutual consent of the parties';<sup>55</sup> which represents a departure from the earlier approach<sup>56</sup> and is at odds with the approach adopted in practice.<sup>57</sup></p>
12.2	<p><b>Method of Measurement</b></p> <p>Measurement shall be made of the net actual quantity.</p>	<p>The quantities set out in the Bill of Quantities, if any, are estimated and not to be taken as the actual quantities by reason of Sub-Clause 14.1 [The Contract Price]. However, a substantial increase in the quantities offers the Contractor a ground for seeking an extension of time pursuant to Sub-Clause 8.4(a) [Extension of Time for Completion].</p> <p>The Engineer is permitted to omit from such measurement of net actual quantities the value of any work or other obligations that is defective or has not been performed in accordance with the Contract, pursuant to Sub-Clause 14.6 [Issue of Interim Payment Certificates]. Although no provision is made for the valuation of any item of work that is the subject of a lump sum<sup>58</sup> this is generally valued on a progress basis, an acceptable solution provided that this is consistent with the requirement for a fair determination pursuant to Sub-Clauses 12.3 [Evaluation] and 3.5 [Determinations].</p> <p>The method of measurement is often supplemented in the Bill of Quantities or elsewhere with additional or more detailed principles, most commonly by reference to the Principles of Measurement (International) For Works of Construction, published by The Royal Institution of Chartered Surveyors (1979).</p>

<sup>54</sup> Dubai Law No. 6/1997, Article 72

<sup>55</sup> Procurement, Tenders and Auctions Guidebook, Article 43, issued under Abu Dhabi Law No. 6/2008.

<sup>56</sup> Abu Dhabi Law No. 4/1977, which governed public procurement in the Emirate of Abu Dhabi before being repealed by Abu Dhabi Law No. 6/2008, included a provision similar to those applicable to Federal Government and Dubai government projects.

<sup>57</sup> For example, Abu Dhabi Law No. 21/2006 introduced approved forms of construction contract based on the FIDIC Conditions, which include the standard mechanism for measurement of the work.

<sup>58</sup> As contemplated for some items of the Works by, for example, Sub-Clause 14.1(d) [The Contract Price].

Clause	Title/Abstract	Commentary
12.3	<p><b>Evaluation</b></p> <p>The Engineer shall agree or determine the Contract Price by evaluating each item of work. A new rate or price shall be applied in certain circumstances, including if the work is instructed as a Variation and no rate or price is specified in the Contract or no specified rate or price is appropriate.</p>	<p>The Engineer is required to evaluate each item of work and make a fair determination thereof in accordance with the Contract taking due regard of all relevant circumstances and in accordance with Sub-Clause 3.5 [Determinations]. In each case the Engineer shall apply the appropriate rate or price for each item being the agreed rate or price. If there is no such agreed rate the Engineer should apply an analogous rate or price. However, the Engineer can also determine that neither approach is appropriate and, in such circumstances, may apply a new rate albeit derived from 'any relevant rates or prices in the contract'.</p> <p>Crucially, the existing rates and prices may no longer be appropriate as envisaged by Sub-Clause 12.3(b)(iii) if a Variation causes the Works to be delayed or disrupted and causes any item of work to be performed, therefore, at greater expense than envisaged at the time of tender. Indeed, a Variation pursuant to Sub-Clause 13.1(f) changing the sequence or timing of the Works results in no remeasurable work yet there is likely to be a cost consequence to the Contractor. Absent any general entitlement to loss and expense, Sub-Clause 12.3(b) constitutes the most obvious contractual source of an entitlement to recover time related costs for a Variation<sup>59</sup> and Sub-Clause 12.3(b)(iii) should, therefore, be read, it is submitted, in the context of an intention to provide the Contractor with an entitlement to an adjustment of the agreed rates and prices to reflect changed circumstances. Accordingly, the Engineer should apply varied rates and prices notwithstanding the availability of agreed rates and prices for the work included in a Variation on the basis that these rates and prices were prepared in reliance upon a programme or in other circumstances that no longer apply. This does not prejudice the Contractor's entitlement to time related costs pursuant to other provisions of the Contract, notably those providing an explicit entitlement to Cost.<sup>60</sup></p> <p>The reference to applying 'the appropriate rate or price' is the source of the Contractor's entitlement to have a lump sum element of the Works included in the Contract Price notwithstanding the remeasurement nature of the FIDIC Conditions.</p> <p>Unlike the corresponding Sub-Clause 52.2 of the FIDIC Conditions, 4th Edition, there is no explicit exclusion of a Variation from the valuation process if notice of a claim is not given. As measurement is required to be made of the net actual quantity of each item of the Permanent Works, pursuant to Sub-Clause 12.2 [Method of Measurement], the Engineer should include a valuation of any varied work in an Interim Payment Certificate. The Contractor may submit that such evaluation is not conditional on notice of a claim for 'additional payment' pursuant to Sub-Clause 20.1 [Contractor's Claims] and that, therefore, if the claim to additional payment arises from a Variation, or at least from the measurable part thereof, notice is not required.</p>

<sup>59</sup> Time related costs arising from causes other than a Variation are often recoverable pursuant to an explicit entitlement contained in an individual Sub-Clause, a list of which is included in the commentary on Sub-Clause 8.4(b).

<sup>60</sup> See footnote above.

Clause	Title/Abstract	Commentary
12.4	<p><b>Omissions</b> The Engineer shall agree or determine the cost of omitted work whenever an omission forms part (or all) of the Variation.</p>	<p>A Variation shall not, pursuant to Sub-Clause 13.1(d), omit work in order for such work to be carried out by other contractors.</p> <p>Omissions properly instructed pursuant to Sub-Clause 13.1 [Right to Vary] (i.e. an omission that is not made for the purpose of awarding the omitted work to others) would not, however, in the absence of Sub-Clause 12.4, result in any reimbursement of the Contractor for abortive work as only net actual quantities of the Permanent Works are to be measured pursuant to Sub-Clause 12.2 [Method of Measurement]. Accordingly, Sub-Clause 12.4 provides the Contractor with a mechanism by which to obtain reimbursement for work rendered abortive by a valid omission instruction.</p>
13.1	<p><b>Right to Vary</b> Variations may be initiated by the Engineer at any time prior to the issuing of the Taking Over Certificate, either by an instruction or a request for a proposal.</p> <p>(a) A Variation may include changes to the quantities of any item of work included in the Contract (however, such changes do not necessarily constitute a Variation).</p>	<p>The Engineer's power to initiate a Variation ceases when the Taking Over Certificate is issued. As the Taking Over Certificate can, pursuant to Sub-Clause 10.1 [Taking Over of the Works and Sections], be deemed to be issued it is possible for the Engineer to lose the power to initiate Variations prior to actually issuing the Taking Over Certificate. If the Employer uses all or any part of the Works prior to a Taking Over Certificate being issued, the Works or that part of the Works is, pursuant to Sub-Clause 10.2 [Taking Over of Parts of the Works], deemed to be taken over but the Taking Over Certificate is not deemed to be issued. Instead, the Contractor may request the Taking Over Certificate, which the Engineer shall then issue. If the Engineer seeks to rely on its own failure to issue the Taking Over Certificate to initiate Variations after the Works or part thereof have been put into use the Engineer and Employer may face an objection to such reliance based on the UAE Civil Code, Articles 246 and 106, which impose on the parties a general duty of good faith and a prohibition on abuse of rights respectively.</p> <p>The quantities set out in the Bill of Quantities or other Schedules are estimated and not to be taken as the actual or correct quantities, pursuant to Sub-Clause 14.1(c) [The Contract Price]. The Contract Price is derived from the actual net quantity of each item of the Permanent Works, pursuant to Sub-Clause 12.2 [Method of Measurement]. Accordingly, flexibility is built into the Contract to accommodate a lack of precision as to the quantities of work and materials to be provided by the Contractor such that a change in quantities does not require a Variation instruction from the Engineer. The Engineer may, however, issue an instruction altering the quantities of any item of work which then constitutes a Variation.</p> <p>The route by which the quantities are changed affects the contractual mechanism for valuing the Works, determining, in particular, whether the change in quantities entitles the Contractor to a new rate or price. Specifically, Sub-Clause 12.3(a) [Evaluation] imposes a quantity and value threshold on the reassessment of the applicable rate and price for changed quantities in contrast to Sub-Clause 12.3(b) which does not. In essence, a Variation instruction resulting in a change in quantities falls under Sub-Clause 12.3(b), presenting the Contractor with an opportunity to seek an adjustment of the agreed rates and prices irrespective of the scale of the change whereas a difference in quantities without a variation instruction generally does not.</p>

Clause	Title/Abstract	Commentary
		<p>A Variation instruction also provides a ground for an extension of the Time for Completion, pursuant to Sub-Clause 8.4(a) [Extension of Time for Completion], a clearer trigger for an entitlement than a 'substantial change in the quantity of an item of work included in the Contract', which is also granted pursuant to Sub-Clause 8.4(a).</p>
	(b) Omission of work is permitted provided this is not to be carried out by others.	<p>The Contractor may claim that a breach of the restriction on omitting any part of the Works for this to be carried out by others amounts to a deliberate default, paving the way for indirect and consequential damages, including loss of profit to be recoverable, pursuant to Sub-Clause 17.6 [Limitation of Liability].<sup>61</sup></p>
	(e) A Variation may include additional work, Plant, Materials or services necessary for the Permanent Works.	<p>Any additional work, Plant, Materials or services must be 'necessary' in order to entitle the Engineer to issue an instruction pursuant to Sub-Clause 13.1(e). As necessity sets a relatively high threshold for justification of a Variation the Contractor may have the option of challenging the authority of the Engineer to issue an instruction in reliance on Sub-Clause 13.1(e). However, the Engineer is also entitled to instruct changes to the 'quality and other characteristics' of any item of work, pursuant to Sub-Clause 13.1(b) without any such change being 'necessary' and, therefore, if the change relates to an existing item of work, rather than additional work, the Engineer's authority is not restricted in the same way.</p>
	(f) A Variation may include changes to the sequence or timing of the execution of the Works.	<p>The power of the Engineer to change the 'sequence or timing' of the execution of the Works does not entitle the Engineer to bring forward the Time for Completion. This is because the Time for Completion is agreed between the Parties, and the Engineer is granted a power to extend the Time for Completion only.</p> <p>In the FIDIC Conditions, 4th Edition the identical phrase was preceded by 'specified', restricting sequence or timing changes to those prescribed by the Contract, significantly limiting the application of this power in practice.</p> <p>Alteration by the Engineer of the Contractor's sequencing of the Works has a high potential for giving rise not only to differences of opinion as to the effect this has on the Contractor's progress but also to differences of opinion as to the cost implications for the Contractor. The Contractor's entitlement to an extension of the Time for Completion if delay is caused by re-sequencing arises pursuant to Sub-Clause 8.4(a) [Extension of Time for Completion]. Evaluation of the Contractor's entitlement to financial compensation is more problematic as Variations fall to be measured on the basis of net actual quantity of each item of the Permanent Works, pursuant to Sub-Clause 12.2 [Method of Measurement], and on the basis of rates and prices for the work instructed, pursuant to Sub-Clause 12.3(b) [Evaluation], whereas a change in the sequence or timing of the Works will often result in no change to the measurable quantities of work.<sup>62</sup></p>

<sup>61</sup> Chapter 19.5 [Damages: Loss of profit].

<sup>62</sup> For a discussion of this issue refer to the commentary on Sub-Clause 12.3 [Evaluation]. Also, refer to the commentary on Sub-Clause 4.6 [Cooperation] pursuant to which an instruction may be given allowing the Employer's Personnel, other contractors or public authorities an opportunity to carry out work on or near the Site, thus potentially altering the timing or sequence of the Works.

Clause	Title/Abstract	Commentary
13.2	<p><b>Value Engineering</b></p> <p>If a proposal, which is approved by the Engineer, includes a change in the design then unless otherwise agreed the Contractor shall design this part and sub-paragraphs (a) to (b) of Sub-Clause 4.1 shall apply.</p>	<p>A value engineering mechanism was not included in the FIDIC Conditions, 4th Edition. The key characteristic of a value engineering proposal that distinguishes this from a proposal submitted pursuant to Sub-Clause 13.3 [Variation Procedure] is that the former is initiated by the Contractor, whereas the latter is initiated by a request from the Engineer.</p> <p>A proposal must be approved by the Engineer in order for the Contractor to qualify for the fee. If a proposal is not approved but is adopted in either in whole or in part as a Variation the Contractor may anyway be entitled to a valuation, pursuant to Sub-Clause 12.3(b) [Evaluation] and the principles applicable to the interpretation of contracts,<sup>63</sup> that reflects the saving achieved.</p> <p>A value engineering proposal does not necessarily involve a change to the design but if it does, the Contractor is not only responsible for preparing the design at its own cost but also assumes liability for the design, which includes a warranty, pursuant to Sub-Clause 4.1 [Contractor's General Obligations], that such part of the Works is fit for its intended purpose.</p> <p>Pursuant to Sub-Clause 13.1 [Right to Vary] the Engineer can initiate a Variation by:</p> <ul style="list-style-type: none"> <li>• an instruction, or</li> <li>• a request for a proposal.</li> </ul> <p>Having initiated a variation by a request for a proposal the Engineer can then implement the Variation by approving such proposal. Adopting this route, in theory, allows the Parties to agree the impact of a Variation on time and cost before the Engineer commits to issuing an instruction.</p> <p>The implication, absent express wording to this effect, is that the Contractor is bound by the content of a proposal and that approval from the Engineer binds the Employer<sup>64</sup> as neither achieves the desired certainty without the creation of a binding agreement. As the Engineer acts for the Employer by virtue of Sub-Clause 3.1(a) [Engineer's Duties and Authority] the Employer is bound by any such agreement. If no intention to create a binding agreement is inferred, the procedure is probably not contractually binding as, notwithstanding the likely presence of all other 'essential elements', the absence of an intention to be bound is generally fatal to the creation of a binding obligation.<sup>65</sup> The existence or otherwise of a contractual obligation by virtue of the submission of a proposal and the Engineer's response determines whether the Variation is to be valued in accordance with Clause 12 [Measurement and Evaluation] or, instead, the Parties are bound by the content of the proposal.</p> <p>As an alternative to approval or disapproval, the Engineer can provide comments on a Contractor's proposal. Such comments, unless accepted by the Contractor, constitute a rejection of the proposal as both offer and acceptance are required to create a binding contract. Further, as the Engineer is required, in the absence of an approved proposal, to issue an instruction to the Contractor to execute a Variation the provision of comments does not obligate the Contractor to proceed with a Variation on the basis of such comments.</p>
13.3	<p><b>Variation Procedure</b></p> <p>The Engineer shall as soon as practicable after receiving a proposal respond with approval, disapproval or comments.</p>	<p>Pursuant to Sub-Clause 13.1 [Right to Vary] the Engineer can initiate a Variation by:</p> <ul style="list-style-type: none"> <li>• an instruction, or</li> <li>• a request for a proposal.</li> </ul> <p>Having initiated a variation by a request for a proposal the Engineer can then implement the Variation by approving such proposal. Adopting this route, in theory, allows the Parties to agree the impact of a Variation on time and cost before the Engineer commits to issuing an instruction.</p> <p>The implication, absent express wording to this effect, is that the Contractor is bound by the content of a proposal and that approval from the Engineer binds the Employer<sup>64</sup> as neither achieves the desired certainty without the creation of a binding agreement. As the Engineer acts for the Employer by virtue of Sub-Clause 3.1(a) [Engineer's Duties and Authority] the Employer is bound by any such agreement. If no intention to create a binding agreement is inferred, the procedure is probably not contractually binding as, notwithstanding the likely presence of all other 'essential elements', the absence of an intention to be bound is generally fatal to the creation of a binding obligation.<sup>65</sup> The existence or otherwise of a contractual obligation by virtue of the submission of a proposal and the Engineer's response determines whether the Variation is to be valued in accordance with Clause 12 [Measurement and Evaluation] or, instead, the Parties are bound by the content of the proposal.</p> <p>As an alternative to approval or disapproval, the Engineer can provide comments on a Contractor's proposal. Such comments, unless accepted by the Contractor, constitute a rejection of the proposal as both offer and acceptance are required to create a binding contract. Further, as the Engineer is required, in the absence of an approved proposal, to issue an instruction to the Contractor to execute a Variation the provision of comments does not obligate the Contractor to proceed with a Variation on the basis of such comments.</p>

<sup>63</sup> Chapter 4 [Interpretation].

<sup>64</sup> As the Engineer is deemed to act for the Employer, pursuant to Sub-Clause 3.1(a) [Engineer's Duties and Authority], the Engineer is probably able to create a binding obligation on the Employer's behalf by approving a proposal.

<sup>65</sup> Chapter 3.4 [Contract formation: Mutual intentions].

Clause	Title/Abstract	Commentary
	<p>The Contractor shall not delay any work while awaiting a response.</p>	<p>Pursuant to Sub-Clause 1.1.6.9 [Other Definitions] a Variation must either be instructed or approved. A request for a proposal does not constitute a Variation and, in consequence, the Contractor is required to proceed with the Works, including any work that may change due to a request for a proposal, until such time as a Variation is actually instructed or approved. The effect of abortive work on the Contractor's entitlement to payment is addressed by Sub-Clause 12.4 [Omissions]. To avoid abortive work the Engineer can issue an instruction to suspend any part of the Works, including a part of the Works that may be changed, pursuant to Sub-Clause 8.8 [Suspension of Work].</p>
	<p>Each Variation shall be evaluated in accordance with Clause 12 [Measurement and Evaluation], unless the Engineer instructs or approves otherwise in accordance with this Clause.</p>	<p>Sub-Clause 13.3 is not limited to establishing the procedure for dealing with a request by the Engineer for a proposal. In addition, provision is made for the method to be adopted for the valuation of Variation.</p> <p>The exceptions to the application of Clause 12 for the valuation of a Variation are:</p> <ul style="list-style-type: none"> <li>• the adoption of a value engineering proposal, and</li> <li>• approval of a proposal requested by the Engineer.</li> </ul> <p>The existence of an alternative to remeasurement based on net actual quantities is reflected in Sub-Clause 12.3 [Evaluation] which opens with a qualification to determination of the value of the Works based on measurement alone.</p> <p>Unlike in the FIDIC Conditions, 4th Edition, the Contractor's entitlement to an evaluation of a Variation is not expressly made conditional on the Contractor giving notice. Rather, the Contractor is required to acknowledge receipt of an instruction, without any consequences of a failure to do so being specified.<sup>66</sup></p>
13.5	<p><b>Provisional Sums</b></p> <p>Each Provisional Sum shall only be used, in whole or in part, in accordance with the Engineer's instructions.</p>	<p>The Engineer is free to instruct or omit all or any part of the Works covered by a Provisional Sum. There is no prohibition against instructing another contractor to perform any such part of the Works, an exception to the prohibition on a selective approach to omitting parts of the Works embodied in Sub-Clause 8.3(d) [Right to Vary] and 15.5 [Employer's Entitlement to Termination].</p> <p>As any work covered by a Provisional Sum forms part of the Works the Contractor should include such work in any programme prepared pursuant to Sub-Clause 8.3 [Programme]. It follows that a delay to the Works caused by a late instruction to expend a Provisional Sum or a delay caused by the provision of design information for work covered by a Provisional Sum entitles the Contractor to an extension of time pursuant to 8.4(e) [Extension of Time for Completion] and to an extension of time and additional payment pursuant to Sub-Clause 1.9 [Delayed Drawings or Instructions]. The time allowed in a programme prepared pursuant to Sub-Clause 8.3 for the execution of works covered by a Provisional Sum generally operates as the baseline for an assessment of such delays.</p>

<sup>66</sup> Further commentary on the contractual notice regime for Variations is provided at Sub-Clauses 13.1 [Right to Vary], 14.3 [Application for Interim Payment Certificates] and 20.1 [Contractor's Claims].



Clause	Title/Abstract	Commentary
13.7	<p data-bbox="314 735 501 814"><b>Adjustments for Changes in Legislation</b></p> <p data-bbox="314 814 501 999">The Contract Price shall be adjusted for any change in the Laws or in the interpretation of such Laws.</p>	<p data-bbox="535 177 1130 735">There is no provision for a reduction of the Time for Completion to reflect the omission of all or any part of the work covered by a Provisional Sum and, as the time for Completion is agreed by the Parties, this cannot be brought forward by the Engineer or otherwise, without agreement. Neither, it follows, does an omission give the Employer a right to use any theoretical time saving as a credit against subsequent delay for which the Contractor is entitled to an extension of time. Removal of this work may, however, reduce or eliminate the Contractor's entitlement to an extension of the Time for Completion if the effects of delay events giving rise to an entitlement in principle, are absorbed by a period vacated by work that would otherwise have been covered by a Provisional Sum on the basis that the delay event does not cause actual delay to the Time for Completion. In the absence of any guidance derived from the Contract or from applicable law any controversy over the allocation of time should be resolved fairly, pursuant to Sub-Clause 8.4 [Extension of Time for Completion] and by the application of the common intention of the parties, derived objectively from the nature of the transaction and industry custom and practice.<sup>67</sup></p> <p data-bbox="535 735 1130 920">The definition of Laws includes regulations and bylaws of any legally constituted public authority and, therefore, is broad enough to include regulations of statutory authorities.<sup>68</sup> There is a plentiful supply of public and statutory authorities, such as free zones, utility providers and other statutory establishments that possess regulatory powers the exercise of which may result in delay or additional cost.</p>
13.8	<p data-bbox="314 1005 501 1055"><b>Adjustments for Changes in Cost</b></p> <p data-bbox="314 1055 501 1480">If there is no table of adjustment data the Sub-Clause shall not apply. To the extent that full compensation for any rise or fall in Costs is not covered, the Accepted Contract Amount shall be deemed to have included amounts to cover the contingency of other rises and falls in costs.</p>	<p data-bbox="535 1005 1130 1240">If there is no table of adjustment data included with the Appendix to Tender, Sub-Clause 13.8 does not apply, leaving the Contract silent on the treatment of escalation. There is nothing to indicate that if Sub-Clause 13.8 does not apply this is restricted to the right to escalation costs. In consequence, the reference to the Accepted Contract Amount being treated as having included amounts to cover the contingency of rises and falls in costs except as provided for by the application of the adjustment formulae, is also inapplicable.</p> <p data-bbox="535 1240 1130 1345">If a table of adjustment data is included, the Accepted Contract Amount is deemed to have included amounts to cover the contingency of rises and falls in costs that are not reflected in the application of the adjustment formulae.</p> <p data-bbox="535 1345 1130 1456">During the period of rampant commodity price escalation from 2005 to 2008 contractors sought (mostly unsuccessfully) relief from the effect of similar provisions by relying on the UAE Civil Code, Article 249.<sup>69</sup></p>

<sup>67</sup> Chapter 4 [Interpretation].

<sup>68</sup> Refer to the commentary on Sub-Clause 1.1.6.5 [Other Definitions].

<sup>69</sup> Chapter 5.10 [Contractual principles: Unforeseen circumstances].

