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A practical cross-border insight into construction and engineering law

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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have contracts which place both design and construction obligations upon contractors? If so, please describe the types of contract. Please also describe any forms of design-only contract common in your jurisdiction. Do you have any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (NB For ease of reference throughout the chapter, we refer to “construction contracts” as an abbreviation for construction and engineering contracts.)

As an introduction, it is important to note that the United Arab Emirates (UAE) is a civil law system, and the UAE Civil Transactions Law, No. 5 of 1985 (as amended) (known as the “Civil Code”) forms the cornerstone of the law applicable to civil transactions. Thus, the basic questions of how a contract is made, what constitutes offer and acceptance, the capacity of the parties, the effect of fraud and mistake, the interpretation of agreements, the liberty to withdraw, remedies for breach, and general questions of contract law, as well as numerous specific types of transaction (including construction contracts), are mainly resolved by the provisions of the Civil Code. Other specialised statutes such as the Commercial Transactions Law, Federal Law No. 18 of 1993 (the “Commercial Code”), supplement the Civil Code.

The FIDIC (Fédération Internationale des Ingénieurs-Conseils) forms of contract are those most commonly encountered in the private construction sector. The 1999 edition of the Red and Yellow Books are widely accepted and used. However, some consultants still use the familiar 1987 edition. Use of the FIDIC EPC/Turnkey Silver Book is growing, thanks to its favourable risk allocation to the contractor for design and delivery. Subcontract agreements are frequently bespoke in form, albeit based upon FIDIC forms.

The structuring of construction contracts should be understood within the parameters of Articles 872 to 896 of the Civil Code that sets out the minimum rights and responsibilities of employers, contractors and consultants engaged in what is known as muqawala, being a contract to make a thing or to perform a task.

The public sector continues to use stand-alone bespoke forms of contracts, frequently modelled on the FIDIC forms. Abu Dhabi has promulgated a stand-alone FIDIC contract under licence for civil construction projects undertaken in the Emirate on behalf of public entities. Schedules 1 and 2 to Abu Dhabi Executive Decision No. 1 of 2007 set out its mandatory build-operate (“BO”) and design-build (“DB”) forms. In Dubai, public sector contracts are regulated by Dubai Law No. 6 of 1997 of Contracts of Governmental Departments in the Emirate of Dubai, which prohibits the adoption of any term imposing a FIDIC Condition, whether express or incorporated by reference, without special approval from His Highness the Ruler of Dubai.

With regard to management contracting, the employer may choose that the construction project is procured on this basis and appoint an Engineering, Procurement and Construction Management (EPCM) Contractor to manage the different works packages, such as civil works, mechanical, electrical and plumbing works, and the balance of works packages. The UAE is known for its megaprojects. These types of projects will typically fall under the supervision of a master developer who, in turn, appoints several sub-developers for each phase. The sub-developers will then appoint the contractors in their phase for a particular scope of work.

1.2 Are there either any legally essential qualities needed to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations), or any specific requirements which need to be included in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

The necessary requirements to conclude a binding contract are governed by Articles 125–129 and 199–206 (Civil Code). In particular, Article 129 sets out the necessary elements, namely: the two parties to the contract should agree upon the essential elements; the subject matter of the contract must be something which is possible and defined, or capable of being defined, and permissible to be dealt in; and there must be a lawful purpose for the obligations arising out of the contract. Turning to muqawala (construction contracts), Article 874 (Civil Code) states that there must be a description of the subject matter, a statement of the type and extent thereof, the manner of performance, the period over which it is to be performed, and the amount to be paid. The Civil Code does not specifically require a muqawala contract to be in writing. Article 203(1) of the Civil Procedures Law, No. 11 of 1992 (the “Civil Procedures Law”) permits the parties to record that any dispute between them concerning the implementation of a specified contract may be referred to arbitration. The parties may also agree, by special conditions, to arbitration in a particular dispute. A party will only be able to prove that it was agreed that a dispute may be resolved by arbitration if it produces a written arbitration agreement (Article 203(2)).
1.3 In your jurisdiction please identify whether there is a concept of what is known as a “letter of intent”, in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

This concept is known in the UAE, and such an ‘intention’ may be made orally or in writing. Generally, in order to be binding, the purpose and terms must be unequivocal and the circumstances must leave no doubt that there is mutual consent with regard to the subject matter in question (Article 132 (Civil Code)).

1.4 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer’s liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors’ all-risk insurance?

The Civil Code does not prescribe any insurance to be in place when carrying out construction works, but the parties are free, subject to the law, to agree the content of their contract. The most common forms of insurance under construction contracts in the UAE are as follows: All Risk Insurance; Professional Indemnity Insurance; Public Liability Insurance; Worker’s Compensation Insurance; Decennial Liability Insurance; and Delay in Start-Up Insurance.