Clause	Title/Abstract	Commentary
14.1	<p><b>The Contract Price</b></p> <p>The Engineer may take account of a breakdown of each lump sum element when preparing Payment Certificates but shall not be bound by it.</p>	<p>In the event that prices fall, the Employer may consider terminating for convenience pursuant to Sub-Clause 15.5 [Employer's Entitlement to Termination] in order to re-let the Works at reduced rates and prices, thereby depriving the Contractor of anticipated additional profit. Notwithstanding that the Contract does not provide, pursuant to Sub-Clause 19.6 [Optional Termination, Payment and Release], for payment of loss of profit on termination for convenience this is, in principle, recoverable as damages for a breach of the Contract<sup>70</sup></p> <p>subject to the exclusion of liability for loss of profit applicable pursuant to Sub-Clause 17.6 [Limitation of Liability]. However, as the exclusion does not apply in the case of deliberate default, loss of profit will be recoverable, it is submitted, if the Employer terminates for convenience in order to re-let the Works.</p> <p>Although lump sum elements in the Contract Price are explicitly recognised, their role in calculating the Contract Price and in the valuation of the Works is not clearly prescribed. Specifically, the Contract Price is established, pursuant to Clause 12 [Measurement and Evaluation], by measurement of the net actual quantities of each item of the Works, an approach that is inconsistent with the underlying pricing philosophy of a lump sum element of the Contract Price. There is no express provision in the FIDIC Conditions for an alternative to measurement as a basis for valuing the Works. Instead, the Engineer is entitled to take account of a breakdown of a lump sum for the purpose of preparing Payment Certificates. The extent of the Contractor's right to interim payments for work covered by a lump sum element and the basis for valuing such elements is, thus, left at the Engineer's discretion though the Engineer is still required to determine the amount to be included in an Interim Payment Certificate fairly, pursuant to Sub-Clause 14.6 [Issue of Interim Payment Certificates].</p>
14.2	<p><b>Advance Payment</b></p> <p>Deductions shall commence in the Payment Certificate in which the total of all certified interim payments exceeds ten per cent (10%) of the Accepted Contract Amount less Provisional Sums and shall be made at the amortisation rate of one quarter (25%) of the amount of each Payment Certificate.</p>	<p>The point at which the advance payment is repaid in full, based on the default formula provided, is determined by a variety of factors but mainly by the percentage that the advance payment bears to the Accepted Contract Amount. An advance payment equal to 10% of the Accepted Contract Amount is, in principle, repaid when 50% of the Accepted Contract Amount has been certified for payment.</p> <p>Assuming an amortisation rate of 25% as provided for at Sub-Clause 14.2(b) and recovery commencing after 10% of the Accepted Contract Amount has been certified for payment, an advance of 22.5% or less of the Accepted Contract Amount is recovered in full before the amount certified for payment is equal to the Accepted Contract Amount. In practice, repayment is accelerated by the inclusion in the Accepted Contract Amount of Provisional Sums and by any increase in the Contract Price due to Variations or remeasurement.<sup>71</sup></p>

<sup>70</sup> Chapter 19.5 [Damages: Loss of profit].

<sup>71</sup> The impact of Provisional Sums and an increase in the Contract Price is discussed below.

Clause	Title/Abstract	Commentary
		<p>Provisional Sums are excluded from the Accepted Contract Amount for the purpose of calculating the threshold sum for commencing deductions. In contrast, after the deductions commence, these are calculated on the amount of each Payment Certificate and, therefore, include Provisional Sums. As a result, if the Accepted Contract Amount includes Provisional Sums, this not only accelerates the commencement date for repayment of the advance but also diminishes the amount of the advance payment that is available to the Contractor to fund the Works if the Provisional Sums are expended at an early stage of the Works.</p> <p>No explicit reference is made to whether, once triggered by the threshold value being exceeded, the advance is amortised on the full amount of the certified value or only the portion above 10% of the Accepted Contract Amount less Provisional Sums. The 'Guidance for the Preparation of Particular Conditions' states, in the context of the Employer ensuring that the advance payment is recovered in full, that the assumption is that the advance payment is less than 22% of the Accepted Contract Amount. By commencing deduction at 10% of the Accepted Contract Amount, with no Provisional Sums, the full advance is recovered before the Accepted Contract Amount is certified, provided the advance payment does not exceed 22.5% of the Accepted Contract Amount. Thus, it can be inferred that the draftsmen of the FIDIC Conditions assumed, subject to a small mathematical adjustment, that the advance is amortised on the amount over the threshold only, being 90%, of the Accepted Contract Amount.</p> <p>As the recovery threshold is tied to the Accepted Contract Amount, which is not subject to adjustment, recovery of the advance will commence when a fixed value has been certified irrespective of the impact of Variations or remeasurement on the Contract Price. In contrast, repayment is made by the application of the amortisation rate to the Contract Price which may increase due to Variations or remeasurement, potentially accelerating the recovery of the advance payment. On the other hand, as the amortisation rate is applied to the gross value of the Works set out in a Payment Certificate prior to deduction or repayment of Retention Money, part of the advance is repaid from amounts that the Contractor is not entitled to receive until after the Taking Over Certificate is issued.</p>

Clause	Title/Abstract	Commentary
	The whole of the balance, if any, of the advance payment shall become due and payable immediately upon termination under Clause 15 [Termination by Employer] or Clause 16 [Suspension and Termination by Contractor] or Clause 19 [Force Majeure].	<p>The amount due to or from the Contractor following termination is determined upon application of the valuation and assessment mechanisms of the Contract. Immediate repayment is, in principle, inconsistent with the requirement for a termination account to be drawn up in order to ascertain each party's entitlement. However, as repayment of the advance payment is determined by reference to the amounts indicated in the Payment Certificates the Employer will generally be in a position to accurately identify the unrecovered balance at the point of termination. The Employer is entitled to immediate repayment of the advance and to await an assessment of the amount due to the Contractor, if any, pursuant to the applicable termination provisions before making any further payment to the Contractor.</p> <p>In contrast to Sub-Clause 4.2 [Performance Security], there is no prescribed list of grounds permitting a demand to be made under the advance payment guarantee and no indemnity for a wrongful demand.<sup>72</sup></p>
14.3	<p><b>Application for Interim Payment Certificates</b></p> <p>The Contractor's Interim Payment Applications shall include the estimated contract value of the Works up to the end of the month (including Variations).</p> <p>The application shall also include any 'other additions or deductions which may have become due under the Contract or otherwise, including those under Clause 20'.</p>	<p>There is no obligation on the Contractor to identify Variations separately from the estimated contract value of the Works executed. Thus, work executed as a Variation should be included in each monthly payment application, and the Engineer is required to include such work in the measurement prepared pursuant to Sub-Clause 12.3 [Evaluation]. If a Contractor considers that there is an entitlement to recover an amount for delay and/or disruption as part of a Variation the application for payment should, in principle, include an adjustment to the applicable rates and prices for the work that caused such delay and/or disruption.<sup>73</sup></p> <p>The Statement is required to include additions or deductions:</p> <ul style="list-style-type: none"> <li>• due under the Contract</li> <li>• due under Clause 20 [Claims, Disputes and Arbitration], or</li> <li>• otherwise due.</li> </ul> <p>The first category contemplates the inclusion of amounts that arise pursuant to an express right granted by the Contract, such as the right to Cost plus reasonable profit pursuant to Sub-Clauses 1.9 [Delayed Drawings or Instructions], 2.1 [Right of Access], 4.7 [Setting Out], 7.4 [Testing], 10.3 [Interference with Tests on Completion] and 16.1 [Contractor's Entitlement to Suspend Work].</p> <p>Unlike such clauses, Clause 20 does not itself confer on the Contractor any entitlement to additional time or payment. However, Clause 20 establishes a mechanism by which the Parties are able to ascertain the amount to which either of them is entitled pursuant to other provisions of the Contract or for breach. In particular, Clause 20 enables a party to establish an entitlement in the form of a DAB award.</p>

<sup>72</sup> The options available to the Contractor in the event of a wrongful demand are discussed at the commentary on Sub-Clause 4.2 [Performance Security] and in chapter 22.6 [Litigation: summary actions].

<sup>73</sup> Refer to the commentary on Sub-Clause 12.3 [Evaluation] and Sub-Clause 20.1 [Contractor's Claims].

Clause	Title/Abstract	Commentary
		<p>The requirement for an application in respect of amounts due under Clause 20 suggests that the Contractor is required to include with the Statement any amount included within a decision given by the DAB. Although FIDIC recommended in a Guidance Memorandum dated 1 April 2013 that Sub-Clauses 14.6 [Issue of Interim Payment Certificates] and 14.7 [Payment] should be amended to state that a DAB award should be reflected in an Interim Payment Certificate no recommendation was made to clarify that such a payment should be applied for by the Contractor in a Statement. If the Contractor does not include an amount awarded by a DAB in a Statement the Engineer is unlikely to include this amount in an Interim Payment Certificate regardless of the obligation to make a fair determination of the amount due. The Contractor needs this certification in order to acquire a clear right to suspend the Works pursuant to Sub-Clause 16.1 [Contractor's Entitlement to Suspend Work] for non-payment.</p> <p>The phase 'or otherwise' indicates that the Contractor should apply for payment of amounts that accrue otherwise than under the Contract, specifically damages for breach of the Contract.</p>
14.5	<p><b>Plant and Materials intended for the Works</b></p> <p>If the lists referred to are not included in the Appendix to Tender, this Sub-Clause shall not apply.</p>	<p>Unless the Appendix to Tender includes a list of the Plant and Materials to be paid for when shipped or paid for when delivered, the entitlement to payment before these Plant and Materials are measured pursuant to Clause 12 [Measurement and Evaluation] does not apply. Ownership of Plant and Materials is dealt with at Sub-Clause 7.7 [Ownership of Plant and Materials].</p>
14.6	<p><b>Issue of Interim Payment Certificates</b></p> <p>The Engineer is required, within 28 days after receiving a Statement and supporting documents, to certify the amount that the Engineer 'fairly determines to be due' with supporting particulars.</p>	<p>The obligation to certify amounts that the Engineer 'fairly determines' are due for payment mirrors the obligation imposed by Sub-Clause 3.5 [Determinations]. While giving considerable latitude to the Engineer to determine how to approach the preparation of an Interim Payment Certificate the manner in which the Engineer exercises this discretion is subject to review by the DAB and by an arbitral tribunal pursuant to Clause 20 [Claims, Disputes and Arbitration] and ought, therefore, to be capable of withstanding objective scrutiny. The principles of contract interpretation applicable to such scrutiny require consideration of the intent of the parties as deduced from the contract itself, and other sources such as contemporary correspondence, the nature of the transaction, commercial custom and practice and the expectation that transactions are created in a spirit of goodwill and trust and in the parties' mutual interests. An excessively literal or counterintuitive interpretation is inconsistent with the approach prescribed by applicable law.<sup>74</sup></p>

<sup>74</sup> Chapter 4 [Interpretation].

Clause	Title/Abstract	Commentary
	<p data-bbox="265 827 458 1064">An Interim Payment Certificate shall not be withheld for any other reason but the value of any work done may be withheld unless or until rectification or replacement.</p>	<p data-bbox="484 214 1078 399">The Engineer may withhold certification in respect of:</p> <ul data-bbox="484 242 1078 399" style="list-style-type: none"> <li>• the cost of rectification or replacement of any things supplied or work done by the Contractor not in accordance with the Contract, and/or</li> <li>• the Contractor's failure to perform any work or obligation in accordance with the Contract, provided the Contractor has been so notified by the Engineer.</li> </ul> <p data-bbox="484 402 1078 532">The Engineer's entitlement to withhold the cost of rectification work and the value of work not performed in accordance with the Contract is separate from the Employer's right of set off which, pursuant to Sub-Clause 2.5 [Employer's Claims], is conditional on notice from the Employer and a determination by the Engineer.</p> <p data-bbox="484 535 1078 717">As the Engineer is required to make a fair determination of the amount due to the Contractor, an explicit entitlement to omit from such determination the value of work not performed or not performed in accordance with the Contract is probably unnecessary as by any objective standard the Contractor would not fairly be entitled to payment for work not done in accordance with the Contract.</p> <p data-bbox="484 720 1078 827">In a Guidance Memorandum issued in April 2013, FIDIC recommended that this Sub-Clause be modified to make clear that an Interim Payment Certificate should include any amount included in an award of the Dispute Adjudication Board.</p> <p data-bbox="484 831 1078 1411">The only reason that an Interim Payment Certificate can be withheld is if the Contractor has not provided the Performance Security, or the amount to be certified is less than the minimum amount specified in the Appendix to Tender. Although the Engineer has a duty, pursuant to Sub-Clause 12.3 [Evaluation], to determine the Contract Price and, pursuant to Sub-Clause 1.3 [Communications], not unreasonably to withhold or delay any such determination, this duty is not tied directly to the monthly interim payment regime. Accordingly, the Contractor must issue a Statement and supporting documents to trigger the time for the issuing of an Interim Payment Certificate. The supporting documents that the Contractor is required in accordance with Sub-Clause 4.21 [Progress Reports] to submit include a monthly report on progress by virtue of Sub-Clause 14.3 [Application for Interim Payment Certificates] but are otherwise unspecified. The supporting documents, it is submitted, are intended to facilitate the performance of the Engineer's assessment of the value of the Works, the absence of which may, therefore, result in an under certification but it is the Statement that triggers the Contractor's entitlement to an Interim Payment Certificate. Thus, an Interim Payment Certificate cannot be withheld purely due to the absence of the supporting documents.</p> <p data-bbox="484 1415 1078 1650">Failure by the Engineer to issue an Interim Payment Certificate within 28 days after receiving a Statement and supporting documents allows the Contractor to suspend the Works or reduce the rate of progress pursuant to Sub-Clause 16.1 [Contractor's Entitlement to Suspend Work]. Failure to issue an Interim Payment Certificate within 56 days after receiving a Statement and supporting documents allows the Contractor to give a notice of termination pursuant to Sub-Clause 16.2 [Termination by Contractor].</p>

Clause	Title/Abstract	Commentary
14.7	<p data-bbox="314 190 494 343">The Engineer may make any correction or modification to any previous Payment Certificate.</p> <p data-bbox="314 1018 486 1356"><b>Payment</b> The Employer shall pay to the Contractor the amount certified in each Interim Payment Certificate within 56 days after the Engineer receives the Statement and supporting documents.</p>	<p data-bbox="535 190 1130 343">In contrast to an extension of the Time for Completion, which cannot be reduced, pursuant to Sub-Clause 8.4 [Extension of Time for Completion], the Engineer is entitled to make any 'correction or modification' to any previous Payment Certificate, thus entitling the Engineer to reduce or increase an earlier valuation.</p> <p data-bbox="535 352 1130 691">The correction or modification is made by way of an Interim Payment Certificate, not as an amendment to the previous Payment Certificate. Accordingly, although the Employer's ongoing payment obligations will be adjusted it is doubtful that any accrued rights, such as a right to give a notice of termination, will be extinguished by a subsequent reduction or that any other requirements of the Contract, such as an obligation to give notice of a deduction from a Payment Certificate, are affected by this mechanism. If the Employer intends to withhold payment of any part of any earlier Interim Payment Certificate, notice and a determination of the Engineer will be required pursuant to Sub-Clause 2.5 [Employer's Claims].</p> <p data-bbox="535 700 1130 853">If the result of any correction or modification is that an Interim Payment Certificate shows an amount due from the Contractor to the Employer – an outcome not contemplated by Sub-Clause 14.7 [Payment] – the Employer must also follow the procedure laid out at Sub-Clause 2.5 in order for the Contractor's repayment obligation to crystallise.</p> <p data-bbox="535 863 1130 1016">The explicit caveat that a Payment Certificate is not deemed to indicate acceptance, approval, consent or satisfaction on the part of the Engineer mirrors the caveat that no certificate issued by the Engineer relieves the Contractor from any responsibility under the Contract, pursuant to Sub-Clause 3.1 [Engineer's Duties and Authority].</p> <p data-bbox="535 1025 1130 1677">The period for payment runs from the date on which the Statement (i.e. the application for payment) is received by the Engineer. In contrast to the FIDIC Conditions, 4th Edition, Sub-Clause 60.10 [Time for Payment], the payment period is not triggered by receipt by the Employer of the Interim Payment Certificate. The effect of this change is that if the Engineer issues the Interim Payment Certificate within 14 days of receiving the Statement instead of the full 28 days allowed pursuant to Sub-Clause 14.6 [Issue of Interim Payment Certificates], the Employer will have the balance of the 56 day period (i.e. 42 days) within which to make the payment due under such Interim Payment Certificate. If, on the other hand, the Engineer does not issue the Interim Payment Certificate until 49 days after receipt of the Statement (in breach of the obligation to issue the Interim Payment Certificate within 28 days), the Employer will have only 7 days within which to make payment. If the Engineer does not issue the Interim Payment Certificate until 56 days after receipt of the Statement, payment will be due immediately. As the Engineer is deemed to act for the Employer by virtue of Sub-Clause 3.1 [Engineer's Duties and Authority], the Employer is not able to rely on the Engineer's delay to resist any exercise of the Contractor's rights for late payment, including the right to suspend or reduce the rate of progress pursuant to Sub-Clause 16.1 [Contractor's Entitlement to Suspend Work].</p>

Clause	Title/Abstract	Commentary
14.8	<p><b>Delayed Payment</b></p> <p>The Contractor is entitled to receive financing charges without 'formal notice' or certification and without prejudice to any other right or remedy.</p>	<p>The effect of the exemption from the requirement for formal notice is unclear. The Contractor is not excused, at least not explicitly, from the requirement for notice to be given of a claim for additional payment pursuant to Sub-Clause 20.1 [Contractor's Claims]. Nor does Sub-Clause 1.3 [Communications], which prescribes the requirements for notices issued pursuant to the Contract, contemplate any exceptions. The prominent role that the requirement for notice plays in the Contract, nevertheless makes this the natural target for the exemption. Thus, while it is possible that the reference to formal notice refers to notice that might, for example, be required by law – though no such requirement exists under the laws of the United Arab Emirates – the preferable view, it is submitted, is that this is a reference to notice pursuant to Sub-Clause 20.1. The Contractor may, nevertheless, consider that the inclusion of financing charges within a Statement is advantageous.</p> <p>Although financing charges are exempted from the certification process, the absence of an alternative mechanism for triggering payment leaves some uncertainty as to when they fall due. Furthermore, unless the Contractor includes a claim for financing charges within the Statement, as permitted pursuant to Sub-Clause 14.3(f), the Engineer may not be required 'fairly' to determine whether such charges are due and to certify any amount for financing charges within an Interim Payment Certificate.</p> <p>In the absence of an Interim Payment Certificate the Contractor will not acquire any rights associated with non-payment of a Payment Certificate should the Employer fail to reimburse such financing charges. Inclusion of any claim to financing charges in the Statement at Completion pursuant to Sub-Clause 14.10 will also avoid the need to reconcile the exemption from any formal notice requirement with the exclusion of liability for any matter not included in the Statement at Completion or the Final Statement.</p> <p>The entitlement to financing charges replaces the corresponding entitlement to interest contained in the FIDIC Conditions, 4th Edition. This is intended, presumably, to address the objection in some jurisdictions to interest on public order grounds. However, the amendment is merely a change of terminology as the financing charges are calculated at the annual rate applied by the central bank in the country of the currency of payment and does not, therefore, avoid public order objections which have the capacity to override the express terms of the Contract.<sup>75</sup> Indeed, the explicit reference to such financing charges being compounded, which did not appear in the FIDIC Conditions, 4th Edition, increases the likelihood that public order objections will be engaged.<sup>76</sup></p> <p>Provision for payment of financing charges does not deprive the Contractor of any other remedy for the Employer's failure to make payment in accordance with Sub-Clause 14.7 [Payment], including the right to suspend the Works or issue a notice of termination pursuant to Sub-Clause 15 [Suspension and Termination by Contractor].</p>

<sup>75</sup> Chapter 5.2 [Contractual principles: mandatory obligations].

<sup>76</sup> Chapter 15 [Interest].



<b>Clause</b>	<b>Title/Abstract</b>	<b>Commentary</b>
14.9	<p><b>Payment of Retention Money</b></p> <p>The first half of the Retention Money shall be certified for payment when the Taking Over Certificate has been issued.</p>	<p>The Contractor is not required to apply for the release of the Retention Money. The first half must be certified following the Taking Over Certificate and the balance 'promptly' paid after the expiry of the latest of the Defects Notification periods. There is no prescribed period following the date of the Taking Over Certificate within which the Engineer must issue a certificate for payment of the first half of the Retention Money. However, pursuant to Sub-Clause 1.3 [Communications], certificates must not be unreasonably withheld or delayed. Based on the period for issuing an Interim Payment Certificate and the Final Payment Certificate, each of which is set at 28 days, anything longer than 28 days risks contravening this requirement.</p> <p>Neither is the release of the Retention Money tied to the Statement at Completion, the Final Statement or the Final Payment Certificate pursuant to Sub-Clauses 14.10 [Statement at Completion], 14.11 [Application for Final Payment Certificate] and 14.3 [Issue of Final Payment Certificate] respectively. In consequence, the regime for procuring a release of the Employer from any residual liability pursuant to the Contract is not part of the process for recovering the balance of the Retention Money.</p>
14.10	<p><b>Statement at Completion</b></p> <p>Within 84 days after receiving the Taking Over Certificate the Contractor shall submit a Statement at Completion showing the value of work done, any further sums that the Contractor considers to be due and an estimate of any other amounts that the Contractor considers will become due.</p>	<p>The amounts included by the Contractor in the Statement at Completion and the Final Statement – defined, contrary to the structure of the Conditions, within Sub-Clause 14.11 [Application for Final Payment Certificate] – are the only amounts for which the Employer is potentially liable under or in connection with the Contract, pursuant to Sub-Clause 14.14 [Cessation of Employer's Liability], with limited exceptions. This acts as a longstop on the right of the Contractor to submit claims for additional payment arising from events that have been notified pursuant to Sub-Clause 20.1 [Contractor's Claims] but which are either continuing or that have not been presented in monetary terms.</p> <p>Based on the exemption pursuant to Sub-Clause 14.8 [Delayed Payment] of financing charges from the requirement for formal notice or certification these need not be included in the Statement at Completion in order to survive. All other amounts to which the Contractor considers itself entitled should, however, be included.</p>
14.11	<p><b>Application for Final Payment Certificate</b></p> <p>The Contractor shall submit a draft final statement in a form approved by the Engineer showing in detail the value of all work done and any further sums that the Contractor considers due. If agreed, this shall become the 'Final Statement'</p>	<p>The objective of this provision is to bring into existence a definitive statement of the Employer's liability for, and the Contractor's entitlement to, payment pursuant to and arising from the Contract. The process does not impose on the Employer any obligation to crystallise any of the Employer's claims, including those of which the Employer is aware when the draft final statement is under discussion.</p> <p>It is envisaged that any dispute as to the content of the draft final statement will be referred to the DAB for a decision, which is then incorporated in an agreed Final Statement.</p>

Clause	Title/Abstract	Commentary
14.12	<p><b>Discharge</b></p> <p>When submitting the Final Statement the Contractor shall submit a written discharge which confirms that this represents full and final settlement of all moneys due to the Contractor.</p>	<p>Alongside Sub-Clause 14.11 [Application for Final Payment Certificate] this provision purports to confine the Contractor to claiming amounts stated in the Final Statement on the basis that this constitutes full and final settlement.</p> <p>The use of the defined term – Final Statement – distinguishes between the draft final statement and the Final Statement, the latter of which must be either agreed or determined in accordance with Sub-Clause 14.11. Thus, it is only once the draft final statement is agreed and submitted by the Contractor that this becomes a full and final settlement. As the authority required for an individual to relinquish or waive rights is by virtue of the UAE Civil Procedure Code, Article 58(2), set apart from the authority to enter into commercial contracts the statement of discharge may need to be executed by an individual possessing this power pursuant to a special power of attorney or a corporate entity's Articles of Association.</p> <p>The Employer's payment obligation is not triggered by the Final Statement and notice of discharge, though the Final Statement binds the Employer pursuant to Sub-Clause 3.1 [Engineer's Duties and Authority]. Pursuant to Sub-Clause 14.7(c) [Payment], the Employer's payment obligation is triggered, instead, by the Final Payment Certificate.</p> <p>The discharge notice causes the appointment of the DAB to expire pursuant to Sub-Clause 20.2 [Appointment of the Dispute Adjudication Board].</p>
14.13	<p><b>Issue of Final Payment Certificate</b></p> <p>If the Contractor fails to issue an application for the Final Payment Certificate accompanied by a notice of discharge, the Engineer shall issue the Final Payment Certificate for the amount that the Engineer fairly determines is due.</p>	<p>The Contractor can bypass the requirement to submit a Final Statement and a notice of discharge as the Engineer must, in any event, issue the Final Payment Certificate once 56 days has elapsed following the date of the Performance Certificate and a further 28 days has elapsed after the Engineer requests the Contractor to submit a Final Statement and a notice of discharge.</p> <p>If, on the other hand, the Contractor submits an application for the Final Payment Certificate but no agreement is reached and no dispute over the content of the draft final statement is resolved by the DAB there is no explicit requirement for the Engineer to issue a Final Payment Certificate.</p> <p>As it is consistent with the structure of the Conditions and thus the objectively ascertained intention of the parties<sup>77</sup> that the assessment of the Contract Price culminates in the issuing of the Final Payment Certificate the Engineer must, it is submitted, issue the Final Payment Certificate fairly determining the amount due in either scenario.</p> <p>The Engineer's duty to issue the Final Payment Certificate for such amount as the Engineer fairly determines is due, mirrors the formula for preparation of interim Payment Certificates pursuant to Sub-Clause 14.6 [Issue of Interim Payment Certificates].</p>

<sup>77</sup> Chapter 4.2 [Interpretation: Intentions].

Clause	Title/Abstract	Commentary
14.14	<p><b>Cessation of Employer's Liability</b></p> <p>The Employer shall not be liable to the Contractor for any matter or thing arising under or in connection with the Contract unless an amount was expressly included for it in the Final Statement and the Statement at Completion.</p> <p>The Employer's liability shall not be limited in the case of the Employer's indemnification obligations or any fraud, deliberate fault or reckless conduct by the Employer.</p>	<p>The exclusion of the Employer's liability for any matter or thing not included expressly in the Statement at Completion and the Final Statement puts the onus on the Contractor to ensure that both of these contain an exhaustive statement of the Contractor's claims and entitlements.</p> <p>This provision is aimed at achieving finality for the Employer. The incentive for the Contractor to adhere to the process leading to a Final Payment Certificate is less obviously apparent. In particular, the release of the Retention Money is not tied to the Statement at Completion or the Final Payment Certificate<sup>78</sup> and there is no prohibition on the Contractor seeking and triggering an entitlement to payment following the issuing of the Taking Over Certificate by an application for an Interim Payment Certificate pursuant to Sub-Clause 14.3 [Application for Interim Payment Certificates] instead of submitting the Statement at Completion and the draft final statement.</p> <p>As the authority required for an individual to relinquish or waive rights on behalf of a third party, including a corporate entity is, by virtue of the UAE Civil Procedure Code, Article 58(2), set apart from the authority to enter into commercial contracts, the effectiveness of this provision depends on a variety of factors, including the authority conferred on the Contractor's signatory. In general, this will need to take the form of a special power of attorney if it is to be effective.</p> <p>The requirement for fraud, deliberate default or reckless misconduct in preference to looser terminology such as gross negligence, sets a high culpability threshold for any Party seeking to bring itself within the exception.</p> <p>Exclusion or limitation of liability for fraud or gross mistake is, in any event, prohibited by virtue of the UAE Civil Code, Article 383(2), together with any exclusion of liability for delict and liability arising pursuant to a mandatory provision of the UAE Civil Code.</p>
15.1	<p><b>Notice to Correct</b></p> <p>If the Contractor fails to carry out any obligation under the Contract, the Engineer may by notice require the Contractor to make good the failure and to remedy it within a specified reasonable time.</p>	<p>The requirement for there to be a failure to carry out an obligation ties the notice to correct procedure to a breach of the Contract. Thus, the Engineer should be able to identify the obligation that the Contractor has failed to perform by reference to the relevant Sub-Clause of the Contract. It follows that if the Contractor is excused from performance of any such obligation by, for example, an event of Force Majeure pursuant to Sub-Clause 19.2 [Notice of Force Majeure], the basis for a notice to correct will not exist.</p>

<sup>78</sup> Sub-Clause 14.9 [Payment of Retention Money].

Clause	Title/Abstract	Commentary
15.2	<p data-bbox="265 1243 458 1289"><b>Termination by Employer</b></p> <p data-bbox="265 1295 458 1637">The Employer is entitled to 'terminate the Contract' in a variety of circumstances. The Employer's election to terminate the Contract shall not prejudice any other rights of the Employer under the Contract or otherwise.</p>	<p data-bbox="486 255 1085 543">There is no express restriction on the nature or type of obligation in respect of which a notice to correct can be given nor any threshold on the severity of such failure. The Contractor's safeguard against an abuse of the procedure lies, instead, in the requirement for the Contractor to be given an opportunity to remedy the failure within a specified reasonable time. However, a notice to correct must also be issued, as with the exercise of any contractual rights, in a manner consistent with the duty of good faith. If the result of a notice to correct is manifestly disproportionate or unfair, or if the exercise of the right is motivated by bad faith, the Contract may not be strictly applied.<sup>79</sup></p> <p data-bbox="486 548 1085 728">As the provision of an opportunity to remedy the default is a central part of Sub-Clause 15.1, it is doubtful that a notice to correct can validly be issued for the breach of an obligation that cannot be remedied. In such circumstances the Employer is not entitled to issue a notice to correct, but is limited, instead, to the other grounds for termination, compensatory damages and other remedies, if any, granted pursuant to the Contract.</p> <p data-bbox="486 733 1085 1049">A 'specified reasonable' time for remedying the breach should be interpreted by reference to the parties' mutual intentions ascertained objectively by reference to factors such as the Contract itself, custom and practice and the expectation that obligations are created in a spirit of goodwill, trust and in the parties' mutual interests. On this basis such notice should be sufficient, as a minimum, to provide the Contractor with a realistic opportunity to comply. The Contractor is likely to maintain that, by definition, this cannot be the shortest time within which it would be possible to remedy the failure assuming an immediate start and no interruptions or unforeseen delays.</p> <p data-bbox="486 1055 1085 1234">The Engineer is not under any express obligation to indicate that a notice is given pursuant to Sub-Clause 15.1, though a court or tribunal may conclude that the Contractor should not be taken by surprise by the exercise of any rights resulting from a failure to take remedial action and, therefore, that the Contractor should not be left in any doubt as to the existence or status of a notice to correct.</p> <p data-bbox="486 1240 1085 1557">The use of the phrase 'terminate the contract' represents a departure from the phrase 'terminate the employment of the Contractor' used in the corresponding provision of the FIDIC Conditions, 4th Edition. By referring to the Contractor's employment rather than the Contract, the latter phrase attempted to convey a sense of the continuing existence of the Contract and, equally, to avoid the implication that the Contract ceases to be effective whether from the date of the notice or, worse, from inception. The more concise formulation of the current version abandons the slightly cryptic reference to the Contractor's employment in favour of reliance on a legal analysis derived from the termination mechanism as a whole.</p>

<sup>79</sup> Chapters 5.6 [Contractual principles: Good faith] and 5.8 [Contractual principles: Abuse of rights].

Clause	Title/Abstract	Commentary
	<p>The Employer is entitled to terminate the Contract if the Contractor abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations.</p>	<p>Maintaining a clear distinction between, on the one hand, a contractual mechanism for determining the Parties' rights and, on the other, a termination at law has the potential to determine whether Sub-Clause 15.2 is valid and effective. Although it has been held that a construction contract is a continuing contract such that termination does not affect the parties' accrued rights, uncertainty continues to surround the application of certain formalities imposed by law to the termination of any contract, particularly the requirement for a court order to validate a termination.<sup>80</sup></p> <p>Whether the Contract continues to subsist and to govern the rights and obligations of the Parties following termination is not addressed explicitly in Sub-Clause 15.2 or elsewhere. However, the specified effect of Sub-Clause 15.2, among other things, is that:</p> <ul style="list-style-type: none"> <li>• the Employer's rights under the Contract or otherwise are preserved</li> <li>• the Contractor is required to deliver the Contractor's Documents and other design documents to the Engineer</li> <li>• the Contractor remains entitled to a valuation of the Works executed in accordance with the Contract<sup>81</sup></li> <li>• the Employer remains liable to pay the Contractor any balance due after permitted deductions.<sup>82</sup></li> </ul> <p>It can be deduced from these continuing obligations that both accrued rights and the Contract itself survive termination. In short, it is the obligation to perform the Works, together with the rights and obligations, that are connected with such performance that are terminated rather than the Contract itself.</p> <p>In the FIDIC Conditions, 4th Edition, the corresponding requirement was for a persistent or flagrant failure to comply with any of the Contractor's obligations. Accordingly, the threshold has been lowered from a persistent or flagrant failure to a demonstration of intent not to continue performance. Nevertheless, the Employer must still be able to demonstrate that the Contractor has 'plainly' demonstrated the intention not to continue performance of his obligations, imposing a higher level of certainty than the standard burden of proof.</p> <p>The trigger for the Employer's right is no longer (as in the FIDIC Conditions, 4th Edition), failure to perform 'any of his obligations', but instead failure to perform 'his obligations', from which it could be inferred that the Contractor must demonstrate an intention no longer to perform his obligations collectively rather than severally. This latter interpretation, it is submitted, is consistent with a concept of actual or prospective abandonment of the Works.</p>

<sup>80</sup> Chapter 17.3 [Termination: Termination of a muqawala: Contractor].

<sup>81</sup> Sub-Clause 15.3 [Valuation at Date of Termination]. In contrast, if the Employer terminates the Contract, independently of Sub-Clause 15.2, for a failure to remedy defects, pursuant to Sub-Clause 11.4(c) [Failure to Remedy Defects], the Employer may reject the Works and recover all sums paid.

<sup>82</sup> Sub-Clause 15.4 [Payment after Termination].

Clause	Title/Abstract	Commentary
	<p>The Employer is entitled to terminate the Contract if the Contractor without reasonable excuse fails to proceed with the Works in accordance with clause 8 or to comply with a notice issued pursuant to Sub-Clause 7.5 or Sub-Clause 7.6 within 28 days after receiving it.</p>	<p>The Employer's remedies are not limited to delay damages pursuant to Sub-Clause 8.7 [Delay Damages] if the Contractor fails to complete the Works by the Time for Completion and, thus, the Employer may terminate the Contract pursuant to Sub-Clause 15.2(b) notwithstanding a parallel entitlement to delay damages.<sup>83</sup> Likewise, the Employer has a remedy of termination prior to expiry of the Time for Completion if the Contractor is failing to proceed with the Works with 'due expedition and without delay'; pursuant to Sub-Clause 8.1 [Commencement of Works].</p> <p>In both scenarios the remedy of termination, however, is subject to the proviso that the Contractor is in default 'without reasonable excuse', a phrase that is intriguingly imprecise. The Contractor is likely to maintain that the phrase protects against overzealous use by the Employer of the entitlement to terminate. Given the draconian consequences that are involved for the Contractor and that in most cases damages will be an adequate remedy, restricting the use of the remedy to circumstances in which the Contractor has no reasonable excuse for the default has some merit. On such analysis a reasonable excuse ought not to be defined by reference to the grounds justifying an extension of the Time for Completion pursuant to Sub-Clause 8.4 [Extension of Time for Completion] as these are valid contractual excuses but ought, instead, to extend to 'neutral' causes of delay not covered by Sub-Clause 8.4 such as climatic conditions that are not sufficient to qualify as 'exceptionally adverse' but which, nevertheless, constitutes a reasonable excuse for delay.</p>
	<p>The Employer may upon giving 14 days' notice to the Contractor, terminate the Contract and expel the Contractor from the Site.</p>	<p>The notice period does not provide any obvious opportunity for the Contractor to remedy a default and, thereby, rescind the Employer's entitlement to terminate. Specifically, the express terms of Sub-Clause 15.2 make no mention of a cure period, unlike that provided for at Sub-Clause 16.1 [Contractor's Entitlement to Suspend Work]. This function is performed by Sub-Clause 15.1 [Notice to Correct] which affords the Engineer an opportunity to allow the Contractor to remedy a breach.</p> <p>Taking an alternative view, the events or circumstances listed as the grounds for termination must exist upon expiry of the required 14 days' notice period for the Employer to be permitted to terminate the Contract and expel the Contractor. The categorisation of some of the grounds as permitting termination on notice, thus creating an opportunity for rectification, and others as permitting termination forthwith, lends some support to such an interpretation.</p> <p>In the absence of any provision in the Contract or any instructions from the Engineer to the contrary, the Contractor is required, in principle, to continue the execution of the Works during the notice period while preparing to leave the Site when the notice takes effect.</p>

<sup>83</sup> The grounds entitling the Employer to terminate also entitle the Employer to make a claim under the Performance Security, whether or not the Employer terminates, pursuant to Sub-Clause 4.2 [Performance Security].

Clause	Title/Abstract	Commentary
	<p>The Contractor shall use his best efforts to comply immediately with any reasonable instructions included in the notice for the assignment of any subcontract and for the protection of life, property or the safety of the Works</p>	<p>The Engineer is given the express power to issue 'reasonable' instructions with the notice of termination for the assignment of subcontracts and for the protection of the Works or personnel. The provision of an express entitlement to issue instructions indicates that the Engineer's power to issue instructions pursuant to Sub-Clause 3.3 [Instructions of the Engineer] may not survive the notice of termination, notwithstanding that the Engineer is empowered to issue such instructions 'at any time'. That may be because the power is limited to instructions that are 'necessary for the execution of the Works and remedying of any defects'. If, however, the Contractor is obligated to continue to perform the Works until the notice of termination takes effect after 14 days it follows that the Engineer can, likewise, continue to issue instructions, for example, to suspend the Works until such time.</p> <p>An instruction to assign a subcontract still merits a specific reference, regardless of the effect of the notice of termination, as this is not an instruction that falls squarely within the power conferred on the Engineer to issue instructions necessary for the execution of the Works. Assignment of subcontracts, in the common law sense, may be of limited practical benefit to the Employer. Unless the Contractor continues to perform its obligations under an assigned subcontract, particularly payment, it is unlikely to be long before the Employer ceases to be entitled to receive the benefit of any corresponding contractual performance assigned by the Contractor pursuant to an instruction contained in the notice of termination. The Employer may be reluctant to undertake such performance, notably payment, on the Contractor's behalf due to the risk that the Contractor retains an entitlement to be paid the same amount as part of the termination account resulting in a double payment. The Subcontractor is also likely to prefer a binding contractual obligation on the Employer to make payment in place of a discretion or option to do so. In consequence, the Employer and the Subcontractor may have to reach a new agreement instead of relying on an assignment.</p> <p>Furthermore, a distinction is drawn under applicable law between the assignment of a crystallised debt, which is broadly effective, and the assignment of a right which is neither quantified nor crystallised (such as a damages claim for defective work), which faces the risk of being void for uncertainty. Although the Contractor is required, pursuant to Sub-Clause 4.4 [Subcontractors], to incorporate consent to an assignment in a subcontract it is not specified that this must involve a novation of the benefits and obligations arising thereunder. Accordingly, it is unlikely to be sufficiently certain to constitute a valid agreement to agree.<sup>84</sup></p>

<sup>84</sup> UAE Civil Code, Article 146 and Chapter 3.3 [Contract formation: Certainty].

Clause	Title/Abstract	Commentary
15.3	<p><b>Valuation at Date of Termination</b></p> <p>As soon as practicable after a notice of termination has taken effect, the Engineer shall proceed to agree or determine the value of the Works.</p>	<p>As the Employer is likely to appoint a replacement contractor to complete the Works, a prompt valuation of the Works following termination reduces the likelihood of a dispute over the extent of the work performed pursuant to the Contract on the one hand and that performed pursuant to the completion contract on the other. Either party may pre-empt this valuation exercise by requesting the appointment by the court of an assessor, to make a record of the status of the Works following termination. This is a relatively common use of the powers of the courts to grant summary or provisional relief and does not affect the agreement that a dispute shall be determined in accordance with Clause 20 [Claims, Disputes and Arbitration].<sup>85</sup></p>
15.4	<p><b>Payment after Termination</b></p> <p>After a Notice of Termination has taken effect the Employer may proceed in accordance with Sub-Clause 2.5, to withhold further payments to the Contractor until the costs of completion have been established and/or to recover from the Contractor any losses and damage incurred and any extra costs of completing the Works.</p>	<p>The provision that the Employer may 'proceed in accordance with Sub-Clause 2.5 [Employer's Claims]' indicates that the requirement for notice of claims survives a notice of termination. Sub-Clause 2.5 does not make any exception for amounts claimed by the Employer following termination. The Employer is required, therefore, to give notice of claims that the Employer considers have arisen, including claims arising from termination. In accordance with Sub-Clause 2.5, these claims must be submitted as soon as practicable after the Employer becomes aware of the event or circumstance giving rise to the claim.</p> <p>Such claims are either agreed or, failing agreement, determined by the Engineer in accordance with Sub-Clause 3.5 [Determinations]. Once agreed or determined, the claims may be deducted from the valuation of the Works prepared pursuant to Sub-Clause 15.3 [Valuation at Date of Termination]. In the meantime, the Contractor's entitlement to payment is suspended by virtue of Sub-Clause 15.5(b).</p> <p>Without any longstop on the suspension of payment or any right of the Contractor to information on the progress of the Employer's completion works the Contractor may, in the event of any excessive delay, be able to rely on the overarching duty of good faith to establish an end date to the suspension and an entitlement to any balance due from the Employer. In such cases there is no restriction on the Contractor commencing the dispute resolution procedure and, indeed, to commencing arbitration before the Employer has been able to ascertain the additional cost to complete. However, as payment does not become due until the completion costs have been established, the Contractor may not have any entitlement to payment unless the Employer is in a position to ascertain the completion costs or has exhausted the time that, acting in good faith, would be sufficient to do so.</p> <p>The entitlement to withhold further payment is not, it is submitted, retrospective and, therefore, the Contractor retains the right to payment of any Interim Payment Certificate that is due prior to a notice of termination taking effect and retains an entitlement to any remedies for non-payment, including financing charges pursuant to Sub-Clause 14.8 [Delayed Payment].</p>

<sup>85</sup> Chapter 22.6 [Litigation: Summary actions].



Clause	Title/Abstract	Commentary
	<p>The Employer is entitled to recover any 'extra costs' of completing the Works from the Contractor.</p>	<p>Although Sub-Clause 4.2 [Performance Security] permits a claim against the Performance Security for amounts to which the Employer is entitled by virtue of the events enumerated at Sub-Clause 15.2 [Termination by Employer], no provision is made for the release of the Performance Security in the event that a balance remains or if the termination account results in a net payment to the Contractor. As, in such circumstances, there is no further work to be performed or defects to be remedied by the Contractor, a failure to return the Performance Security risks constituting an abuse of rights.<sup>86</sup></p> <p>To calculate the extra costs the Employer deducts the allowable costs to complete from the costs to complete that would have been incurred if no notice of termination had been given. The reference to extra costs thus clarifies that the Employer is not entitled to all the costs to complete but only those costs net of the liability that the Employer would have incurred if the Contractor had completed the Works in accordance with the Contract.</p> <p>In addition, the Employer is entitled to recover any 'losses and damages' incurred. If assessed on an analogous basis to damages at law these will be a matter left largely to the discretion of the Employer initially and, thereafter to the DAB or Tribunal.<sup>87</sup></p> <p>In the absence of any indication to the contrary, such losses and damages are subject to Sub-Clause 17.6 [Limitation of Liability] and, therefore, exclude any indirect or consequential loss or damage. In contrast, the Contractor's corresponding entitlement to compensation from the Employer pursuant to Sub-Clause 16.2 [Termination by Contractor] is exempted from the application of Sub-Clause 17.6 in the case of a notice of termination issued by the Contractor.</p> <p>Subject to this caveat, if the notice of termination is issued prior to completion of the Works and prior to the Time for Completion the Employer is entitled to general damages for any breach of the obligation to proceed with due expedition and without delay pursuant to Sub-Clause 8.1 [Commencement of Works]. If, on the other hand, the Works are incomplete but the Time for Completion has passed, the Employer may have an entitlement to both delay damages and general damages, subject to the applicable law on the assessment and recovery of general and pre-agreed damages.<sup>88</sup> The application of the exclusion of liability for indirect and consequential loss or damage may, in practice, significantly restrict the amount of such compensation to which the Employer is entitled.</p> <p>The balance of the advance payment also becomes repayable, pursuant to Sub-Clause 14.2 [Advance Payment], immediately upon termination.</p>

<sup>86</sup> Chapter 5.8 [Contractual principles: Abuse of rights].

<sup>87</sup> Chapter 19.3 [Damages: Assessment of damages].

<sup>88</sup> A discussion of the overlapping entitlement, if any, to delay damages can be found at the commentary on Sub-Clause 8.7 [Delay Damages].

Clause	Title/Abstract	Commentary
15.5	<p><b>Employer's Entitlement to Termination</b></p> <p>The Employer shall not terminate the Contract in order to execute the Works itself or to arrange for others to execute the Works.</p>	<p>In the absence, under applicable law, of any mechanism to enforce the prohibition on the Employer completing the Works, any breach of such prohibition will give rise to a cause of action for damages only. This is likely mainly to comprise loss of profit that the Contractor would have earned on completing the Works, a type of loss that is, in practice, awarded under applicable law.<sup>89</sup> Although liability for loss of profit is excluded pursuant to Sub-Clause 17.6 [Limitation of Liability] the Employer risks a finding of deliberate default and the resulting loss of the benefit of this exclusion of liability.</p>
16.1	<p><b>Contractor's Entitlement to Suspend Work</b></p> <p>The Contractor is entitled to suspend work or reduce the rate of work in the event that the Engineer fails to issue an Interim Payment Certificate or the Employer fails to provide details of the Employer's financial arrangements or fails to make payment on time.</p>	<p>The Contractor is entitled to suspend the Works (or reduce the rate of work) for a failure to issue an Interim Payment Certificate, which must be issued within 28 days following:</p> <ul style="list-style-type: none"> <li>• receipt of a Statement, including a Statement applying for the advance payment pursuant to Sub-Clause 14.2 [Advance Payment], or</li> <li>• receipt of the Statement at Completion pursuant to Sub-Clause 14.10 [Statement at Completion].</li> </ul> <p>The Engineer is required not merely to issue a timely Interim Payment Certificate but to certify in accordance with Sub-Clause 14.6 [Issue of Interim Payment Certificates]. Thus, not only does a failure to issue an Interim Payment Certificate within 28 days following receipt of a Statement (or within 28 days following receipt of the Statement at Completion) trigger the right to suspend, so too does a failure by the Engineer to state within any such Interim Payment Certificate the amount which the Engineer fairly determines to be due. Notwithstanding the difficulty of applying this measure, there may be circumstances in which the Engineer demonstrably fails to act fairly. For example, deduction by the Engineer of an amount that has not been claimed by the Employer pursuant to Sub-Clause 2.5 [Employer's Claims], especially if done without the consultation required pursuant to Sub-Clause 3.5 [Determinations], prior to issuing an Interim Payment Certificate may be a sufficiently serious failure as to demonstrate a lack of fairness. Repetition of such conduct increases the likelihood that this fails to satisfy the requirement for a fair determination.</p> <p>Establishing a failure to pay is more straightforward. As time for payment starts from a Statement, not an Interim Payment Certificate, there are circumstances in which the time for payment can be short.<sup>90</sup> If the Engineer issues the Interim Payment Certificate late, for example 55 days after receipt of the Statement, payment will be overdue the following day triggering an entitlement to give a notice of suspension and to suspend the Works 21 days later.</p>

<sup>89</sup> Chapter 19.5 [Damages: loss of profit].