The FIDIC suite of contracts, being the prevailing form of construction contracts in the UAE, has extensive provisions which address the insurance requirements. With regard to health insurance for workers, the Dubai Health Insurance Law No. 11 of 2013 is applicable and is currently being phased in. It mandates that all nationals and residents with a Dubai visa should have compulsory health insurance cover.

1.5 Are there any statutory requirements in relation to construction contracts in terms of: (a) general requirements; (b) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (c) tax (payment of income tax of employees); or (d) health and safety?

The general requirements (i.e. formation, etc.) applicable to commercial transactions, which include construction contracts, are covered by the Civil Code.

However, all labour relations between employers and employees are governed by Federal Law No. 8 of 1980 on Regulation of Labour Relations (the “LRA”). According to its Article 13, no non-national may be recruited for work in the United Arab Emirates without the prior approval of the Labour Department and without first obtaining a work permit in accordance with the procedures and regulations laid down by the Ministry of Labour and Social Affairs.

Employers are compelled to provide adequate preventive equipment and have measures to protect employees against the dangers of accidents and diseases in the workplace. The Ministry of Labour and Social Affairs may order further measures to be implemented by employers to this end. Employees do not pay income tax in the UAE.

1.6 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability is complete?

It is common practice in the UAE for employers to withhold retention money (or request contractors to provide retention bonds in lieu thereof). An amount equal to 10% of the contract price is commonly reserved for retention. The parties are at liberty to agree the terms which must be met prior to the retention money being released. Provision is usually made for half of the retention money to be released at completion, and the balance upon expiry of the defects liability period.

1.7 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee performance, and/or company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such bonds and guarantees?

The use of performance bonds, company guarantees and direct agreements is common practice, particularly in the case of joint ventures or special project vehicles. Further, project bonds, including tender bonds, advance payment guarantees, performance guarantees, or employer payment guarantees, all backed by banking institutions, are commonly recognised commercial transactions. Performance bonds and payment guarantees are typically unconditional and payable on demand.

Government procurement laws support the provision by non-public establishments of interest-free performance bonds equal to 10% of the tender value in the form of an unconditional, irrevocable letter of guarantee from a recognised bank operating in the UAE. In construction contracts, and under government procurement rules, non-public establishments should provide interest-free performance bonds equal to 10% of the tender value of construction projects in the form of an unconditional, irrevocable letter of guarantee and the guarantor must be a recognised bank operating in the UAE.

1.8 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that until they have been paid they retain title and the right to remove goods and materials supplied from the site?

This right is recognised in the Commercial Code, but it is doubtful that the right to retain title to the goods and materials would extend to the right to remove the goods and materials from the site until payment is received.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party? Does any such third party (e.g. an engineer or architect) have a duty to act impartially between contractor and employer? Is that duty absolute or is it only one which exists in certain situations? If so, please identify when the architect/engineer must act impartially.

Supervision of construction contracts on behalf of employers is common practice but the law does not specifically regulate the
impartiality of the engineer. As the FIDIC forms of contract are commonly used, the impartiality of the engineer (under the FIDIC Red Book) is regulated contractually. The engineer, under the FIDIC Red Book, has a greater duty to act impartially than the employer’s representative under the FIDIC Silver Book. The Civil Code requires the parties under a contract to act in good faith that requires parties to act in good faith and good faith is always presumed. The requirement of good faith consists of a general obligation of loyal behaviour, co-operation or collaboration.

2.2 Are employers entitled to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a “pay when paid” clause?

This arrangement is not expressly prohibited by the law of the UAE and the parties are free to include such provisions in construction contracts, and they will be enforceable. The freedom to contract is recognised in Article 257 (Civil Code), but the provisions applicable to contractual conditions will apply to these arrangements. However, most pay-when-paid provisions are found in subcontracts. Considering the fact that such clauses will be enforceable, subcontractors should note that, unless the main contractor has assigned its rights against the employer to the subcontractor, Article 891 (Civil Code) prohibits subcontractors from making claims against employers directly.

2.3 Are the parties permitted to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such agreements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss suffered?

Liquidated damages are enforceable in the UAE. According to Article 390(1) (Civil Code), the parties may agree the amount of compensation in advance for a breach of contract, but the Article draws no distinction between penalties or liquidated damages. However, Article 390(2) states that the court may, on the application of either party (i.e. the employer or the contractor), vary such agreement so as to make the compensation equal to the loss (i.e. increase or decrease the amount), and any agreement to the contrary shall be void.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be done under the contract? Is there any limit on that right?