<sup>90</sup> Sub-Clause 14.7 [Payment].

Clause	Title/Abstract	Commentary
	<p>If the Contractor subsequently receives such Payment Certificate, evidence or payment, before giving notice of termination the Contractor shall resume normal working as soon as reasonably practicable.</p>	<p>The Employer has the opportunity to remedy the default giving rise to a suspension or reduction of the rate of progress provided that such action is taken before the Contractor gives a notice of termination. In the case of suspension for non-payment the Employer may prefer, instead, to eliminate the cause of the suspension by requesting a Payment Certificate correcting or modifying an Interim Payment Certificate, as permitted pursuant to Sub-Clause 14.6 [Issue of Interim Payment Certificates]. However, the condition required to release the suspension is payment and a Payment Certificate, even if the Engineer is able to issue one, does not constitute payment. Further, as the Engineer has no power to retract and reissue an Interim Payment Certificate the original remains effective as does the entitlement to payment. Any resulting overpayment is addressed, therefore, in subsequent Payment Certificates or on termination not retrospectively.</p>
16.2	<p><b>Termination by Contractor</b></p> <p>The Contractor is entitled to terminate the Contract in a number of circumstances.</p> <p>In any of the events or circumstances listed at Sub-Clause 16.2 the Contractor may, upon giving 14 days' notice to the Employer, terminate the Contract.</p>	<p>The use of the phrase 'terminate the Contract' mirrors that used in the context of the Employer's corresponding rights pursuant to Sub-Clause 15.2 [Termination by Employer] and, likewise, represents a departure from the subtly different terminology used in the FIDIC Conditions, 4th Edition.</p> <p>Whether the Contract continues to subsist and to govern the rights and obligations of the Parties following termination is not addressed explicitly in Sub-Clause 16.2 or elsewhere. However, the specified effect of Sub-Clause 16.2, among other things, is that:</p> <ul style="list-style-type: none"> <li>• the Contractor's election to terminate the Contract does not prejudice any other rights of the Contractor</li> <li>• the Contractor must cease all further work except that instructed by the Engineer for the protection of life or property</li> <li>• the Contractor is required to deliver the Contractor's Documents, Plant, Materials and other work for which the Contractor has received payment and other design documents to the Engineer</li> <li>• the Employer must return the Performance Security</li> <li>• The Employer remains liable to pay the Contractor in accordance with Sub-Clause 19.6 [Optional Termination, Payment and Release].</li> </ul> <p>It can be deduced from these continuing obligations that not only accrued rights but also the Contract itself survive termination. Establishing that the contract survives has the potential to affect the validity of a termination pursuant to applicable law. Although it has been held that a construction contract is a continuing contract such that termination does not affect the parties' accrued rights, uncertainty continues to surround the application of certain formalities imposed by law to the termination of any contract, particularly the requirement for a court order to validate a termination.<sup>91</sup></p>

<sup>91</sup> Chapter 17.3 [Termination: Termination of a *muqawala*: Contractor].

Clause	Title/Abstract	Commentary
		<p>The notice period does not provide any obvious opportunity for the Employer to remedy a default and, thereby, rescind the Contractor's entitlement to terminate. Specifically, the express terms of Sub-Clause 16.2 make no mention of a cure period, unlike that provided for at Sub-Clause 16.1 [Contractor's Entitlement to Suspend Work]. Neither is the Contractor obligated to suspend the Works or otherwise exercise any rights under Sub-Clause 16.1 [Contractor's Entitlement to Suspend Work] prior to progressing on to issuing a notice of termination.</p> <p>An alternative interpretation is that the events or circumstances listed as the grounds for termination must exist when the Contractor exercises the right to terminate upon expiry of the required 14 days' notice. The categorisation of some of the grounds as permitting termination on notice, thus creating an opportunity for rectification, and others as permitting termination forthwith, lends some support to such an interpretation.</p>
	<p>The Contractor is entitled to give a notice of termination in the event that payment of an Interim Payment Certificate is not made (except for deductions in accordance with Sub-Clause 2.5 [Employer's Claims]) within 42 days of receipt by the Engineer of the Statement.</p>	<p>The Employer is restricted to making deductions that the Employer has notified pursuant to Sub-Clause 2.5 [Employer's Claims] and in respect of which the Engineer has made a determination. This includes deductions in respect of delay damages to be levied pursuant to Sub-Clause 8.7 [Delay Damages]. In consequence, if the Employer makes a deduction in respect of delay damages or any other type of deduction without having notified the same pursuant to Sub-Clause 2.5 and/or without having received an Engineer's determination in respect thereof the resulting shortfall in payment of an Interim Payment Certificate will give rise to an entitlement for the Contractor to give a notice of termination.</p>
	<p>The Contractor may terminate if the Employer 'substantially fails to perform his obligations under the Contract'.</p>	<p>The FIDIC Conditions do not elaborate on what constitutes 'substantially' failing to perform the Employer's obligations, which, accordingly, must be interpreted on the basis of the parties' intentions as deduced from the Contract itself, and other sources such as contemporary correspondence, the nature of the transaction, commercial custom and practice and the expectation that transactions are created in a spirit of goodwill, trust and in the parties' mutual interests.<sup>92</sup></p> <p>Reference to the Employer's obligations means, it is submitted, the Employer's obligations collectively. The requirement for a substantial failure thus imports a sense that the Employer is not performing its obligations collectively or, in other words, the Employer is failing to perform its side of the bargain. Conversely, partial performance will be insufficient on its own to prevent the right of termination arising.</p>

<sup>92</sup> Chapter 4 [Interpretation].

Clause	Title/Abstract	Commentary
16.3	<p><b>Cessation of Work and Removal of Contractor's Equipment</b></p> <p>After a notice of termination has taken effect the Contractor shall cease all further work, hand over Contractor's Documents, Plant, Materials and other work, for which the Contractor has received payment and leave the Site.</p>	<p>As a construction contract is one that is generally performed over a period of months or years an isolated breach is unlikely on this basis to be intended to give rise to a right to terminate. However, an ongoing breach of a significant obligation such as the removal of, and failure to replace the Engineer, may in the context of a construction project, be sufficient without more to amount to a substantial failure to perform the Employer's obligations.</p> <p>Although the Contractor is only required to hand over Contractor's Documents, Plant, Materials and other work for which the Contractor has received payment, ownership of such Plant and Materials will have transferred to the Employer, irrespective of payment, if the Contractor has become entitled to payment for them, in accordance with Sub-Clause 7.7 [Ownership of Plant and Materials].<sup>93</sup> The Contractor, therefore, requires an enforceable possessory lien to protect against a claim for delivery from the Employer. The creation of a possessory lien over Plant and Materials is implicit, perhaps, from the qualified obligation to hand over Contractor's Documents, Plant and Materials. Further, a possessory lien is supported by various provisions of the UAE Civil Code and the UAE Code of Commercial Practice.<sup>94</sup> If the Employer fails to make payment the Contractor is entitled to re-sell the Plant and Materials and claim any loss arising on the proceeds of sale.<sup>95</sup> However, if such Plant and Materials have been delivered into the custody and control of the Employer, for example, to a laydown area controlled by the Employer, the lien is, ordinarily, extinguished.</p>
16.4	<p><b>Payment on Termination</b></p> <p>After a Notice of Termination has taken effect, the Employer shall promptly return the Performance Security, pay the Contractor in accordance with Sub-Clause 19.6 and pay to the Contractor the amount of any loss of profit or other loss or damage sustained by the Contractor as a result of this termination.</p>	<p>The entitlement of the Contractor to recover loss of profit is an exception to the limitation of liability at Sub-Clause 17.6 [Limitation of Liability].</p> <p>The Employer's obligation to promptly settle the balance due to the Contractor, including loss of profit or other loss or damage sustained by the Contractor, contrasts with the Contractor's obligation to repay any unearned balance of the advance payment immediately, pursuant to Sub-Clause 14.2 [Advance Payment]. It is unclear how, at a time when the account between the Employer and the Contractor requires evaluation by the Engineer, the amount of the advance to be repaid can be established with sufficient certainty to enable the Contractor to comply with the obligation to repay this immediately unless the Employer is required first to comply with Sub-Clause 2.5 [Employer's Claims], and thus obtain a determination from the Engineer of the amount due. This, in turn requires the Engineer to complete the accounting exercise required pursuant to Sub-Clause 16.4 and 19.6 [Optional Termination, Payment and Release].</p> <p>In the absence of any further guidance under the Contract on the approach to assessing loss of profit or other loss or damage sustained by the Contractor as a result of termination, this will be a matter left largely to the discretion of the DAB and, thereafter to an arbitral Tribunal to the extent that the Parties are unable to agree.</p>

<sup>93</sup> For further commentary on ownership of Plant and Materials see Sub-Clause 19.6 [Optional Termination, Payment and Release].

<sup>94</sup> Chapter 18.2 [Self-help remedies: Possessory lien].

<sup>95</sup> UAE Code of Commercial Practice, Article 107.

Clause	Title/Abstract	Commentary
17.1	<p><b>Indemnities</b></p> <p>The Contractor is required to indemnify the Employer, the Employer's Personnel and their respective agents against personal injury to the extent that the former arises otherwise than as a result of negligence, wilful acts or breach of the Contract by the Employer and loss or damage to any property (other than the Works) to the extent that the latter arises as a result of the Contractor's design or the Contractor's negligence, wilful act or breach of the Contract.</p>	<p>The benefit of the indemnities extends to the Engineer and the Engineer's staff by virtue of the definition of the Employer's Personnel pursuant to Sub-Clause 1.1.2.6 [Parties and Persons]. In some jurisdictions the Engineer would have difficulty enforcing the indemnity against the Contractor as a result of privity of contract principles. In the United Arab Emirates the Parties can create an enforceable entitlement for the benefit of a third party, such as the Engineer, by virtue of the UAE Civil Code, Article 252.</p> <p>As there is no time limit on the indemnity, the Contractor is liable to the Employer not merely during the execution of the Works but thereafter. Liability for design,<sup>96</sup> in particular, has the potential to give rise to claims long after the end of the Defects Notification Period. For example, the indemnity is broad enough to cover liability arising from accidents due to a lack of adequate access for cleaning and maintenance or other health and safety measures that result in any liability on the Employer. A building owner has a number of statutory obligations (in addition to direct liability in delict) a breach of which may result in liability at any time and which may, thus, trigger the indemnity if the Contractor was responsible for the design of the building.<sup>97</sup></p> <p>The indemnity for damage to or loss of any property does not include the Works themselves and is restricted, therefore, to surrounding property of the Employer or third parties. Responsibility for the Works themselves is addressed at Sub-Clause 17.2 [Contractor's Care of the Works]. As with the indemnity for personal injury or death there is no time limit on the indemnity for damage to surrounding property, exposing the Contractor to a risk of liability long after the end of the Defects Notification Period, especially for any design provided by the Contractor. Liability occurring during the execution of the Works ought, in general, to be insured, pursuant to Sub-Clause 18.3 [Insurance against Injury to Persons and Damage to Property].</p> <p>There are several sources of liability on an Employer for damage to surrounding property that can trigger the indemnity, most notably the UAE Civil Code, Article 316, which imposes a duty to take special care to prevent damage being caused by hazardous things,<sup>98</sup> a duty broadly analogous to liability for nuisance under English law.</p>

<sup>96</sup> For commentary on design liability see Sub-Clause 4.1 [Contractor's General Obligations].

<sup>97</sup> Chapter 6.6 [Health, safety and welfare: Sanctions and penalties].

<sup>98</sup> Chapter 10.4 [Physical damage and personal injury: Inherent danger (nuisance)].

Clause	Title/Abstract	Commentary
17.2	<p><b>Contractor's Care of the Works</b></p> <p>If any loss or damage occurs to the Works, Goods or Contractors' Documents during the period when the Contractor is responsible for their care, from any cause other than the Employer's Risks, the Contractor shall rectify the loss or damage at the Contractor's risk and cost.</p>	<p>The Contractor is not liable for loss or damage to the Works arising from the Employer's Risks. These include, by virtue of Sub-Clause 17.3(g) [Employer's Risks], the design of any part of the Works by the Engineer. If and to the extent that this purports to exempt the Contractor from any liability covered by the UAE Civil Code, Article 880, which imposes joint liability on the Contractor and the Engineer for a partial or total collapse of a structure or any defect that affects the safety or stability thereof, the exemption is void.<sup>99</sup></p> <p>The Parties are given the opportunity, pursuant to Sub-Clause 18.2 [Insurance for Works and Contractor's Equipment], to select the insuring Party for the Works. The choice of insuring Party does not, however, alter the Contractor's responsibility for the care of the Works nor the obligation, at the Contractor's risk and cost, to reinstate such Works arising from any cause other than Employer's Risks.</p> <p>The Contractor, therefore, has an interest in ensuring that the cover procured by the Employer, if the employer is the insuring party, is adequate to provide an indemnity in respect of the Contractor's obligations and duties in respect of the care of the Works and that the proceeds of any insurance are applied to the reinstatement of the Works, as provided for at Sub-Clause 18.2(b) [Insurance for Works and Contractor's Equipment].</p> <p>The Contractor is entitled, if the Employer is the insuring Party and fails to procure insurance that complies with the requirements of Sub-Clause 18.2, to recover from the Employer the amount that ought to have been paid pursuant to such insurance.</p>
17.3	<p><b>Employer's Risks</b></p> <p>The Employer's Risks include use or occupation, except as specified in the Contract, by the Employer of any part of the Permanent Works.</p>	<p>The Employer is not entitled pursuant to Sub-Clause 10.2 [Taking Over of Parts of the Works] to use any part of the Works unless or until the Engineer has issued a Taking Over Certificate other than as a temporary measure which is either specified in the Contract or agreed by the Parties. Such unauthorised or unspecified use of any part of the Works causes, pursuant to Sub-Clause 10.2, such part which is used to be deemed to have been taken over and the Contractor to cease being liable for the care of such part from the date of such use. In the event that the Employer takes occupation or puts into use any part of the Permanent Works, therefore, other than as a temporary measure specified in the Contract, responsibility for the care of such part shifts to the Employer. The result is that the Contractor ceases, in general, to be liable for damage to that part of the Works and, if the insuring Party, ceases to be required to maintain insurance cover for that part of the Works other than for loss or damage caused by the Contractor.</p> <p>In addition, any loss or damage that is suffered by the Works as a result of such premature occupation or use of the Works is an Employer's Risk, the consequences of which are set out at Sub-Clause 17.4 [Consequences of Employer's Risks].</p>

<sup>99</sup> Chapter 9.5 [Decennial liability: Mitigating decennial liability].

Clause	Title/Abstract	Commentary
	The Employer's Risks include any operation of the forces of nature which is Unforeseeable or against which an experienced Contractor could not reasonably have been expected to have taken adequate preventative measures.	There is some scope for disagreement between the Employer and the Contractor as to the extent of the events or circumstances included within the meaning of the Unforeseeable operation of the forces of nature. <sup>100</sup> Lightning and even earthquakes are foreseeable but their timing is not. To the extent that the test for risks that are foreseeable includes an element of the Contractor being expected to factor such risks into the Contract Price natural phenomena such as earthquakes or fire caused by lightning, for example, are likely to fall within the definition of Employer's Risks given that they are not only rare in the Gulf but the timing of their occurrence is unpredictable making them Unforeseeable. Natural catastrophes may also fall within the definition of Force Majeure and 'exceptionally adverse climatic conditions' pursuant to Sub-Clause 8.4 [Extension of Time for Completion].
17.4	<b>Consequences of Employer's Risks</b> If and to the extent that any of the Employer's Risks results in loss or damage the Contractor shall promptly give notice and shall rectify this loss or damage to the extent required by the Engineer.	Notwithstanding that any loss or damage to the Works caused by the Employer's Risks is outwith the responsibility of the Contractor, the Contractor is, nevertheless, required to reinstate the Works if so instructed. If the Engineer instructs the Contractor to reinstate the Works it is implicit that the Engineer shall, first, value, pursuant to Sub-Clause 12.3 [Evaluation], the work executed prior to the loss or damage before assessing the Cost of the reinstatement work. Thus, if the Works are, for example, destroyed by fire due to a lightning strike the Contractor, if so instructed, is required to reinstate the Works at Cost (i.e. excluding any entitlement to profit) in addition to being paid for the Works completed up to the point of reinstatement.
17.6	<b>Limitation of Liability</b> Neither party shall be liable to the other for any loss of use of any Works, loss of profit, loss of any contract or any indirect or consequential loss or damage suffered in connection with the Contract, other than under Sub-Clause 16.4 and 17.1.	An agreement to limit or exclude liability is, in principle, effective under applicable law, subject to exceptions for the exclusion of liability for delict, mandatory provisions of law and liability for fraud or gross mistake. <sup>101</sup> There is no definition of indirect or consequential loss in the UAE Civil Code or elsewhere, nor much judicial guidance on this issue in the available judgments of the domestic courts. In practice, damages are routinely awarded for loss of earnings and loss of profit, though in the absence of a finding of serious fault there is a prospect of a narrower measure of loss being adopted. Indeed, the assessment of damages is left largely to the discretion of the Court of Merits. Accordingly, the scope of the limitation of liability depends on its interpretation as derived from the intentions of the parties and its application on a case by case basis.

<sup>100</sup> For further commentary see Sub-Clause 1.1.6.8 [Other Definitions].

<sup>101</sup> Chapter 19.8 [Damages: Limitation of liability].



Clause	Title/Abstract	Commentary
		<p>The only exceptions to the exclusion of liability for indirect or consequential loss are the Contractor's entitlement to loss of profit or other loss or damage sustained as a result of termination pursuant to Sub-Clause 16.2 [Termination by Contractor] and any claims falling within the indemnity for personal injury or damage to surrounding property pursuant to Sub-Clause 17.1 [Indemnities]. In contrast, the Employer's entitlement to damages following termination pursuant to Sub-Clauses 15.2 [Termination by Employer] and 15.4(b) [Payment after Termination] for delay in completion is not exempted from the application of the exclusion of liability for indirect or consequential loss.</p>
		<p>The Contractor's entitlement to financing charges, which arises pursuant to Sub-Clause 14.8 [Delayed Payment] and the Employer's entitlement to financing charges that arises pursuant to Sub-Clause 11.4(c) [Failure to Remedy Defects] is not preserved by means of a carve out from Sub-Clause 17.6. Presumably, therefore, financing charges are not considered to be indirect or consequential, a conclusion that would apply irrespective of whether an entitlement to financing charges arises pursuant to an express provision of the Contract or otherwise.</p>
		<p>Indemnities contained within the FIDIC Conditions that are not carved out of the limitation can be found at Sub-Clauses 1.13(a) and (b) [Compliance with Laws], 4.2 [Performance Security], 4.14 [Avoidance of Interference], 4.16 [Transport of Goods], 5.2 [Objection to Nomination] and 17.5 [Intellectual and Industrial Property Rights]. The effect of Sub-Clause 18.1 [General Requirements for Insurances] is similar to an indemnity in the event of a failure to insure. The exclusion of loss of profit and the like applies to all of these indemnities.</p>
		<p>Although the cap on the Contractor's total liability does not apply to liability incurred pursuant to the listed exceptions, such exceptions are limited. The exceptions do not, for example, apply to any liability for delay damages, pursuant to Sub-Clause 8.7 [Delay Damages], the cost of remedial work performed by the Employer, rejection of the Works pursuant to Sub-Clause 11.4 [Failure to Remedy Defects] or to loss and damage incurred by the Employer on termination, all of which are, therefore, counted within the liability cap. Liability pursuant to indemnities other than those at Sub-Clauses 17.1 [Indemnities] and 17.5 [Intellectual and Industrial Property Rights] is also included in the calculation for the purpose of applying the cap.</p>
		<p>The requirement for proof of fraud, deliberate default or reckless misconduct in preference to looser terminology such as gross negligence, imposes a significant burden on any Party seeking to bring itself within the exception.</p>
		<p>Any exclusion or limitation of liability for fraud or gross mistake is, in any event, ineffective by virtue of the UAE Civil Code, Article 383(2), together with liability for delict by virtue of Article 296 and liability arising pursuant to mandatory provisions of the UAE Civil Code.</p>

Clause	Title/Abstract	Commentary
18.1	<p><b>General Requirements</b></p> <p>'Insuring Party' means, for each type of insurance, the Party responsible for effecting and maintaining the insurance specified in the relevant Sub-Clause.</p> <p>If a policy is required to indemnify joint insureds, the cover shall apply separately to each insured as though a separate policy had been issued for each of them.</p>	<p>In the absence of agreement to the contrary, the Contractor is the insuring Party pursuant to Sub-Clauses 18.2 [Insurance for Works and Contractor's Equipment] and 18.3 [Insurance Against Injury to Persons and Damage to Property]. In consequence, the Contractor controls the insurance programme, albeit constrained by the express requirements of Sub-Clauses 18.1, 18.2 and 18.3.<sup>102</sup></p> <p>The general requirements are applicable to all forms of insurance required pursuant to Clause 18 [Insurance], whereas the subsequent Sub-Clauses set out the requirements in relation to each specific type of cover.</p> <p>The types of cover required pursuant to Clause 18, in effect, are:</p> <ul style="list-style-type: none"> <li>• contractor's all risks insurance, goods in transit insurance and machinery damage insurance, pursuant to Sub-Clause 18.2</li> <li>• public and third party liability insurance, pursuant to Sub-Clause 18.3, and</li> <li>• employer's liability or workmen's compensation insurance, pursuant to Sub-Clause 18.4 [Insurance for Contractor's Personnel].</li> </ul> <p>Notably absent is any requirement to procure cover for contractor's design liability even if the Contractor has agreed to design any part of the Works pursuant to Sub-Clause 4.1 [Contractor's General Obligations].</p> <p>Other risks and liabilities for which no insurance is prescribed include decennial liability, delay in start-up and inherent or latent defects. These are specialist products that are either not currently available in the United Arab Emirates or are difficult to obtain on commercially acceptable terms. Specifically, decennial liability cover is not available as a standard product in the local market.<sup>103</sup></p> <p>Joint names insurance has the benefit of reducing the scope for overlapping cover and for duplication of both administrative effort and premium.</p> <p>As joint insured, rather than co-insured, each insured has a right to indemnification under the policy independently of the corresponding entitlement of the other named insureds. In consequence, the conduct of one insured, for example, in failing to notify a claim<sup>104</sup> does not compromise the entitlement to the policy proceeds of another insured whose notice was submitted in accordance with the policy terms. In addition, the insurer is not entitled to pursue a subrogated right against any joint insured or, indeed, any party for whom an insured is responsible.<sup>105</sup></p>

<sup>102</sup> This does not reflect the conclusions set out in 'Insurance of large civil engineering projects: A Status Report' published by FIDIC in 2004, which promoted the advantages of an owner controlled programme. An owner controlled programme places responsibility on the Employer and the Engineer to procure and manage the insurance scheme.

<sup>103</sup> Chapter 9.5 [Decennial liability: Mitigating decennial liability].

<sup>104</sup> A notice exclusion in an insurance policy is subject to the UAE Civil Code, Article 1028(1)(b).

<sup>105</sup> UAE Civil Code, Article 1030. An explicit waiver of subrogation rights either in the main policy conditions or as an endorsement is relatively common in a contractor's all risks policy, thereby avoiding the need to rely on the position at law.

Clause	Title/Abstract	Commentary
18.2	<p>Any amounts not insured or not recovered from the insurer shall be borne by the Contractor and/or the Employer in accordance with their respective obligations under the terms of the Contract or otherwise.</p> <p>Any amounts that should have been recoverable under any insurance required to be effected and maintained shall be paid by the Party that should have but failed to maintain such insurance.</p> <p><b>Insurance for Works and Contractor's Equipment</b></p> <p>The insurance shall provide cover for loss or damage to the Works, Plant, Materials and Contractor's Documents for which the Contractor is liable until the date of the issue of the Taking Over Certificate.</p>	<p>Thus, each Party remains liable for any loss and damage as if neither Party had an obligation to obtain insurance. An obligation to insure does not, therefore, affect the allocation of the Parties' contractual rights and obligations.</p> <p>If, contrary to the default position, the Employer is the insuring Party pursuant to Sub-Clause 18.2, the Contractor remains liable for loss and damage to the Works pursuant to Sub-Clause 17.2 [Contractor's Care of the Works] including, for example, the cost of effecting repairs in the event of a fire from an adjacent property. However, if insurance is effected and maintained the liable Party will either have direct access to such insurance for the purpose of obtaining an indemnity in respect of its liability incurred under the Conditions or is entitled to have the proceeds applied to the cost of performing the remedial work. The Party with liability will be entitled to pursue any rights against insurers to enforce the indemnity to which such Party considers itself entitled if cover is wrongly declined.</p> <p>To the extent that an indemnity is not available as a result of the insuring Party having failed to maintain the required cover, the insuring Party will be liable for any amount that would have been payable but for such failure irrespective of the underlying liability. Thus, if the Employer, as insuring Party, fails to effect insurance in respect of the Works which are destroyed by a fire caused by welding operations (for which the Contractor would ordinarily be liable pursuant to Sub-Clause 17.2 [Contractor's Care of the Works]) the Employer is liable to the Contractor for the cost of reinstatement less any deductible or other amounts not recoverable pursuant to a compliant policy.</p> <p>Although not stated, the obligation to insure against loss or damage to the Works imposes on the insuring Party an obligation to procure and maintain contractor's all risks or a similar form of cover. This is widely available in the market and typically includes an indemnity against loss or damage to the Works, an indemnity against third party liability and policy endorsements that extend cover to include, for example, professional fees within reinstatement costs or loss and damage for which the Contractor is liable during the Defects Notification Period. Contractor's all risks cover usually excludes or restricts an insurer's liability for damage to Plant or Equipment, such cover being available separately in the form of a machinery damage policy.</p>

Clause	Title/Abstract	Commentary
	<p>Unless otherwise stated insurances shall cover loss or damage from any cause not listed in Sub-Clause 17.3 [Employer's Risks] but shall cover loss or damage attributable to the Employer's use and occupation of the Works and loss or damage arising, among other things, from design by the Employer's Personnel.</p>	<p>Standard policy wording typically includes a requirement for sudden and unforeseen loss or damage. As a result, inherent defects and non-compliant elements of the Works are not covered by contractor's all risks insurance which, in any event, typically expressly excludes such risks. Loss or damage that is caused by any such inherent defects and non-compliant elements of the Works is, in contrast, generally covered. As cover is required only up to the Taking Over Certificate and to a limited extent during the Defects Notification Period, contractor's all risks cover does not respond to loss or damage caused by latent or inherent defects thereafter. A total or partial collapse of a building<sup>106</sup> that occurs after the Taking Over Certificate has been issued that is caused, for example, by defective foundations is typically not, therefore, covered by the insurance required pursuant to Sub-Clause 18.2 although an extension to cover this risk may be available.</p> <p>As the insurance must cover anything not included among the Employer's Risks and as the insuring Party is liable, pursuant to Sub-Clause 18.1 [General Requirements for Insurances] for any monies that would have been receivable if such cover had been procured, the Contractor, as the insuring Party in the absence of any agreement to the contrary, is liable for all residual risk to the extent that cover is available in the market.</p> <p>Notably, the insuring Party is required to procure cover for loss or damage arising from designs prepared by the Engineer. Importantly, this cover is limited to the risk of loss and damage to the Works. The insuring Party is not required to procure cover for the Engineer's liability for design, cover that is typically excluded from contractor's all risks insurance<sup>107</sup> or, indeed, for the Contractor's own liability for design, if any, pursuant to Sub-Clause 4.1 [Contractor's General Obligations]. However, whereas the Contractor as a joint named insured has the benefit of the cover for loss or damage to the Works, if available, from the Contractor's own design the Engineer, on the other hand, is not a joint insured and, therefore, is exposed to the risk of a subrogated claim from the insurer in the event that the insured risk materialises.<sup>108</sup> Professional indemnity insurance, if maintained by the Engineer, typically responds to this risk.</p>

<sup>106</sup> This is the wording used in the UAE Civil Code, Article 880 on which further commentary can be found in Chapter 9 [Decennial liability].

<sup>107</sup> Paul Reed (2014) *Construction All Risks Insurance*: Sweet & Maxwell Limited, 1-007 and 3-014.

<sup>108</sup> Subject to the application of the UAE Civil Code, Article 1030.

Clause	Title/Abstract	Commentary
18.3	<p><b>Insurance Against Injury to Persons and Damage to Property</b></p> <p>The insuring Party shall insure against each Party's liability for any loss, damage, death or bodily injury which arises out of the Contractor's performance of the Contract.</p> <p>Unless otherwise stated cover shall be extended to all loss and damage to the Employer's property.</p>	<p>Liability for any death or injury caused by the Contractor's performance of the Contract may come from a number of sources but most commonly will take the form of the Diya or Arsh and compensatory damages in delict, broadly analogous to the tort of negligence.<sup>109</sup> Liability for loss or damage to property other than the Works arises in delict and pursuant to the UAE Civil Code, Article 878 which imposes liability on a contractor for physical damage unless the Contractor can prove that the damage was caused by an external or intervening event. There are also several sources of liability on an Employer for damage to surrounding property that can trigger the indemnity, most notably the UAE Civil Code, Article 316, which imposes a duty to take special care to prevent damage being caused by hazardous things,<sup>110</sup> a duty broadly analogous to liability for the tort of nuisance under English law.</p> <p>Such risks are usually covered by either or both of a contractor's all risks policy and, in the case of a contractor, a third party/public liability policy.</p> <p>General property cover typically excludes loss or damage caused by construction works procured by the insured, unless separately notified and a waiver is agreed. Although a contractor's all risks policy can be extended to include cover for existing property this normally requires such property and its replacement value to be identified in a schedule to the policy.</p>
18.4	<p><b>Insurance for Contractor's Personnel</b></p> <p>The Contractor shall effect insurance against liability arising from injury, sickness, disease or death of any person employed by the Contractor or any other of the Contractor's Personnel. The Employer and the Engineer shall also be indemnified under the policy of insurance.</p>	<p>In addition to the Diya, Arsh and compensatory damages in delict, employees or their heirs are entitled to statutory compensation for death or disability suffered in the workplace.<sup>111</sup> Such risks are usually covered by a workman's compensation or employer's liability cover.</p> <p>The definition of Contractor's Personnel includes 'all personnel whom the Contractor utilises on Site who may include the staff, labour and other employees of the Contractor and of each Subcontractor'. The Contractor has an obligation, therefore, to procure insurance for the Subcontractors' employees in addition to the Contractor's own employees. Further, the cover must extend to the Employer and the Engineer. This, in effect, requires the Contractor to procure workman's compensation cover on a project or 'wrap-up' basis.</p>

<sup>109</sup> Chapter 6.6 [Health, safety and welfare: Sanctions and penalties] and Chapter 10 [Physical damage and personal injury].

<sup>110</sup> Chapter 10 [Physical damage and personal injury].

<sup>111</sup> Chapter 6.6 [Health, safety and welfare: Sanctions and penalties].

Clause	Title/Abstract	Commentary
19.1	<p><b>Definition of Force Majeure</b></p> <p>'Force Majeure' means an exceptional event or circumstance satisfying the four criteria enumerated.</p> <p>Force Majeure may include natural catastrophes such as earthquakes, hurricanes, typhoons or volcanic activity.</p>	<p>Although Clause 19 [Force Majeure] incorporates elements of the FIDIC Conditions, 4th Edition, Sub-Clause 66.1, a clause specifically addressing Force Majeure is new to the FIDIC Conditions.</p> <p>The existence of Force Majeure is established by the application of a cumulative series of tests, including the requirement for the event to be 'exceptional', rather than by reference to an exhaustive list of events and circumstances. This approach is consistent with civil law generally and the law of the United Arab Emirates specifically, as is the definition itself which broadly mirrors that imported by the UAE Civil Code, Article 273 as applied by the courts.<sup>112</sup> Significantly, though, there is no requirement imposed by Sub-Clause 19.1 for Force Majeure to comprise an event of a public nature<sup>113</sup> or, in other words, an event that has a widespread and indiscriminate impact in contrast to one that is localised.</p> <p>By reason of Sub-Clause 19.4(b) [Consequences of Force Majeure] the categorisation at (i) – (v) is relevant for more than purely illustrative purposes. The first four examples of potential Force Majeure events are almost identical to the first four Employer's Risks at Sub-Clause 17.3 [Employer's Risks] and will, therefore, have the consequences of both. Furthermore, the phrase 'natural catastrophes' is similar to that used at Sub-Clause 17.3(h) which includes within Employer's Risks any 'operation of the forces of nature'. There is also overlap between these two expressions and 'exceptionally adverse climatic conditions' entitling the Contractor to an extension of the Time for Completion pursuant to Sub-Clause 8.4(c) [Extension of Time for Completion].</p>
19.2	<p><b>Notice of Force Majeure</b></p> <p>If a Party is or will be prevented from performing any of its obligations under the Contract by Force Majeure then it shall give notice within 14 days to the other Party.</p>	<p>In contrast to Sub-Clause 17.4 [Consequences of Employer's Risks] which determines the Parties' rights and obligations if the Works, Goods or Contractor's Documents suffer any loss or damage, Sub-Clause 19.2 excuses a Party from performance, except for the obligation to make payment.</p> <p>As an event of Force Majeure potentially affects either or both Parties and excuses performance, the notice requirement set out at Sub-Clause 20.1 [Contractor's Claims] which applies to the Contractor only and to claims for additional time and payment, is inapplicable. In contrast to Sub-Clause 20.1, the effect of a failure to give notice of Force Majeure is not specified. However, in the absence of notice the Party being prevented from performing the Contract by reason of Force Majeure runs the risk of forfeiting the right to be excused from performance and may, instead, be exposed to termination or other sanctions pursuant to the Contract.</p>

<sup>112</sup> Chapter 17.9 [Termination: Impossibility and force majeure].

<sup>113</sup> Chapter 5.10 [Contractual principles: Unforeseen circumstances].

Clause	Title/Abstract	Commentary
19.3	<p><b>Duty to Minimise Delay</b></p> <p>Each Party shall use reasonable endeavours to minimise any delay as a result of Force Majeure.</p>	<p>The obligation to mitigate any delay arising from Force Majeure highlights the absence in the FIDIC Conditions of any overarching duty to mitigate loss or delay arising from any other causes, including a breach by the other Party. In the absence of either a specific provision in the UAE Civil Code or a duty of mitigation established by practice, an obligation to mitigate could conceivably be derived from the duty of good faith.<sup>114</sup> Alternatively, a failure to mitigate could be reflected in the discretionary element of an award of damages.<sup>115</sup></p>
19.4	<p><b>Consequences of Force Majeure</b></p> <p>The Contractor is entitled to an extension of time and payment of any Cost, subject to Sub-Clause 20.1 [Contractor's Claims], suffered as a result of Force Majeure, except as a result of any natural catastrophes.</p>	<p>Notice of a Force Majeure event is required within 14 days pursuant to Sub-Clause 19.2 [Notice of Force Majeure]. Notice of delay and/or a claim for additional payment is required within 28 days pursuant to Sub-Clause 20.1 [Contractor's Claims]. As an event of Force Majeure potentially affects either or both Parties and excuses performance, whereas a notice issued pursuant to Sub-Clause 20.1 [Contractor's Claims] is required from the Contractor only and applies to claims for additional time and/or payment, these two notices serve different purposes.</p> <p>An extension of time entitlement arises from Force Majeure of any kind. In contrast, an entitlement to payment of Cost arises only for the types of Force Majeure identified at Sub-Clause 19.1(i) – (iv), not for those identified at (v), such as earthquakes, hurricanes and other 'natural catastrophes'. The exclusion of natural catastrophes is consistent with the absence of any express entitlement to recover Cost as part of an extension of time due to exceptionally adverse climatic conditions pursuant to Sub-Clause 8.4(c) [Extension of Time for Completion]. However, if the Works are damaged as a result of a natural catastrophe the Contractor may, nevertheless, be entitled to recover Cost pursuant to Sub-Clause 17.4 [Consequences of Employer's Risks] if the natural catastrophe is also properly described as an operation of the forces of nature as per Sub-Clause 17.3(h) [Employer's Risks].</p>
19.6	<p><b>Optional Termination, Payment and Release</b></p> <p>Upon optional termination (pursuant to Sub-Clause 15.5) or termination by reason of Force Majeure, the Engineer is required to determine the value of the work done and issue a Payment Certificate.</p>	<p>The Parties are directed to this Sub-Clause for establishing the Contractor's entitlement to payment in the event of a termination for convenience by the Employer pursuant to Sub-Clause 15.5 [Employer's Entitlement to Termination].</p> <p>If termination occurs for the Employer's convenience the Employer must return the Performance Security as a condition precedent to such termination taking effect. No similar provision is made for the return of the Performance Security in the event of termination for Force Majeure pursuant to Sub-Clause 19.6. As the Employer's obligation to return the Performance Security is triggered, pursuant to Sub-Clause 4.2 [Performance Security], by receipt of the Performance Certificate which in turn is generally triggered by the expiry of the latest of the Defects Notification Periods commencing on the date stated in the Taking Over Certificate, a process which will not operate in the event of termination pursuant to Sub-Clause 19.6, there is no prescribed means by which the Contractor secures the release of the Performance Security in the event of termination for Force Majeure. The limited circumstances in which the Employer is entitled to make a claim under the Performance Security, pursuant to Sub-Clause 4.2, mitigates the Contractor's risk to some extent.</p>

<sup>114</sup> Chapter 5.6 [Contractual principles: Good faith].

<sup>115</sup> Chapter 19.7 [Damages: Mitigation].

Clause	Title/Abstract	Commentary
19.7	<p><b>Release from Performance under the Law</b></p> <p>If any event or circumstance outside the control of the Parties (including, but not limited to Force Majeure) arises which makes it impossible or unlawful for either or both Parties to fulfil their contractual obligations or entitles the Parties to be released from their contractual obligations the Parties shall be discharged from further performance and the Contractor shall be entitled to be paid as if the Contract had been terminated by reason of Force Majeure.</p>	<p>In the absence of any qualification on the type of events or circumstances causing performance to be impossible or unlawful other than that this must be out of the control of the Parties the scope of this test is potentially broad. If performance is unlawful for a reason that is within the control of one of the parties, such as failure to obtain a building permit, Sub-Clause 19.7 does not apply because the other party's remedy is generally found elsewhere.</p> <p>Further, there are a variety of provisions of the laws of the United Arab Emirates that, if imported by reference to the law governing the Contract, could render the Parties discharged from their contractual obligations. Thus, for example:</p> <ul style="list-style-type: none"> <li>• contractual obligations must be consistent with public order as per the UAE Code of Commercial Practice, Article 2 and the UAE Civil Code, Article 3<sup>116</sup></li> <li>• a party to a construction contract is entitled to terminate the contract 'if any cause arises preventing the performance of the contract or completion of the performance thereof' pursuant to the UAE Civil Code, Article 893</li> <li>• a party is entitled to relief from grave loss arising in 'exceptional circumstances of a public nature' pursuant to the UAE Civil Code, Article 249.<sup>117</sup></li> </ul>

<sup>116</sup> UAE Civil Code, Article 3 defines public order as 'matters relating to sovereignty, freedom of trade, the circulation of wealth, rules of private ownership and the other rules and foundations upon which society is based, in such manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Shari'ah.'

<sup>117</sup> Chapter 5.10 [Contractual principles: Unforeseen circumstances].



Clause	Title/Abstract	Commentary
20.1	<p><b>Contractor's Claims</b></p> <p>If a Contractor considers himself entitled to an extension of the Time for Completion and/or additional payment, under any Clause of these Conditions or otherwise, the Contractor shall give notice to the Engineer describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.</p>	<p>In contrast to the FIDIC Conditions, 4th Edition, the notice requirement applies to claims for additional time and payment, not only to claims for additional payment. The independent notice mechanism that formed part of the corresponding extension of time provisions in the FIDIC 4th Edition, Sub-Clause 44.2 [Contractor to Provide Notification and Detailed Particulars] has been removed and replaced with a number of express cross-references to Sub-Clause 20.1,<sup>118</sup> to make it clear that a claim for additional time is subject to the same notice requirements as a claim for additional payment.</p> <p>Potentially there are two triggers for the Contractor's obligation to give notice of a claim. The first is when the Contractor considers itself to be entitled to an extension of time and/or additional payment. The second is when the Contractor becomes aware of the occurrence of the event or circumstance giving rise to such entitlement. The selection of one or other trigger has a practical bearing on the date by which notice must be given.<sup>119</sup></p> <p>If the Contractor's awareness of an event or circumstance and the Contractor's formation of a positive view on entitlement do not coincide there is the possibility of an early and late date from which the period for giving notice is to be calculated.</p> <p>The phrase 'additional payment' begs the question: additional to what?</p>

<sup>118</sup> These include an erroneous cross-reference as discussed further in the commentary on Sub-Clause 8.4 [Extension of Time for Completion].

<sup>119</sup> In *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* [2014] EWHC 1028 (TCC), paragraph 312, the High Court of England and Wales held that Sub-Clause 20.1 requires both an event and awareness. The first instance judgment was upheld by the Court of Appeal in *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* [2015] EWCA Civ 712.

Clause	Title/Abstract	Commentary
		<p>As 'additional' is a relative term, a reference point is required in order to ascertain whether a payment claim requires notice. There are a number of possible reference points that can be adopted for this purpose including, most obviously, the Accepted Contract Amount or the Contract Price or, less obviously, work that is required to be measured pursuant to Clause 12 [Measurement and Evaluation]. Even limiting the choice to either of the Accepted Contract Amount or the Contract Price causes significantly different results. Whereas the Accepted Contract Amount is fixed by reference to the amount, if any, stated in the Letter of Acceptance, and is, thus, static, the Contract Price is only established as the Works proceed, in accordance with Sub-Clause 14.1(a) [The Contract Price] and Clause 12, by the application of additions or deductions due under the Contract. Measurable work is thus, not, additional to the Contract Price and an amount that is 'additional' to the Accepted Contract Amount is not necessarily 'additional' to the Contract Price.</p> <p>Adopting the Contract Price has the result that a claim to an amount that is 'additional' would exclude any amount forming part of a measurement of the net actual quantities, including that performed as a Variation. Support for this approach can be drawn from the content required for an application for an Interim Payment Certificate, pursuant to Sub-Clause 14.3 [Application for Interim Payment Certificates], which distinguishes between the estimated value of the work executed (including Variations) at Sub-Clause 14.3(a) and 'any other additions or deductions' due under the Contract or otherwise, including those under Clause 20, at Sub-Clause 14.3(f). On the basis of the omission of any reference to Clause 20, an entitlement to a valuation of the work executed (including Variations) can be read as arising independently and without notice.</p> <p>In contrast, a claim for additional payment falling within Sub-Clause 14.3(f) not only expressly requires notice but also makes such notice a condition precedent to any entitlement. Such additional claims arise pursuant to:</p> <ul style="list-style-type: none"> <li>• Sub-Clause 1.9 [Delayed Drawings or Instructions]</li> <li>• Sub-Clause 2.1 [Right of Access]</li> <li>• Sub-Clause 4.7 [Setting out]</li> <li>• Sub-Clause 4.12 [Unforeseeable Physical Conditions]</li> <li>• Sub-Clause 4.24 [Fossils]</li> <li>• Sub-Clause 7.4 [Testing]</li> <li>• Sub-Clause 8.5 [Delays Caused by Authorities]</li> <li>• Sub-Clause 8.9 [Suspension]</li> <li>• Sub-Clause 10.3 [Interference with Tests on Completion]</li> <li>• Sub-Clause 16.1 [Contractor's Entitlement to Suspend Work]</li> <li>• Sub-Clause 17.4 [Employer's Risks], and</li> <li>• Sub-Clause 19.4 [Consequences of Force Majeure].</li> </ul>

Clause	Title/Abstract	Commentary
	<p data-bbox="314 842 510 1160">Notice must be given if the Contractor considers himself entitled to an extension of the Time for Completion and/or additional payment, under any Clause of these Conditions or otherwise.</p> <p data-bbox="314 1245 510 1319">The Contractor shall give notice to the Engineer.</p>	<p data-bbox="535 173 1134 358">One conclusion to which this approach leads, in a departure from the approach in the FIDIC Conditions, 4th Edition, is that Sub-Clause 20.1 does not require notice to be given of any claim for payment of a Variation, at least not to the extent that the claim comprises measurable work. The Engineer is required to calculate and adjust the Contract Price by measurement of the net actual quantities of each item, including Variations.</p> <p data-bbox="535 362 1134 519">Indeed, Sub-Clause 12.3 [Evaluation] expressly contemplates that the Engineer will include work executed as a Variation, without reference to Sub-Clause 20.1 within an interim valuation. The only requirement, it seems, is that the Contractor acknowledges receipt of a Variation instruction, pursuant to Sub-Clause 13.3.</p> <p data-bbox="535 522 1134 838">Any non-physical component of a Variation, such as a time related claim resulting from delay and disruption is not necessarily assessed in the same manner as the corresponding physical component of the Variation. However, if payment of time related claims is sought by adjusting the existing rates and prices for the affected work (such existing rates and prices being inapplicable) to reflect the time related or other intangible costs of a Variation this element of a Variation is valued in the same way as the measured component pursuant to Sub-Clause 12.3.<sup>120</sup> An independent claim for damages, in contrast, does not naturally qualify for measurement.</p> <p data-bbox="535 842 1134 1051">It is not merely claims for additional payment 'under any clause of these Conditions' that must be notified but also any claim for additional payment that arises otherwise in connection with the Contract. This phrase is generally considered to extend the reach of the notice provision to claims for damages, whether for breach of the Contract or under applicable law, which cannot be said to arise pursuant to the Contract and might otherwise be exempt from the notice requirements.</p> <p data-bbox="535 1055 1134 1240">An exception to the requirement for 'formal' notice is provided for claims for financing charges pursuant to Sub-Clause 14.8 [Delayed Payment]. Also, in the case of any claim arising from an omission, pursuant to Sub-Clause 12.4 [Omissions], the Contractor is required to give notice but not (unlike the standard entitlement provision) expressly in accordance with Sub-Clause 20.1.</p> <p data-bbox="535 1243 1134 1557">The form in which a notice must be given is not specified in Sub-Clause 20.1. Instead, the applicable formalities for notice are prescribed by Sub-Clause 1.3 [Communications], which include the permitted methods of delivery, a requirement that a notice should be in writing, the address to be used and recipients to be copied. Failure to comply with any or all of these requirements constitutes a breach of the Contract for which the remedy is compensatory damages. However, by virtue of the final paragraph of Sub-Clause 20.1, an extension of time or an additional payment may be adjusted to reflect the extent to which this failure has prevented or prejudiced the proper investigation of a claim.</p>

<sup>120</sup> For a further discussion of the recovery of time related costs of a Variation refer to the commentary on Sub-Clause 12.3.