The employer is entitled to vary the works under the contract. Article 877 (Civil Code) states that the contractor must complete the work in accordance with the conditions of the contract. Thus, if the contract provides that the scope of works may be varied, then the contractor must comply with the conditions applicable to the execution of variations. Conversely, the right of the employer to instruct variations may be limited by the contractual provisions.

3.2 Can work be omitted from the contract? If it is omitted, can the employer do it himself or get a third party to do it?

Work may be omitted from the contract, but the exact circumstances under which the employer may execute the works himself, or get a third party to do so, are generally determined by the terms and conditions of the contract.

3.3 Are there terms which will/can be implied into a construction contract?

Terms are not readily implied in contracts and if the wording of a contract is clear, an alternative interpretation may not be given to the words Article 265(1) (Civil Code). However, in the absence of clear wording, an examination of the mutual intention of the parties, the nature of the transaction, and the trust and confidence which should exist between the parties in accordance with the custom in such transactions, will be made Article 265(2) (Civil Code). Part Two of the Civil Code prescribes certain interpretational maxims and rules, and Article 50 states that which is established by custom is equivalent to a stipulated condition.

3.4 If the contractor is delayed by two events, one the fault of the contractor and one the fault or risk of his employer, is the contractor entitled to: (a) an extension of time; or (b) the costs occasioned by that concurrent delay?

Generally, concurrency will lead to an extension of time being awarded, but without additional payment. The contractor may be entitled to additional payment where it is proven that a part of the delay is not concurrent.

3.5 If the contractor has allowed in his programme a period of time (known as the float) to allow for his own delays but the employer uses up that period by, for example, a variation, is the contractor subsequently entitled to an extension of time if he is then delayed after this float is used up?

This issue is not specifically addressed by legislation. Unless there is an express provision to the contrary in the contract, where there is a remaining float in the programme at the time of an employer risk event, it is anticipated that an extension of time will generally only be granted to the extent that the employer’s delay is predicted to reduce to below zero of the total float on the activity paths affected by the employer’s delay.

3.6 Is there a limit in time beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and from what date does time start to run?

In principle, the general prescription period of 15 years of Article 473(1) (Civil Code) applies to claims under construction contracts (with the possible exception of claims under engineering services contracts, where the shorter prescription period of five years for claims of professionals under Article 475 may apply). Generally, the prescription period will commence from the time that the right is due (Article 478).
In cases of structural defects (whether in case of collapse of the structure, or a defect threatening its stability), Article 880 (Civil Code) establishes decennial liability of the contractor, calculated from the time when the works were delivered. The designer is jointly liable with the contractor as above, unless he has not supervised construction, in which case he will remain liable for defects in the design. A claim resulting from this liability will prescribe after the lapse of a period of three years, calculated from the date of the collapse of the structure, or from the date that a defect in the structure was discovered (Article 883 (Civil Code)).

### 3.11 On what grounds can a contract be terminated? Are there any grounds which automatically or usually entitle the innocent party to terminate the contract? Do those termination rights need to be set out expressly?

The parties do not need to detail the conditions for termination in a contract, as is the case in a common law jurisdiction, as the grounds for termination are set out in the Civil Code. It is permissible to explicitly agree that a contract will be considered automatically cancelled if a party fails to perform its obligations under the contract (Article 271). The Civil Code requires that, unless the parties have agreed otherwise, notice of cancellation must be given. Further, if one of the parties does not honour his contractual obligations, the other party may, after giving notice to the defaulting party, require that the contract be performed or cancelled. The judge may also order specific performance, defer performance or order cancellation and payment of compensation in any case, if appropriate (Article 272).

### 3.12 Is the concept of force majeure or frustration known in your jurisdiction? What remedy does this give the injured party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for force majeure?

**Force majeure** is an established concept in the UAE. If *force majeure* makes the performance of the contract impossible, the corresponding obligation shall cease, and the contract shall be automatically cancelled (Article 273 (Civil Code)). The Article also notes that, in the case of partial impossibility, the part of the contract which has become impossible to perform shall be extinguished. It will not be possible to successfully argue that a contract which has become uneconomic to perform will constitute *force majeure*.

### 3.13 Are parties which are not parties to the contract entitled to claim the benefit of any contract right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the original contracts in relation to defects in the building?

The doctrine of privity of contract is applicable in the UAE. Unless these rights to claim for defects to the building have been assigned to the new owner, the new owner will only have a claim against the seller for defects. Rights may be granted or transferred to third parties without the consent of the debtor, but obligations cannot be transferred to a third party without the consent of the creditor (Article 252 (Civil Code)).