Clause	Title/Abstract	Commentary
	<p>If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim.</p>	<p>The only requirement for the content of the notice is that a description of the event or circumstance giving rise to the claim must be provided. The Contractor is required to follow up such notice within 42 days from the event or circumstances giving rise to the claim with a fully detailed claim including supporting particulars. The extent to which any failure to provide these particulars prevents or prejudices the proper investigation of the claim shall be taken into account and reflected in the Engineer's assessment of such claim but the entitlement is not automatically lost.</p> <p>Although this wording, particularly the reference to the Employer being discharged from liability and a claim being excluded (in the final sentence of Sub-Clause 20.1) is consistent with the forfeiture of rights, it is widely acknowledged that the notice mechanism in the FIDIC Conditions is structured, in common law terms, as a condition precedent. Rather than extinguishing rights that have accrued, a condition precedent imposes conditions, the fulfilment of which is a necessary component of any rights coming into existence, thus circumventing the objections that can hinder the implementation of forfeiture provisions.</p> <p>As Sub-Clause 20.1 does not itself create any entitlement to additional time or payment it is necessary to look beyond Sub-Clause 20.1 to the source of this entitlement for evidence of a condition precedent in the FIDIC Conditions. Adopting this approach it is found that an entitlement to additional payment or time is, in each case (except for financing charges), expressly made subject to Sub-Clause 20.1.<sup>121</sup> An entitlement arises only if a compliant notice has been given.<sup>122</sup> Failing this, there is no entitlement to be extinguished.</p> <p>As an entitlement to damages for breach of the Contract or an entitlement at law,<sup>123</sup> in contrast, does not arise pursuant to any of these Sub-Clauses, this entitlement is not subject to a condition precedent and is, instead, dealt with by the discharge wording alone if a valid notice is not given. That a meaningful distinction is drawn, in practice, between an entitlement that is prevented from arising or that is extinguished given the less formalistic philosophy of the applicable law, is doubtful.</p>

<sup>121</sup> See, for example, Sub-Clause 8.4 [Extension of Time for Completion].

<sup>122</sup> As noted in the commentary on Sub-Clause 13.3 [Variation Procedure] measured work forming part of a Variation must be included in a fair determination of the amount due to the Contractor without any explicit requirement for notice to be given. It follows that there is also no condition precedent applicable to an entitlement to be paid for such work as part of a Variation.

<sup>123</sup> Such a claim may arise, for example, pursuant to the UAE Civil Code, Article 1271, which provides a remedy that is roughly analogous to a quantum meruit claim under common law.

Clause	Title/Abstract	Commentary
20.2	<p><b>Appointment of the Dispute Adjudication Board</b></p> <p>Disputes shall be adjudicated by a Dispute Adjudication Board (DAB) to be appointed jointly by the Parties by the date stated in the Appendix to Tender.</p>	<p>Nevertheless, claims that bypass the condition precedent have a better prospect of surviving a failure to give notice in accordance with Sub-Clause 20.1 because, stripped of the condition precedent, the discharge provision is exposed to an assortment of potential challenges. These include challenges derived from principles of contract interpretation,<sup>124</sup> the preservation of prescription periods<sup>125</sup> and restrictions on the permitted scope of any limitation or exclusion of liability.<sup>126</sup></p> <p>For the purpose of applying the relevant principles of interpretation the emphasis is placed, both in principle and in practice, on the Parties' intentions. These are the intentions of the Parties derived from the words used and other objective criteria, such as custom and practice. The intentions of third parties, such as the FIDIC drafting committee, whether recorded in the FIDIC Contracts Guide<sup>127</sup> or elsewhere, are of limited, if any, relevance (unless, perhaps, both Parties are members of the relevant drafting committee), the Court of Merits instead having the task of applying the relevant criteria to the wording used.</p> <p>Although the Engineer is still required under the FIDIC Conditions to make 'fair' determinations, pursuant to Sub-Clause 3.5 [Determinations], the Engineer is relieved of the task of maintaining the independence required to determine disputes impartially during the course of the Works while relying on the Employer for payment of the Engineer's fees. This increasingly challenging duty under the FIDIC Conditions, 4th Edition, has been abandoned in favour of a DAB. Although Sub-Clause 20.2 does not require members of a DAB to be independent and impartial, the General Conditions of Dispute Adjudication Agreement appended to the FIDIC Conditions, if adopted, impose this requirement on the DAB members.</p> <p>The intention of Sub-Clause 20.2 and, therefore, the premise on which the FIDIC Conditions are drafted is that a DAB is appointed from the outset. The DAB remains in place until the notice of discharge is submitted by the Contractor with the Final Statement.</p> <p>If the Parties do not specify the date for appointment there is no default mechanism in the FIDIC Conditions that provides a deadline date and, accordingly, a DAB is unlikely to be appointed, with the result that a dispute proceeds directly to arbitration pursuant to Sub-Clause 20.8 [Expiry of Dispute Adjudication Board's Appointment].</p>

<sup>124</sup> Chapter 4 [Interpretation], including the UAE Civil Code, Article 266.

<sup>125</sup> For a discussion of prescription periods and claims notices see Chapter 21.4 [Prescription: Restriction on amendment].

<sup>126</sup> Chapter 19.8 [Damages: Limitation of Liability].

<sup>127</sup> FIDIC (2000) FIDIC Contracts Guide, 1st edn., Geneva: FIDIC.

Clause	Title/Abstract	Commentary
		<p>Failure to appoint a DAB creates a decision-making vacuum and numerous opportunities for deadlock. In relation to an objection to nomination, for example, pursuant to Sub-Clause 5.2 [Objection to Nomination] the Contractor is not under any obligation to employ a nominated Subcontractor to whom a reasonable objection is raised. The Engineer has no entitlement pursuant to the Contract to overrule any such objection, such right being vested in the DAB or, failing the appointment of a DAB, an arbitral tribunal by virtue of Sub-Clause 20.8. If neither Party is willing to resolve the resulting deadlock by backing down, the Parties are driven towards a high stakes process to resolve what ought to be a straightforward issue.</p> <p>The DAB may, if both Parties consent, offer its opinion on any issues referred to it by either Party as well as deciding disputes, without the necessity for the consent of both Parties.</p>
20.3	<p><b>Failure to Agree Dispute Adjudication Board</b></p> <p>If the Parties fail to appoint or re-constitute the DAB, the appointing body or official identified in the Appendix to Tender shall make this appointment.</p>	<p>Appointment of the DAB pursuant to Sub-Clause 20.2 [Appointment of the Dispute Adjudication Board] is a consensual process, requiring approval of each Party's nominee and agreement of the nominee's terms of appointment. If the process breaks down, the Parties may have recourse to the appointing body or individual identified in the Appendix to Tender for the purpose of constituting or reconstituting the DAB. Neither Party can, however, be compelled to sign the Dispute Adjudication Agreement as envisaged by Sub-Clause 20.2, which (together with the General Conditions of Dispute Adjudication Agreement) governs the appointment of the DAB members, including the entitlement to payment and to an indemnity for any claims. Without such agreement DAB members may be reluctant to accept an appointment.</p>
20.4	<p><b>Obtaining Dispute Adjudication Board's Decision</b></p> <p>If a dispute of any kind whatsoever arises including a dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer either Party may refer the dispute in writing to the DAB for its decision.</p>	<p>Although termination is not mentioned in the list of disputes referable to a DAB, the DAB most likely survives a notice of termination in a manner consistent with the treatment of the Contract in general and with the recognition afforded to a construction contract as a continuing one.<sup>128</sup> As the Engineer's role survives termination the DAB's role for resolving any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer should, it is submitted, also survive. Expiry of the appointment of the DAB, pursuant to Sub-Clause 20.2 [Appointment of the Dispute Adjudication Board], on the notice of discharge being given by the Contractor provides some further support for this approach.</p>

<sup>128</sup> Chapter 17.8 [Termination: consequences of termination].

Clause	Title/Abstract	Commentary
	<p>The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below.</p>	<p>A DAB decision is binding on an interim basis and, therefore, the Parties are contractually obligated to put the DAB decision into effect.</p> <p>If a DAB decision is not challenged by way of a notice of dissatisfaction within 28 days and is not put into effect, Sub-Clause 20.7 [Failure to Comply with Dispute Adjudication Board's Decision] provides that this failure may be referred directly to arbitration essentially for the purpose of converting the DAB decision into a final and enforceable arbitration award.<sup>129</sup></p> <p>However, if the decision is challenged and, therefore, does not become final and binding there is no provision within the FIDIC Conditions for the consequences of any subsequent failure to implement the DAB's decision, as required, on an interim basis. The options in such circumstances, for the Employer, include treating a failure to implement a DAB decision as the basis for a notice to correct pursuant to Sub-Clause 15.1 [Notice to Correct] or as grounds for encashment of the Performance Security pursuant to Sub-Clause 4.2(b) [Performance Security] or, in the case of the Contractor, as constituting a substantial failure by the Employer to perform its obligations and, accordingly, as grounds for a notice of termination pursuant to Sub-Clause 16.2(d) [Termination by Contractor].</p> <p>To trigger an entitlement to suspend performance or reduce the rate of progress pursuant to Sub-Clause 16.1 [Contractor's Entitlement to Suspend Work] the Contractor should include the amount of the DAB decision in a Statement issued pursuant to Sub-Clause 14.3 [Application for Interim Payment Certificates]. If the Engineer fails to include any payment awarded to the Contractor in a subsequent Interim Payment Certificate, or the Employer fails to make payment of an amount included in an Interim Payment Certificate to reflect a DAB decision the Contractor acquires a right to suspend performance until such time as payment is made.</p> <p>Alternatively, either Party may:</p> <ul style="list-style-type: none"> <li>• proceed to arbitration, in which case the dispute is reheard prior to final resolution, pursuant to Sub-Clause 20.6 [Arbitration],<sup>130</sup></li> <li>or</li> <li>• refer the failure itself to arbitration.</li> </ul> <p>The difficulty with the latter approach is that a failure to comply with a DAB decision is a separate cause of action (for breach of the Contract) from the underlying claim and must, accordingly, be referred back to the DAB before this can be referred to arbitration. Even then it is unclear whether an arbitral tribunal would be free to endorse a DAB decision without reviewing the underlying merits given the reluctance of the courts in the United Arab Emirates and elsewhere, to cede jurisdiction over the administration of justice to any process other than one given statutory recognition.<sup>131</sup></p>

<sup>129</sup> As to the status and treatment of any such award, see the discussion below.

<sup>130</sup> This was the interpretation given to Sub-Clause 20.6 [Arbitration] by the Singapore Court of Appeal in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33.

<sup>131</sup> Further commentary on this issue is set out below in relation to a final and binding award.

Clause	Title/Abstract	Commentary
		<p>The Respondent in any such arbitration would also be likely to file a counterclaim for the review and revision of the DAB decision precipitating a rehearing of the dispute. A tribunal may, however, be willing to grant interim or conservatory relief on the basis of a cause of action for breach of Sub-Clause 20.4, though any such relief is likely to be of limited utility in the United Arab Emirates.<sup>132</sup></p> <p>In April 2013, FIDIC issued a Guidance Memorandum stating the intention that a failure to comply with a DAB decision can be referred directly to arbitration under Sub-Clause 20.6 [Arbitration] without first being referred back to the DAB, and proposed a number of amendments to the FIDIC Conditions to achieve this aim. Although intentions are a factor in determining the proper interpretation of contracts in the event of ambiguity it is the intentions of the Parties not those of FIDIC that are relevant for this purpose. Consequential amendments to Sub-Clauses 14.6 [Issue of Interim Payment Certificates] requiring the Engineer to include the amount of a DAB award in an Interim Payment Certificate and 14.7 [Payment] requiring the Employer to pay an amount contained in a DAB award and an Interim Payment Certificate are also suggested. This is, presumably though not explicitly, intended to trigger the Contractor's entitlement to suspend the Works and to accrue financing charges in the event of a failure by the Employer to pay the amount awarded.</p>
	<p>Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.</p>	<p>The Contractor is not entitled, it seems, to treat a DAB decision as retrospective confirmation of a repudiatory breach and, thus, exercise a right to abandon, repudiate or terminate the Contract on the basis of a decision. It is unclear whether this extends to a failure to give effect to a DAB decision, although, in principle, any such failure constitutes an independent and new cause of action that must be established pursuant to Clause 16 [Suspension and Termination by Contractor]. The obligation to continue to proceed with the Works potentially excludes the various statutory rights of suspension and termination contained in the UAE Civil Code,<sup>133</sup> though this must be reconciled with the context and express wording used.</p>
	<p>Neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given.</p>	<p>If a DAB decision has been issued no arbitration can be commenced unless a notice of dissatisfaction has been issued. Limited exceptions are made pursuant to Sub-Clauses 20.7 [Failure to Comply with Dispute Adjudication Board's Decision] and 20.8 [Expiry of Dispute Adjudication Board's Appointment]. These implement the final and binding status of a DAB decision that goes unchallenged and address the impossibility of obtaining a DAB decision in the absence of a DAB but do not grant an exception for a Party's choice not to refer a dispute to the DAB.</p>

<sup>132</sup> Chapter 22.6 [Litigation: Summary actions].

<sup>133</sup> UAE Civil Code, Articles 247, 272 and 892 and Chapters 16.2 [Suspension: statutory right of suspension] and 17.2/3 [Termination: Termination of a *muqawala*].



Clause	Title/Abstract	Commentary
20.6	<p>If the DAB has given its decision as to a matter in dispute to both Parties but no notice of dissatisfaction has been given by either Party within 28 days after it received the decision then the decision shall become final and binding on both Parties.</p> <p><b>Arbitration</b></p> <p>Any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration.</p>	<p>As a notice of dissatisfaction is issued in response to a DAB decision it follows that a Party is prohibited from proceeding to arbitration without first obtaining a DAB decision, making it mandatory to refer a dispute to a DAB before proceeding to arbitration. A precondition for commencement of arbitration proceedings does not contravene public order and, accordingly, the requirement for a notice of dissatisfaction is likely to be enforceable pursuant to applicable law.<sup>134</sup></p> <p>Arbitration is treated by the courts as 'an exceptional method' of dispute resolution, which is subject to specific safeguards to protect a party from the consequences of unwittingly relinquishing the right to have disputes resolved by an independent state sanctioned judiciary.<sup>135</sup> Although the civil courts routinely recognise and enforce arbitration awards, there is some doubt as to whether an arbitration award ratifying a DAB decision without regard to the merits on the basis of this having become 'final and binding' would withstand a challenge based on the public order ground that a DAB is neither a domestic court nor the only permitted alternative thereto, namely arbitration.</p> <p>Establishing the existence of a dispute is a necessary ingredient for a valid arbitration. A dispute is generally considered to exist when a claim or entitlement is asserted by one party and rejected by another.<sup>136</sup></p> <p>In general, it is a precondition, pursuant to Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision], for proceeding to arbitration that a notice of dissatisfaction has been issued in response to a DAB decision. The qualification of the reference to a DAB decision 'if any', in the opening wording of Sub-Clause 20.6 acknowledges that this precondition does not apply in all cases, including, for example, if a DAB has not been constituted. As a dispute shall be adjudicated by a DAB in accordance with Sub-Clause 20.2 [Appointment of the Dispute Adjudication Board] and thereafter shall be subjected to an attempt at amicable settlement in accordance with Sub-Clause 20.5 [Amicable Settlement] obtaining a DAB decision is mandatory, with only limited exceptions. It is unlikely, therefore, that the qualification (i.e. 'if any') of the requirement for a DAB decision permits an interpretation that arbitration may be commenced if there is no DAB decision due to a Party's own failure to request one, notwithstanding that taken in isolation it is capable of this literal interpretation.</p>

<sup>134</sup> Chapter 24.5 [Arbitration: Jurisdiction and powers].

<sup>135</sup> Chapter 24.6 [Arbitration: Procedures and formalities].

<sup>136</sup> Chapter 24.5 [Arbitration: Jurisdiction and powers].

Clause	Title/Abstract	Commentary
		As neither the place nor the seat of arbitration are specified this is to be decided, for the purpose of any arbitration, by a tribunal appointed pursuant to the ICC Rules of Arbitration. The designation of the seat determines the procedural law applicable to arbitration proceedings and the court having supervisory jurisdiction. The seat may also determine the law applicable to the arbitration agreement itself. <sup>137</sup> As strict procedural rules govern the capacity of signatories and the form of authority required to bind a Party to an arbitration agreement the law applicable to the arbitration agreement, critically, has the potential to determine whether this is effective. In particular, failure to establish capacity at the time of executing the Contract, for example by production of a special power of attorney or other evidence of capacity, may render the arbitration agreement void. Selecting the DIFC as the arbitration seat and applying DIFC law to an arbitration agreement is an option that mitigates this risk. <sup>138</sup>
	Arbitration may be commenced prior to or after completion of the Works.	Commencement of arbitration prior to completion of the Works can, in certain circumstances, be problematic. For example, in the case of termination by the Employer, pursuant to Sub-Clause 15.2 [Termination by Employer], the process for valuation of the Contractor's entitlement requires the Works to have been completed in order for the extra costs of such completion to be assessed.
20.7	<b>Failure to comply with Dispute Adjudication Board's Decision</b> If the DAB's decision has become final and binding and the relevant Party has not complied with such decision the other Party may refer the failure itself to arbitration.	Arbitration is treated by the courts as 'an exceptional method' of dispute resolution, which is subject to specific safeguards to protect a party from the consequences of relinquishing the right to have disputes resolved by an independent state sanctioned judiciary. <sup>139</sup> As a DAB is not recognised by the UAE Civil Procedure Code or otherwise as a permitted exception to the jurisdiction of the courts, a DAB decision is not capable of judicial recognition and enforcement. On the basis that a civil court would not recognise a DAB decision as final and binding a Party is able to commence arbitration for the purpose, in effect, of ratifying the DAB decision and converting this into an arbitration award without any review by the tribunal of the underlying merits. This option is only available, however, if no notice of dissatisfaction has been given within 28 days from the date of the DAB decision. It is unclear whether an arbitration award ratifying a DAB decision without regard to the merits on the basis of this having become 'final and binding' would withstand a challenge based on public order grounds, particularly the requirement of a tribunal to safeguard the 'the right of opposition and equality'. <sup>140</sup>

<sup>137</sup> Chapter 24.4 [Arbitration: Capacity to agree].

<sup>138</sup> DIFC Law No. 1/2008 [Arbitration Law] is based on the UNCITRAL Model Law on International Commercial Arbitration and does not, for example, contain a provision corresponding to the UAE Civil Procedure Code, Article 203(4) but a party's lack of capacity, if applicable, to execute an arbitration agreement remains a ground for annulment pursuant to the DIFC Arbitration Law, Article 41(2)(a)(i), which mirrors the wording in the New York Convention, Article V(1)(a).

<sup>139</sup> Chapter 24.1 [Arbitration: Right to arbitrate].

<sup>140</sup> Chapter 24.6 [Arbitration: Procedures and formalities] and the UAE Civil Procedure Code, Article 212(1).

Clause	Title/Abstract	Commentary
20.8	<p><b>Expiry of Dispute Adjudication Board's Appointment</b></p> <p>If a dispute arises between the Parties and there is no DAB in place whether by reason of the expiry of the DAB's appointment (i.e. after the notice of discharge) or otherwise the dispute may be referred directly to arbitration.</p>	<p>In April 2013, FIDIC issued a Guidance Memorandum suggesting the replacement of Sub-Clause 20.7 with alternative wording extending its effect to any DAB decision, irrespective of whether this is binding or final and binding.</p> <p>An entitlement to proceed directly to arbitration without a DAB decision or an attempt at amicable settlement arises whether this is due to the expiry of the DAB's appointment 'or otherwise'. The latter phrase does not draw a distinction between neutral causes and those that result from a default, such as a failure to appoint a DAB member pursuant to Sub-Clause 20.2 [Appointment of the Dispute Adjudication Board]. This probably reflects the expectation that a DAB will be appointed at the outset and that there is limited, if any, scope for this not to happen. The entitlement to proceed directly to arbitration is limited, however, to the absence of a DAB and does not relieve the Parties of the obligation to follow the procedure for referring disputes to an established DAB.<sup>141</sup></p> <p>The DAB's appointment expires, pursuant to Sub-Clause 20.2 [Appointment of the Dispute Adjudication Board], when the final written discharge to be issued by the Contractor pursuant to Sub-Clause 14.12 [Discharge] becomes effective. As this requires the Engineer to have issued the Performance Certificate following expiry of the Defects Notification Period or as soon thereafter as the outstanding work has been completed and defects remedied, the DAB could remain in place for a considerable period after the Works have been taken over unless the parties otherwise agree. However, any dispute over latent or inherent defects is likely to occur after the expiry of the DAB and, in such circumstances, proceeds directly to arbitration.</p>

<sup>141</sup> In the English High court case of *Peterborough City Council v Enterprise Managed Services Ltd* [2014] EWHC 3193 (TCC) the court concluded, albeit on the Silver book, that the parties were not relieved by Sub-Clause 20.8 of the obligation to appoint a DAB after a dispute had arisen but hinted that the decision might be different under the FIDIC Conditions as these require a standing DAB rather than an ad hoc DAB. The Swiss Supreme Court (4A\_124/2014), declined to enforce the requirement for a dispute to be referred to a DAB and, instead, found that it was an abuse of rights for a party that obstructed the appointment of a DAB subsequently to insist on the performance of this requirement by the Claimant prior to the latter proceeding to arbitration.



# Glossary

Abbreviation	Full Title/Law No.
ADCCAC Rules	Abu Dhabi Commercial Conciliation and Arbitration Centre Rules effective 1 September 2013.
Bahrain Arbitration Law	Emiri Decree No. 9/2015 issuing the Arbitration Law.
Bahrain Civil Code	Emiri Decree No. 19/2001 issuing the Civil Code.
Bahrain Civil Procedure Code	Emiri Decree No. 12/1971 issuing the Civil and Commercial Procedures Act.
Bahrain Commerce Law	Emiri Decree No. 7/1987 issuing the Law of Commerce.
Bahrain Constitution	Constitution of the Kingdom of Bahrain (2002).
Bahrain Labour Law	Emiri Decree No. 36/2012 issuing the Labour Law for the Private Sector.
Bahrain Law of Proof	Emiri Decree No. 14/1996 issuing the Law of Evidence in Civil and Commercial Matters, as amended by Emiri Decree No. 17/2009 and Emiri Decree No. 24/2013.
Bahrain Penal Code	Emiri Decree No. 15/1976 issuing the Penal Law.
BCDR-AAA Rules	Arbitration Rules issued by the Bahrain Chamber for Dispute Resolution in partnership with the American Arbitration Association.
Court of Merits	The Court of Merits comprises the Court of First Instance and the Court of Appeal and excludes the Court of Cassation, which is sometimes referred to as a court of law as it is confined to addressing issues of law only.
DIAC Rules	Dubai International Arbitration Centre Arbitration Rules effective from 7 May 2007.
DIFC	Dubai International Financial Centre.
FIDIC	International Federation of Consulting Engineers.
FIDIC Conditions	Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, published by FIDIC in 1999.
FIDIC Conditions, 4th Edition	Conditions of Contract for Works of Civil Engineering Construction, published by FIDIC in 1987.
GCC	Cooperation Council for the Arab States of the Gulf (commonly referred to as the Gulf Cooperation Council).
ILO	International Labour Organisation.
Kuwait Civil Code	Emiri Decree No. 67/1980 issuing the Civil Code.
Kuwait Civil Procedure Code	Emiri Decree No. 38/1980 issuing the Civil and Commercial Pleadings Law.
Kuwait Commerce Law	Emiri Decree No. 68/1980 issuing the Law of Commerce.

*(continued overleaf)*

<b>Abbreviation</b>	<b>Full Title/Law No.</b>
Kuwait Constitution	Kuwait Constitution (1962).
Kuwait Labour Law	Emiri Decree No. 6/2010 issuing the Law of Labour for the Private Sector.
Kuwait Law of Proof	Emiri Decree No. 39/1980 concerning Evidence in Commercial and Civil Matters.
Kuwait Penal Code	Emiri Decree No. 16/1960 issuing the Penal Law.
KSA Arbitration Law	Royal Decree No M/34 dated 24/5/1433 AH corresponding to 16/4/2012 AD issuing the Law of Arbitration.
KSA Labour Law	Royal Decree No. M/51/2005 issuing the Labour Law.
KSA Basic Law of Government	Basic Law of Government passed by Royal Decree on 27 Shaaban 1412H corresponding to 2 March 1992.
New York Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.
Oman Civil Code	Sultan Decree No. 29/2013 issuing the Civil Code.
Oman Civil Procedure Code	Sultan Decree No. 29/2002 issuing the Civil and Commercial Procedure Code.
Oman Commerce Law	Sultan Decree No. 55/1990 issuing the Law of Commerce.
Oman Constitution	Basic Law of the Sultanate of Oman (1996).
Oman Labour Law	Sultan Decree No. 35/2003 as amended by Law No. 112/2006 and No. 63/2009 issuing the Labour Law.
Oman Law of Proof	Sultan Decree No. 68/2008 issuing the Law of Evidence in Civil and Commercial Transactions.
Oman Penal Procedures Law	Sultan Decree No. 97/1999 issuing the Law of Civil and Commercial Procedure.
Oman Penal Code	Sultan Decree No. 7/1974 issuing the Penal Law.
Oman Arbitration Law	Sultan Decree No. 47/1997 issuing the Law of Arbitration in Civil and Commercial Disputes.
Qatar Civil Code	Emiri Decree No. 22/2004 issuing the Civil Code
Qatar Civil Procedure Code	Emiri Decree No. 13/1990 issuing the Commercial and Civil Procedure Code.
Qatar Commerce Law	Emiri Decree No. 27/2006 issuing the Commercial Code.
Qatar Constitution	Permanent Constitution of the State of Qatar (2003).
Qatar Labour Law	Emiri Decree No. 14/2004 issuing the Labour Law.
Qatar Penal Code	Emiri Decree No. 11/2004 issuing the Penal Law.
Qatar Penal Procedures Law	Emiri Decree No. 23/2004 issuing the Penal Procedures Law.
QFC	Qatar Financial Centre
UAE Civil Code	Federal Law No. 5/1985 issuing the Civil Code, as amended by Federal Law No. 1/1987.
UAE Civil Procedure Code	Federal Law No. 11/1992 issuing the Civil Procedure Code, as amended by Federal Law No. 30/2005 and Federal Law No. 10/2014.
UAE Code of Commercial Practice	Federal Law No. 18/1993 issuing the Code of Commercial Practice.
UAE Commercial Companies Law	Federal Law No. 2/2015 issuing the Commercial Companies Law.
UAE Constitution	Constitution of the United Arab Emirates (1971), as amended by Amendment No. 1/1972, 1/1976, 1/1996, 1/2004 and 1/2009.

Abbreviation	Full Title/Law No.
UAE Federal Supreme Court Law	Federal Law No. 10/1973 issuing the Federal Supreme Court Law.
UAE Labour Law	Federal Law No. 8/1980 as amended by Federal Law Nos. 24/1981, 15/1985, 12/1986, 14/1999 and 8/2007 issuing the Labour Law.
UAE Law of Proof	Federal Law No. 10/1992 issuing the Law of Proof in Civil and Commercial Transactions.
UAE Ministry of Justice Commentary	James Whelan (2011) <i>UAE Civil Code and Ministry of Justice Commentary</i> : Sweet & Maxwell Limited.
UAE Penal Code	Federal Law No. 3/1987 issuing the Penal Code, as amended by Federal Law No. 34/2005 and Federal Law No. 52/2006.
UAE Penal Procedures Code	Federal Law No. 35/1992 issuing the Penal Procedures Code, as amended by Federal Law No. 29/2005 and Federal Law No. 35/2006.
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006.





# Index

- absence of express terms,
  - interpretation 39–40
- Abu Dhabi
  - building codes 90, 99
  - courts 230, 231
  - court fees 236
  - defects 89–90, 99, 114
  - delay damages 145
  - health and safety 63, 66, 119
  - interest 168, 169
  - jurisdiction between emirates 234–235
  - professional indemnity insurance 93
  - property damage 119
  - public procurement 22, 114, 119, 145, 155, 158
  - utility lines 120–121
- Abu Dhabi Global Market 6, 10, 11, 289
- abuse of rights 52–53
- acceleration 138
- accommodation 67–68
- acts causing harm *see* delict (tort)
- ADCCAC Rules, arbitration 269, 271
- adhesion, contract of 53–54
- adjudication *see* mediation and adjudication
- administrative contracts 23–24, 143–146, 232
  - delay damages 143–146
- administrative court 24, 231, 290, 291
- administrative law 55
- administrative sanctions, sanctions and penalties 78–79
- alternative dispute resolution 242–244
- ambiguity, resolution 39
- appeal
  - effect 247
  - execution 247–248
  - grievance 241
  - right of 230–231
- apportionment
  - concurrent delay 133–135
  - decennial liability 109–110
  - joint liability 92–93
- Arabic language 217
- arbitration 253–283
  - ADCCAC Rules 269, 271
  - Bahrain 277, 280
  - Bahrain Chamber for Dispute Resolution 277
  - confrontation, right of 271, 272
  - costs 271, 274
  - criminal proceedings 270, 274
  - DIAC Rules 269, 271
  - Dubai government, prior notice 238
  - Dubai International Financial Centre (DIFC) 255, 268, 273
  - enforcement of domestic awards 273–277
  - enforcement of foreign awards 278–280
  - engineer's decision 265–266
  - equality 272
  - evidence 272
  - FIDIC Conditions 259, 265–266
  - International Centre for Settlement of Investment Disputes (ICSID) 256–257
  - jurisdiction and powers 264–267
  - New York Convention 280–283
  - power of attorney 261–263, 288, 291
  - procedures and formalities 267–272
  - public order 5, 43, 255–256
  - Riyadh Convention for Judicial Cooperation Among Arab States 282
  - time limit 268–269, 288
  - treaty arbitration 256–257
  - UNCITRAL Model Law 254–255, 257–258, 259, 268, 271, 273, 277
  - Washington Convention on the Settlement of the Investment Disputes between States and Nationals of Other States 256–257
- arbitration agreements
  - capacity to agree 260–264
  - Dubai government 254
  - incorporation by reference 258–259
  - interpretation 264–265
  - power of attorney 261–263, 288, 291
  - ratification 263
  - recognition and enforcement 253–255
  - Saudi Arabia government 232

- arbitration agreements (*cont'd*)
  - severability 259
  - writing, requirement to be in 257–258
- arbitrators
  - challenge 272–273
  - liability 268
- architects *see* design consultants
- arsh* 73–74, 204, 287
- assignment 47–48
- attachment order 164, 238–239, 240–242
- authority *see* capacity to agree
- awards
  - arbitration agreement, inclusion of 275–276
  - costs 271, 274
  - enforcement of domestic awards 273–277
  - enforcement of foreign awards 278–280
  - precautionary attachment 239
  - procedural challenge 268, 274–276
  - signature 276
  - time limit 268–269, 288
- Bahrain
  - abuse of rights 52–53
  - administrative contracts 146
  - arbitration 260, 276, 277–278, 280–281
  - basis of government 2
  - binding obligations 42
  - burden of proof 215, 216–217
  - civil obligations 225–226
  - commencement of proceedings 235–237
  - commercial and civil contracts 17
  - commercial obligations 224
  - compensation 109
  - conclusive findings of facts 221
  - construction safety 59, 61, 62
  - contract formation 26, 28, 30, 31, 32
  - contractual principles 42, 43, 44
  - court appointed experts 219–220
  - court structure 229–230
  - criminal penalties 72
  - damages 76–78, 201, 203, 204, 207, 210, 212, 214
  - decennial liability 104, 110–111
  - delay damages 139–140, 142–143, 146
  - delict (tort) 18, 115–116
  - direct payment 198
  - duty of care 83
  - enforcement 245–249, 251
  - force majeure* 189, 190
  - good faith 49–50
  - interest 167, 170
  - international jurisdiction 233
  - Islamic Shari'ah 4
  - joint liability 92–93
  - litigation 235–237, 238
  - mandatory obligations 44
  - materials defects 96
  - muqawala* 14, 183
  - obligation of result 84–85
  - ownership retention 191–192
  - payment 157, 158, 160, 164, 165
  - possessory lien 194
  - prescription 224, 225–226
  - prescription, restriction on
    - amendment 226–227, 228
  - preservation of assets 241–242
  - preservation of evidence 239
  - price 148–151, 152–153
  - priority rights 196
  - public procurement 20
  - public projects 113
  - set off 200
  - statutory compensation 75–76
  - subcontractors 48–49
  - suspension 176–177
  - termination 180, 182, 183, 187, 188, 189, 190
  - third parties 46–48
  - time for completion 124, 129
  - summary actions 238
  - unforeseen circumstances 55
  - witness testimony 218
  - workmanship 97–98
- Bahrain Chamber for Dispute Resolution 277
- bank guarantee 163–165
- binding obligations
  - contractual principles 41–43
  - Islamic Shari'ah 41
- blood money (Diyah) 73–75
- bond, *see* bank guarantee
- breach of contract
  - breach vs. fault, duty of care 82
  - damages 91–94, 203–211
  - delict contrasted 19, 82
  - good faith, and 50
  - joint liability 91–94, 103, 104, 109
  - material breach 181
  - performance by compulsion 201–203, 287

- prolongation costs 135
  - remedies for 100–102, 176
  - serious fault 210–211, 287
  - burden of proof 215–216
  - cancellation *see* termination
  - capacity to agree
    - arbitration 260–264
    - director 33
    - manager 33
    - power of attorney 236–237, 261–263, 288, 291
  - causation 103, 131–133, 144, 207, 211, 287
  - certificate
    - completion 100
    - payment 159
  - challenging an arbitrator 272–273
  - cheque payment 165–166
  - civil contracts *see* commercial and civil contracts
  - civil damages 76–78
  - civil law 6–8
    - administrative contracts 23–24
    - civil code 6–8, 17
    - common law, contrasted 7–8, 285–289
    - construction law 17
    - Islamic Shar'ia 7
    - jurisprudence constante* 8–9
    - stare decisis* 8–9
  - Code of Practice for the Management of Dangerous Goods 64
  - collateral warranties 46
  - commencement of proceedings 235–237
  - commercial and civil contracts 15–18
  - commercial obligations 224–225
  - common law and Islamic civil law
    - contrasted 7–8, 285–289
  - compensation *see* damages
    - statutory compensation 75–76
  - completion
    - certificate 100
    - contract formation 29, 123–124
    - delayed *see* time for completion
    - payment upon 157–158, 161
    - prevention of 150, 151, 188–190
    - termination upon 184
    - time for, *see* time for completion
  - components, contract 25–26
  - conclusive findings of facts 221
  - concurrent delay
    - definition 131
    - English law 132–133, 135
    - FIDIC Conditions 131, 134
    - French law 133
    - time for completion 130–135
  - consequential loss, damages 209–211
  - constitution, the
    - Arab nation 2
    - disputes 234
    - federal government (UAE) 2–4
    - form of government 2
    - role of Islamic Shari'ah 4–6
    - rule of law 229
  - construction law 13–24
    - civil code 17
    - definition 1, 13
    - muqawala* 14
  - construction safety 59–64
    - see also* health, safety and welfare
    - Code of Construction Safety Practice (Dubai) 63
    - Construction (Design & Management) Regulations 2015 (UK) 65
  - construction safety 59–64
  - cranes 62
  - criminal offences 71–73
  - design and management
    - responsibilities 65–66
  - Environment Health & Safety Management System (Abu Dhabi) 66
  - inspection and reporting 69–71
  - International Labour Organisation (ILO) 68–69
  - labour laws 59–63
  - machinery and equipment 62
  - National Committee of Occupational Health & Safety (Qatar) 63
  - Qatar Construction Specifications 63
  - sanctions and penalties 71–79
- contra preferentem* 39
- contract
    - adhesion, of 53–54
    - administrative 23–24, 143–146, 232
    - arbitration, capacity to agree 260–264
    - cause 42
    - delict vs 18–20, 82
    - Dubai International Financial Centre 10–11
    - express terms absence, interpretation 39–40

- contract (*cont'd*)
  - implied terms 51, 83, 97–98, 125, 153, 286
  - interpretation 35–39
  - letter of intent 29–30, 148, 208
  - nominate and innominate 14, 25, 51, 126, 183, 184, 185, 189, 194, 286, 291
  - verbal 27–29
- contract formation 25–33
  - capacity 33
  - certainty 28–31
  - components 25–26
  - essential elements 28–31
  - mutual intentions 31, 32
  - offer and acceptance 26–28
  - price not agreed 147–148
  - subject matter 28–29
- contractors' classification 13
- contractual principles 41–57
  - abuse of rights 52–53
  - binding obligations 41–43
  - cause 42
  - contra preferentem* 39
  - good faith 49–50, 52, 125, 126, 134, 286
  - mandatory obligations 41, 43–46, 53, 54, 100, 110, 116, 139, 213, 214, 226, 271, 286, 288
  - mutual obligations 176–177
  - objet* 28, 189
  - pacta sunt servanda* 42
  - public order 5, 42–43
  - Qur'an 41
  - subcontractors 48–49
  - third parties 46–48
  - unfair contract terms 53–54
  - unforeseen circumstances 54–57
- contribution *see* apportionment
- Convention on Enforcement of Judgments, arbitration 282
- court appointed experts 219–220, 287
  - concurrent delay 135
  - consultant's fees 150, 151
  - damages 205, 206, 209
  - document disclosure 217
  - extension of time 126, 127, 128, 129
  - preservation of evidence 239–240
  - price 149
  - standard of care 88
  - workmanship 97
- Court of First Instance 8–9
- Court of Law 8–9
  - supervisory role 8, 36–37, 151, 206
- Court of Merits 7, 8–9
  - abuse of rights 52–53
  - application of custom and practice 31
  - causation 287
  - consultant's fees 150, 151
  - court appointed experts 219–220
  - damages 91–93, 206, 209, 211
  - force majeure* 190
  - interest 172
  - interpretation of contracts 36
  - interpretation of evidence 30
  - price 149
  - prolongation costs 135
  - reduction of delay damages 140, 141
  - standard of care 88
  - suspension 176
  - termination 180, 181
  - time for completion 126–127
  - unfair contract terms 54
  - unforeseen circumstances 56
  - witness testimony 218
  - workmanship 97
- courts
  - Abu Dhabi 230–231
  - Bahrain 231–232
  - Constitutional Division, Union Supreme Court (UAE) 234
  - Dubai 230–231
  - Dubai International Financial Centre (DIFC) 230
  - inquisitorial vs adversarial 230, 235, 238, 287
  - international jurisdiction 233
  - Islamic Shari'ah 5, 231–232
  - jurisdiction between emirates 234–235
  - jurisprudence constante* 8–9
  - Kuwait 231–232
  - litigation 229–232
  - Qatar 231–232
  - Saudi Arabia 232
  - stare decisis* 8–9
  - United Arab Emirates (UAE) 230–231
- crime
  - cheques 165–166, 287
  - courts 231
  - damages 74, 76, 77
  - diya* and *arsh* 74
  - health, safety and welfare 71–72

- negligent manslaughter 72
- res judicata* 77, 221
- usury 168
- criminal damage 116–117
- custom and practice 5, 16–17, 31, 36, 38, 39–40, 45, 50–51, 96, 97, 98, 124–125, 133, 135, 143, 150, 151, 157–158, 190, 198, 200
- damages 203–211
  - consequential loss 209–211
  - criminal damage 116–117
  - decennial liability 109–110
  - delay *see* delay damages
  - delict 91–92
  - design and supervision 91
  - entitlement 203–204
  - FIDIC Conditions 204
  - French Civil Code 210
  - global claims 206–207
  - health and safety 75–78
  - indirect loss 209–211
  - Islamic Shari'ah 202, 208
  - liquidated *see* delay damages
  - loss of profit 207–209
  - measure of loss 204–206
  - mitigation 211–212
  - net contribution 93
  - performance by compulsion 201–203
- death
  - by fault 72
  - corporate manslaughter 72
  - criminal offences 71–73
  - damages 75–78
  - delict 115–116
  - diyya* 73–75
  - Islamic Shari'ah 87
  - statutory compensation 75–76
- decennial liability 85, 103–114
  - cause étrangère* 88, 108
  - compensation 109–110
  - contractual status 107–109
  - Egyptian Civil Code 106, 109
  - French Civil Code 105–106, 108–109
  - insurance 111–112
  - key points 110
  - mitigating 110–112
  - public projects 112–114
  - statutory sources 104–106
  - strict liability 106–107
  - subsequent owners 108–109
  - third parties 108–109
  - warranty of good running 85, 105
  - warranty of perfected completion 85, 105, 106, 113
- defects 95–102
  - see also* materials defects
  - materials 95–97
  - owners' responsibility 64, 99–100
  - remedies 100–102
  - statutory duties 98–100
  - workmanship 97–98
- defects liability provisions, FIDIC
  - Conditions 81
- delay *see* time for completion
- delay damages 137–146
  - administrative contracts 143–146
  - increasing delay damages 142–143
  - Islamic Shar'ia 141
  - penalties 138–139
  - reducing delay damages 138–142
  - termination for delay 137–138
- delict (tort) 18–20, 115–116
  - compensation 91–92
  - contract vs 18–20, 82
  - crime, and 19, 20
  - design 82
  - FIDIC Conditions 116
  - force majeure*, defence of 19
  - health, safety and welfare 77
  - Islamic Shar'ia 87
  - liability 115–116
- design and supervision 81–94
  - cause étrangère* 88
  - defences 88–89
  - delict 82
  - duty of care 82–84
  - force majeure* 88
  - French law 85
  - obligation of result 84–87
- design consultant
  - appointment 27, 31, 32, 46
  - appointment as arbitrator 273
  - certificates 159
  - decennial liability 103–109
  - defects, liability for *see* decennial liability
  - and* obligation of result
  - diyya* 74–75
  - duty of care 83–84
  - duty to warn 83

- design consultant (*cont'd*)  
 failure to certify 176, 185  
 fees 35, 150–151, 196, 226  
 inherent danger (nuisance) 118, 120  
 joint liability 91–94  
 obligation of result 84–87, 287  
 professional indemnity insurance 83,  
 93–94, 106, 111–112  
 loss of profit 208  
 standard of care 51, 87–88  
 statutory duties 65, 98–100, 120  
 workmanship, liability for 105
- developer *see* owner
- DIAC Rules, arbitration 269, 271
- DIFC *see* Dubai International Financial  
 Centre
- differences  
 common law vs. Islamic civil  
 law 285–289  
 laws of the GCC states 289–291
- direct payment 197–198  
*see also* payment  
 FIDIC Conditions 197
- disposition imperatives see* mandatory  
 obligations
- dispute 267
- diyya* (blood money) 73–75  
 sanctions and penalties 73–75
- documentary evidence 216–217
- Dubai  
 abuse of rights 52–53  
 accommodation 67–68  
 administrative contracts 145–146  
 arbitration 254, 255–256, 257–259, 261,  
 262, 263, 264–265, 266, 267, 268, 269,  
 270, 271, 272–273, 274, 275–276,  
 278–280, 281–282  
 binding obligations 42–43  
 burden of proof 216, 217  
 civil damages 76–78  
 commercial and civil contracts 15–17  
 commencement of proceedings 236–237  
 commercial obligations 225  
 compensation 91  
 conclusive findings of facts 221  
 construction safety 61, 63–64  
 contract formation 26–28, 31, 32, 33  
 contract of adhesion 53–54  
 contractual principles 42–43, 45  
 contractual status 107–109  
 court appointed experts 219  
 damages 203, 205, 207, 208, 209, 210,  
 211, 212, 213  
 decennial liability 108–109  
 defects, remedies 101–102  
 defects, statutory duties 99–100  
 delay damages 140–143, 145–146  
 delict (tort) 18, 19, 19–20, 20, 116  
 design and management  
 responsibilities 65  
 direct payment 197  
*diyya* (blood money) 74–77  
 duty of care 82  
 enforcement 246, 252  
 financial free zones 10  
 financing charges 173  
*force majeure* 189, 190  
 government, proceedings against 237–238  
 inherent danger (nuisance) 118–120  
 intentions 37–38  
 interest 169, 170, 171, 173–174  
 international jurisdiction 233  
 interpretation 36, 37–38  
 joint liability 92  
 jurisdiction between emirates 234–235  
*jurisprudence constante* 9  
 litigation 234–235, 237–238  
 mandatory obligations 45–46  
 mediation and adjudication 243  
*muqawala* 184  
 obligation of result 85, 86–87  
 offer and acceptance 27–33  
 payment 158, 159, 161–162, 164, 165  
 prescription 224, 225, 228  
 preservation of assets 240, 241, 242  
 preservation of evidence 240  
 price 149–150, 152–155  
 priority rights 196–197  
 property damage 117–118  
 public procurement 23  
 public projects 113–114  
 public utilities 120–121  
 service lines 120–121  
 set off 199, 200  
 statutory duties 90  
 subcontractors 48–49  
 suspension 176–177, 178  
 termination 179, 180, 181, 183, 184, 187,  
 188, 190  
 termination for delay 137–138

- third parties 46–48
- time for completion 126–129
- unfair contract terms 53–54
- unforeseen circumstances 55–57
- witness testimony 218
- Dubai International Financial Centre (DIFC)
  - arbitration 255
  - common law 6
  - courts 230
  - enforcement 246, 252
  - financial free zones 10–11
- duress 32
- duty of care 82–84
  - fault vs. breach 82
  - FIDIC Model Services Agreement 82–83
- duty to warn 83
- Egyptian Civil Code 6–8
  - decennial liability 106, 109
- employer *see* owner
- enforcement 245–252
  - appeal 247–248
  - arbitration 273–280
  - domestic arbitration awards 273–277
  - Dubai International Financial Centre (DIFC) 246, 252
  - foreign arbitration awards 278–280
  - foreign judgments 248–252
  - health, safety and welfare 69–79
  - procedure 245–247
  - stay of execution 247–248
  - Riyadh Convention 249–250
- engineer *see* design consultant
- English law, concurrent delay 132–133, 135
- Environment Health & Safety Management System, Abu Dhabi 66
- essential elements of a contract 28–31
- evidence 215–221
  - Arabic 217
  - arbitration 271–272
  - burden of proof 215–216
  - conclusive findings of facts 221
  - contract *see* contract formation
  - court appointed experts 219–220
  - disclosure and production 216–217
  - documents 216–217
  - preservation of evidence 239–240
  - privilege 166, 217
  - witness testimony 218
- experts *see* court appointed experts
- express terms absence, interpretation 39–40
- extension of time
  - entitlement 125–135
  - government contracts 144–146
  - time for completion 125
- fault vs. breach, duty of care 82
- FIDIC Conditions 293–385
  - arbitration 259, 265–266
  - concurrent delay 131, 134
  - damages 204
  - defects liability provisions 81
  - delay damages 137
  - delict (tort) 116
  - direct payment 197
  - financing charges 173
  - interest 172–173
  - key features/differences 288–289
  - mediation and adjudication 244
  - muqawala* 185, 186
  - ownership retention 193
  - payment 157, 163, 164
  - possessory lien 195
  - prescription 227, 228
  - prolongation costs 135
  - public procurement 22
  - public projects 113
  - set off 199
  - suspension 175–176, 177–178
  - termination 185, 186
  - time for completion 123–124
  - workmanship 97–98
- FIDIC Model Services Agreement
  - compensation 91
  - duty of care 82–83
  - joint liability 93
- financial free zones 10–11
- financing charges 173–174
  - FIDIC Conditions 173
- first aid 60
- force majeure*
  - cause étrangère* 88, 108
  - Dubai Government contracts 146
  - FIDIC Conditions 325, 326, 346, 372–374
  - imprévision* 55–56
  - obligation of result 88
  - presumed liability for physical damage 118
  - termination 185, 188–190

- foreign judgments
  - Dubai International Financial Centre 252
  - enforcement 248–252
- French Civil Code 6–8
  - contractual principles 42
  - damages 210
  - decennial liability 105–106, 108–109
  - direct payment 198
  - payment 160
  - subcontractors 48–49
- French law
  - concurrent delay 133
  - obligation of result 85
  - termination 180
  
- global claims, damages 206–207
- glossary 387–389
- good faith 49–50, 286
  - abuse of rights 52
  - concurrent delay 134
  - definition 50
  - exclusion of liability 213
  - related obligations 50, 125
- government
  - see also* public procurement *and*
    - administrative contracts
    - commercial business 17
    - constitutional basis 2
    - division of powers 2–4
    - Islamic Shari’ah 4–6
    - proceedings against 237–238
  - Gulf Cooperation Council (GCC) 249, 250, 282
  - Gulf states contrasted 289–291
- handover
  - decennial liability 104, 105, 287
  - payment 157–158, 161–162
- health, safety and welfare 59–79
  - accommodation 67–68
  - Code of Construction Safety Practice (Dubai) 63
  - construction safety 59–64
  - cranes 62
  - criminal offences 71–73
  - delict 77
  - design and management
    - responsibilities 64, 65–66
  - first aid 60
  - inspection and reporting 69–71
  - International Labour Organisation (ILO) 68–69
  - Labour Inspection Convention (1947) 69, 70–71
  - labour laws 59–63
  - machinery and equipment 62
  - National Committee of Occupational Health & Safety (Qatar) 63
  - owner 64, 65, 70, 74–75
  - personal protective equipment 61–62
  - Qatar Construction Specifications 63
  - sanctions and penalties 71–79
  - summertime working 66–67
  - welfare 66–68
- ICSID *see* International Centre for Settlement of Investment Disputes
- ILO *see* International Labour Organisation
- implied terms 50–51
  - civil law vs common law 286
  - fitness for purpose 97
  - reasonable skill and care 83
  - reasonable time for completion 125
- impossibility 188–190, 374
- imprévision* 55, 290
- indirect loss, damages 209–211
- inherent danger (nuisance) 118–120
- injunction *see* summary actions
- injury *see* death
- innominate contracts, termination 179–183
- inspection and reporting 69–71
- insurance
  - decennial liability 44, 109, 111–112
  - latent defects 106, 111
  - professional indemnity 83, 93–94, 106, 111–112
- intentions
  - contract formation 29, 32
  - interpretation 36–38
  - Islamic Shar’ia 31
- interest 167–174
  - compound 172
  - FIDIC Conditions 172–173
  - financing charges 173–174
  - fixed or crystallised debt 170–171
  - Islamic Shari’ah 167–169
  - riba* and usury 167–169
  - statutory right 169



- International Centre for Settlement of Investment Disputes (ICSID), arbitration 256–257
- international jurisdiction 233
- International Labour Organisation (ILO) 68–69
- interpretation 35–40
- absence of express terms 39–40
  - contra preferentem* 39
  - custom and practice 5, 16–17, 31, 36, 38, 39–40, 45, 50–51, 96, 97, 98, 124–125, 133, 135, 143, 150, 151, 157–158, 190, 198, 200
  - intentions 36–38
  - resolution of ambiguity 39
  - statutory maxims 35
  - summary 40
- Islamic civil law
- vs. common law 285–288
  - key features/differences 285–288
- Islamic Shari'ah 4–6
- application 5
  - assignment 43
  - binding obligations 41
  - court structure 231–232, 291
  - damages 202
  - definition 4
  - enforcement 249, 250
  - FIDIC Conditions 172–173
  - first aid 60
  - forfeiture 227–228
  - gharar* 170, 202, 208
  - intentions in contracting 31
  - interest 167–169, 287
  - prescription 223–224, 228
  - public order 43, 255
  - riba* and usury 167–169
  - source of law 4–5, 285–286
  - time 223–224, 227–228
- joint liability 91–94, 103, 104, 109
- joint venture 300–301
- judicial independence 229
- jurisdiction and powers, arbitration 264–267
- jurisdiction between emirates 234–235
- jurisprudence constante* 8–9
- Kuwait
- abuse of rights 52–53
  - administrative contracts 144
  - arbitration 254, 257–258, 260, 268–270, 272–277, 278–281
  - burden of proof 215, 216–217
  - civil obligations 225–226
  - commencement of proceedings 235–237
  - commercial and civil contracts 15, 17
  - commercial obligations 224
  - conclusive findings of facts 221
  - contract formation 26, 28, 30, 31, 32
  - contractual principles 42, 44
  - court appointed experts 219
  - court structure 229–230
  - criminal penalties 72
  - damages 201, 203, 204, 207, 210, 212, 214
  - decennial liability 110–111
  - defences 88–89
  - delay damages 139–140, 142–143, 144
  - delict (tort) 18, 115–116
  - direct payment 198
  - diya* (blood money) 73–75
  - duty of care 83
  - enforcement 245–247, 249, 251
  - force majeure* 189, 190
  - good faith 49–50
  - government, proceedings against 238
  - inspection and reporting 71
  - interest 167, 170
  - international jurisdiction 233
  - interpretation 40
  - Islamic Shari'ah 4
  - joint liability 92–93
  - litigation 235–237, 238
  - mandatory obligations 44
  - materials defects 96
  - muqawala* 14, 183
  - obligation of result 84–85
  - ownership retention 191–192
  - payment 157, 158, 165
  - possessory lien 194, 195
  - prescription 224, 225–226, 226–227, 228
  - preservation of assets 240, 241
  - preservation of evidence 239
  - price 148–151, 153
  - priority rights 196
  - public procurement 20, 21
  - safety 59, 61
  - set off 200
  - statutory compensation 75–76
  - summary actions 238
  - suspension 176–177

Kuwait (*cont'd*)

- termination 180, 182, 183, 187, 188, 189, 190
- time for completion 124
- unforeseen circumstances 55
- witness testimony 218
- workmanship 97–98

## Labour Inspection Convention (1947) 69, 70–71, 290

## legal system, Islamic Shari'ah 4–6

## letter of intent 29–30, 148, 208

## liability

- see also* decennial liability; defects
- liability provisions; joint liability
- delict (tort) 115–116
- exclusion of 44, 91, 93, 110, 116, 118, 212–214
- inherent danger (nuisance) 118–120
- joint 91–94, 103, 104, 109
- limitation of 91, 93, 110, 118, 212–214
- property damage 117–118
- vicarious 77, 86, 116, 129, 221

## lien 193–195, 196, 197

liquidated damages *see* delay damages

## limitation of liability 91, 93, 110, 118, 212–214

## litigation 229–244

- commencement of proceedings 235–237
- court structure 229–232
- government, proceedings against 237–238
- international jurisdiction 233
- jurisdiction between emirates 234–235
- mediation and adjudication 242–244
- preservation of assets 240–242
- preservation of evidence 239–240
- summary actions 238–242
- summary relief 238–239

Louisiana Civil Code, *muqawala* 14

## lump sum contracts, price 151–152

## maintenance of buildings 64

## mandatory obligations 43–46, 286, 288

- decennial liability 110
- delay damages 139
- delict 116
- imprévision* 54
- limitation of liability 213, 214
- list 44
- prescription 226
- unfair contract terms 53

## materials defects 95–97

## measure of loss, damages 204–206

## mediation and adjudication

## FIDIC Conditions 244

## litigation 242–244

## multi-tiered dispute resolution 265–266

*muqawala* 14

## definition 14

## FIDIC Conditions 185, 186

*French Law of Contract* 14

## implied terms 50

## Louisiana Civil Code 14

## payment 158

## price 153

## termination: contractor 184–187

## termination: employer 183–184

## time for completion 126

## mutual intentions, contract formation 32

## mutual obligations 176–177

## New York Convention, arbitration 280–283

nominated subcontractors *see* subcontractors

## notice

- arbitration 238, 266, 382, 383–384
- defect 96, 320, 321, 332
- delay damages 303, 330, 362
- delayed payment 173
- discharge 352
- failure to issue 227–228, 303, 348, 349, 378–379
- force majeure* 372
- forfeiture 227–228
- inspection 70
- insurance 368
- loss or damage 366
- public order 227
- set off 199, 303, 348, 349, 350
- suspension 178
- termination 96, 126, 144, 180, 182, 184, 308, 310, 313, 320, 329, 353, 354, 356, 361, 362

## nuisance (inherent danger) 118–120

*objet* 28, 189

## obligation of means 85

## obligation of result 84–87

*cause étrangère* 88

## defences 88–89

*force majeure* 88

## French law 85

- occupiers' liability 118–120
- offer and acceptance 26–28
- Oman
  - abuse of rights 52–53
  - accommodation 67, 68
  - arbitration 255, 257–258, 259, 260, 268–269, 273, 277, 280, 281
  - burden of proof 215, 216–217
  - civil obligations 225–226
  - commencement of proceedings 235–237
  - commercial and civil contracts 17
  - commercial obligations 224
  - conclusive findings of facts 221
  - construction safety 59, 61, 62–63
  - contract formation 26, 28, 29, 30, 31, 32
  - contractual principles 42, 44
  - Court appointed experts 219
  - court structure 229–230
  - damages 201, 203, 205, 208, 210, 212–213, 214
  - decennial liability 110–111
  - defences 88–89
  - delay damages 139–140
  - delict (tort) 18, 115–116
  - direct payment 197, 198
  - duty of care 84
  - enforcement 245–247, 249, 251
  - force majeure* 189, 190
  - government, proceedings against 238
  - interest 169
  - international jurisdiction 233
  - Islamic Shari'ah 4
  - litigation 235–237, 238
  - mandatory obligations 44
  - materials defects 95
  - mediation and adjudication 243
  - muqawala* 14, 185
  - obligation of result 84–85
  - ownership retention 191–192
  - payment 157, 158, 159, 165
  - possessory lien 193, 194, 195
  - prescription 224, 225–227, 228
  - preservation of assets 241–242
  - preservation of evidence 239
  - price 153
  - priority rights 196
  - property damage 117–118
  - public procurement 21
  - set off 198
  - statutory compensation 75–76
  - subcontractors 48–49
  - summary actions 238
  - suspension 176–177
  - termination 180, 185, 187, 188, 189, 190
  - time for completion 124
  - witness testimony 218
  - workmanship 97–98
- owner
  - building maintenance 64
  - classification of 15
  - duty of care 103
  - health and safety 64, 65, 70, 74–75
  - liability for defects 99–100
  - occupiers' liability 118–120
  - quantum meruit* 149–150, 378
  - trespass 195
  - unjust enrichment 148
- ownership retention 191–193
  - see also* possessory lien
  - FIDIC Conditions 193
- pacta sunt servanda* 42
- payment 157–166
  - see also* direct payment
  - bank guarantee 163–165
  - cheque 165–166
  - conditional payment clauses 160–162
  - FIDIC Conditions 157, 163, 164
  - French Civil Code 160
  - muqawala* 158
  - payment certificates 159
  - payment on delivery 157–158
  - nominated subcontractors 197
  - subcontractors 159–160
- pay when paid 160–162
- penalties *see* delay damages
- performance by compulsion 201–203
- personal injury 115–121
- physical damage 115–121
- possessory lien 193–195
  - see also* ownership retention
  - FIDIC Conditions 195
- power of attorney 236–237, 261–263, 288, 291
- precautionary attachment 164, 238–239, 240–242
- prescription 15–16, 223–228
  - see also* time for completion
  - civil obligations 225–226
  - commercial obligations 224–225

- prescription (*cont'd*)
  - FIDIC Conditions 227, 228
  - Islamic Shari'ah 223–224, 227–228
  - restriction on amendment 226–228
- preservation of assets 241–242
- preservation of evidence 239–240
- prevention 132–134
- price 147–155
  - definition 148–151
  - fair remuneration: consultant 150–151
  - fair remuneration: contractor 148–150
  - lump sum contracts 151–152
  - muqawala* 153
  - price not agreed 147–148
  - public procurement 154–155
  - remeasure contracts 151–152
  - subcontracts 153–154
  - supply contracts 151
  - variations 152–153
- priority rights 196–197
- privilege 166, 217
- prolongation costs
  - agreement 131
  - FIDIC Conditions 135
  - global claims 206–207
  - time for completion 126, 135
- property damage
  - liability 117–118
- public order
  - arbitration 5, 255–256, 274, 277, 279, 281
  - contracts 5, 42–43
  - definition 42, 255
  - jurisdiction 233, 234–235
  - Kingdom of Saudi Arabia 43
  - limitation of liability 213, 214
  - mandatory obligations 44, 286
  - prescription 227
  - Riyadh Convention 250
- public procurement 20–23
  - Abu Dhabi 22
  - Bahrain 20
  - Dubai 23
  - FIDIC Conditions 22
  - PPP 23
  - price 154–155
  - Qatar 20, 21
  - Saudi Arabia 21
  - United Arab Emirates (UAE) 21, 154–155
- public projects
  - Abu Dhabi 114
  - Bahrain 113
  - decennial liability 112–114
  - Dubai 113–114
  - FIDIC Conditions 113
  - United Arab Emirates (UAE) 112–113
- public utilities 120–121
- Qatar
  - abuse of rights 52–53
  - administrative contracts 144
  - arbitration 254, 257–258, 260, 263, 268–269, 272, 273–277, 278–280, 281
  - burden of proof 215, 216–217
  - civil damages 76–78
  - civil obligations 225–226
  - commencement of proceedings 235–237
  - commercial obligations 224
  - construction safety 59, 63
  - contract formation 26, 28, 30, 31, 32
  - contractual principles 42, 44
  - court appointed experts 219–220
  - court structure 229–230
  - damages 201, 204, 207, 210, 212, 213, 214
  - decennial liability 110–111
  - defences 88–89
  - delay damages 139–140, 142–144
  - delict (tort) 18, 115–116
  - direct payment 198
  - diya* (blood money) 73–75
  - enforcement 245–247, 249, 251
  - financing charges 173
  - force majeure* 189, 190
  - good faith 49–50
  - government, proceedings against 238
  - inspection and reporting 70–71
  - interest 167, 169, 173
  - interpretation 36
  - litigation 235–237, 238
  - mandatory obligations 44
  - materials defects 95
  - muqawala* 14, 183
  - ownership retention 191–192
  - payment 157, 158, 165
  - possessory lien 194
  - prescription 224, 225, 227, 228
  - preservation of assets 240, 241, 242
  - preservation of evidence 239
  - price 148–151, 153–155
  - priority rights 196

- public procurement 20, 21
- set off 200
- statutory compensation 75–76
- summary actions 238
- suspension 176–177
- termination 180, 182, 183, 188, 189, 190
- termination for delay 138
- time for completion 124
- unforeseen circumstances 55
- witness testimony 218
- workmanship 97–98
- Qatar Construction Specifications, defects,
  - statutory duties 100
- Qatar Financial Centre
  - Courts 232, 244
  - financial free zones 11
- Qur'an
  - see also* Islamic Shari'ah
  - contractual principles 41
- quantum meruit* 150, 378
  
- remeasure contracts, price 151–152
- remedies
  - see also* damages
  - declarations 203
  - precautionary attachment 164, 240–242
  - preservation of assets 240, 241, 242
  - preservation of evidence 239–240
  - sanctions and penalties 71–79
- repudiation 180
- rescission 158, 180, 189
- resolution of ambiguity 39
- retention of ownership *see* ownership
  - retention
- riba* and usury 167–169
  - Islamic Shari'ah 167–169
- right to arbitrate 253–256
- Riyadh Convention for Judicial Cooperation
  - among Arab States, arbitration
    - 249–250, 282
- rule of law 229
  
- safety *see* construction safety
- sanctions and penalties 71–79
  - administrative sanctions 78–79
  - civil damages 76–78
  - compensation 91
  - criminal penalties 71–73
  - defences 88–89
  - diya* (blood money) 73–75
  - health, safety and welfare 71–79
  - joint liability 91–94
  - obligation of result 84–87
  - standard of care 87–88
  - statutory compensation 75–76
  - statutory duties 89–91
- Saudi Arabia
  - administrative contracts 144
  - arbitration 255, 257–258, 259, 260, 272,
    - 273, 277, 280
  - commercial obligations 225
  - construction safety 59, 61
  - court structure 232
  - delay damages 144
  - enforcement 245–247, 248, 249, 251
  - interest 169
  - prescription 225
  - public procurement 20, 21
  - statutory compensation 75–76
- service lines 120–121
- set off 198–200
  - FIDIC Conditions 199
- Shari'ah *see* Islamic Shari'ah
- specific performance *see* performance by
  - compulsion
- standard of care 87–88
- stare decisis* 8–9
- statutory compensation
  - sanctions and penalties 75–76
- statutory duties, sanctions and
  - penalties 89–91
- statutory maxims, interpretation 35
- statutory right
  - interest 169
  - suspension 176–177
- strict liability 106–107
- subcontractors
  - contractual principles 48–49
  - main contractor's liability for 129
  - nominated 54, 128, 129, 141–142, 197
- subcontracts
  - payment 159–160
  - price 153–154
- summary actions 238–239
  - precautionary attachment 164,
    - 240–242
  - preservation of assets 240, 241, 242
  - preservation of evidence 239–240
- summertime working 66–67
- supply contracts, price 151

- suspension 175–178
  - excluding the right of suspension 177–178
  - FIDIC Conditions 175–176, 177–178
  - formalities 178
  - statutory right 176–177
- termination 179–190
  - consequences 187–188
  - Court of Merits 181
  - Delay, for 137–138
  - FIDIC Conditions 185, 186
  - force majeure* 188–190
  - French law 180
  - impossibility/*force majeure* 188–190
  - innominate contracts 179–183
  - muqawala*: contractor 184–187
  - muqawala*: employer 183–184
  - repudiation 180
  - rescission 158, 180, 189
  - trespass 195
- third parties
  - contractual principles 46–48
- time at large 129–130
- time for completion 123–135
  - see also* delay damages; prescription
  - agreement 123–125
  - assessment of entitlement 125–129
  - concurrent delay 130–135
  - extension of time 125
  - FIDIC Conditions 123–124
  - muqawala* 126
  - nominated subcontractors 128, 129, 141–142
  - prevention 132–134
  - prolongation costs 135
  - reasonable 125
  - time at large 129–130
- time limit *see* prescription
- tort (delict) *see* delict (tort)
- total cost claim *see* global claim
- treaty arbitration 256–257
- trespass 195
- UAE *see* United Arab Emirates
- UNCITRAL Model Law, arbitration 254–255, 257–258, 259, 268, 271, 273, 277
- unfair contract terms 53–54
- Unfair Terms Law, Dubai International Financial Centre (DIFC) 10–11
- unforeseen circumstances 54–57
- United Arab Emirates (UAE)
  - see also* UAE...
  - abuse of rights 52–53
  - accommodation 67
  - administrative contracts 144–145
  - administrative sanctions 78–79
  - arbitration 253, 255, 257–258, 260, 261, 262, 263, 267–268, 270, 272–281
  - burden of proof 215, 216–217
  - civil damages 76–78
  - civil law 7
  - civil obligations 225–226
  - commencement of proceedings 235–237
  - commercial and civil contracts 15–17
  - commercial obligations 224, 225
  - compensation 91
  - conclusive findings of facts 221
  - construction safety 59–62
  - contract formation 26, 28, 29, 30, 31, 32
  - contractual principles 41–45
  - court appointed experts 219
  - court structure 229–231
  - criminal damage 116–117
  - criminal penalties 72–73
  - damages 201, 203, 204, 205, 208, 210–211, 212–213, 214
  - decennial liability 104–106, 110–111
  - defects, remedies 101–102
  - defects, statutory duties 98
  - defences 88–89
  - delict (tort) 18, 19, 115–116
  - direct payment 197, 198
  - division of powers 2–3
  - diya* (blood money) 73–75
  - enforcement 245–247, 249, 251
  - financial free zones 10
  - force majeure* 189, 190
  - good faith 49–50
  - government, proceedings against 237–238
  - inherent danger (nuisance) 118–120
  - inspection and reporting 69–71
  - interest 167–172
  - international jurisdiction 233
  - interpretation 35, 36, 37, 39
  - Islamic Shari'ah 4, 5
  - joint liability 92–93
  - jurisdiction between emirates 234–235

- litigation 234–238
- mandatory obligations 44, 45
- materials defects 95
- muqawala* 14, 184–185
- obligation of result 84–85
- ownership retention 191–192
- payment 157, 158, 159, 162, 164
- possessory lien 193–194, 195
- prescription 224–228
- preservation of assets 240, 241, 242
- preservation of evidence 239
- price 148–151, 154–155
- priority rights 196
- property damage 117–118
- public projects 21, 112–114, 154–155
- set off 198, 199, 200
- statutory compensation 75–76
- statutory duties 89
- subcontractors 48–49
- summary actions 239
- suspension 176–177
- termination 180, 182, 184–185, 189, 190
- third parties 46–47
- time for completion 123–124, 126–129
- unfair contract terms 53–54
- unforeseen circumstances 54–57
- welfare 66
- witness testimony 218
- workmanship 97–98
- unjust enrichment 148
- validity of an arbitration agreement 257–259
- variations 152–153
  - Abu Dhabi government projects 22
  - notice 226–228, 338, 375–377
  - omissions 137
  - public projects 22, 154–155
  - subcontracts 153–154
- vicarious liability 77, 86, 116, 129, 221
- warranty of good running 85, 105
- warranty of perfected completion 85, 105, 106, 113
- Washington Convention on the Settlement of the Investment Disputes between States and Nationals of Other States, arbitration 256–257
- welfare 66–68
  - see also* health, safety and welfare accommodation 67–68
- without prejudice privilege 166, 217
- witness testimony 218
  - oath 218
- workmanship
  - decennial liability 104–106
  - defects 97–98
  - FIDIC Conditions 97–98
  - implied term 31
  - public projects 112–114
  - Qatar Construction Specifications 100

# WILEY END USER LICENSE AGREEMENT

Go to [www.wiley.com/go/eula](http://www.wiley.com/go/eula) to access Wiley's ebook EULA.