### 3.14 Can one party (P1) to a construction contract which owes money to the other (P2) set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

Set-off may be mandatory, occur by operation of law, by agreement between the parties, or judicially by virtue of an order of the court (Article 369 (Civil Code)). For a mandatory set-off to apply (that is, by operation of law) each of the parties must be in debt to the other, the obligations must be of the same kind and description, must be equally due and of equal strength or weakness, and the set-off must not prejudice third parties, irrespective of the cause giving rise to the obligation (Article 370 (Civil Code)).
3.15 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine?

Save as provided for between the parties in the contract, and subject to the overarching concept of good faith, there is no specific duty of care due in construction contracts.

3.16 Where the terms of a construction contract are ambiguous are there rules which will settle how that ambiguity is interpreted?

The Civil Code states that the basic principle in contracts is that the parties must have reached an agreement regarding their obligations (Article 257). Article 258 goes on to state that the primary rule of interpretation 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. Article 259 states that there shall be no scope for implications in the face of clear words.

Article 265 states that if there is scope for an interpretative construction of the contract, an enquiry shall be made into the mutual intentions of the parties beyond the literal meaning of the words, and guidance may be sought in so doing from the nature of the transaction, and the trust and confidence which should exist between the parties in accordance with the custom current in such dealings. Please also refer to question 3.3 above in this respect.

3.17 Are there any terms in a construction contract which are unenforceable?

Any contractual condition which conflicts with a mandatory provision in the law is unenforceable, such as provisions exempting the contractor or the designer from liability, or provisions limiting such liability. Therefore, any term aiming to limit the liability of a party in a contract which is contrary to the provisions of the law shall be unenforceable.

3.18 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer’s obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

The contractor and the architect are jointly liable for any total or partial destruction within 10 years to the buildings they have constructed (Article 880 (Civil Code)). If the architect did not supervise the construction of the works, its liability will be limited to the any defects in the plans for a period of 10 years (Article 881 (Civil Code)).

4 Dispute Resolution

4.1 How are disputes generally resolved?

In every Emirate of the UAE, there is a court system that resolves disputes, and consists of a Court of First Instance, Court of Appeal and Court of Cassation, with the exception of Ras Al Khaima, which does not have a Court of Cassation. Each of these courts has separate circuits, namely the Civil Court, Commercial Court, Criminal Court, Labour Court, Real Estate Court and Personal Status Courts. Although the UAE does not have a separate arbitration act, the Civil Procedures Law, which primarily governs court proceedings, does contain a small number of articles relating to arbitral proceedings. Almost all construction disputes are resolved through arbitration, which is the most popular method of dispute resolution for construction contracts.

4.2 Do you have adjudication processes in your jurisdiction? If so, please explain how adjudication works in your jurisdiction.

Adjudication is not regulated by legislation in the UAE. It is not an uncommon method of dispute resolution, but the parties may not be able to enforce an adjudicator’s award through the courts. There are instances where disputes are resolved by adjudication under the auspices of the International Chamber of Commerce, or Dispute Adjudication Board as established under the FIDIC contracts. If the agreement states that an adjudicator’s award, or that of the Dispute Adjudication Board, is binding on the parties, then failure to comply with the award may be considered to be a breach of contract.

4.3 Do your construction contracts commonly have arbitration clauses? If so, please explain how arbitration works in your jurisdiction.

Almost all construction contracts provide for arbitration as a dispute resolution mechanism. Agreements to resolve disputes by means of arbitration must be clear and in writing, and if the parties have agreed to resolve the dispute through arbitration, they may not approach the court to resolve the dispute (Article 203 (Civil Procedures Law)). However, if one of the parties approaches the court to resolve the dispute despite the presence of an arbitration clause in the contract, and the other party does not object at the first hearing, the action must be tried by the court and the arbitration clause shall be deemed to be cancelled.

Generally, the rules of the arbitral institution elected in the construction contract are followed. The most popular arbitral institutions are the International Chamber of Commerce (“ICC”), the Dubai International Arbitration Centre (“DIAC”), the Dubai International Financial Centre – London Court of International Arbitration (“DIFC-LCIA”), and the Abu Dhabi Commercial Conciliation and Arbitration Centre (“ADCCAC”).

4.4 Where the contract provides for international arbitration do your jurisdiction’s courts recognise and enforce international arbitration awards? Please advise of any obstacles to enforcement.

The UAE acceded to the New York Convention in 2006 without reservation. The courts are developing a culture and are becoming more accustomed to the idea of enforcing foreign arbitral awards. However, the courts sometimes tend to widen the grounds on which the New York Convention allows courts to resist enforcement of foreign arbitral awards.

4.5 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction?

In general, the test to enforce foreign judgments is higher than that of enforcing foreign arbitral awards as there is no treaty, such as the New York Convention, that governs this issue. Only when there are mutual treaties between the UAE and the country in question will the courts in the UAE enforce foreign judgments, but it will be subject to the laws of public order and morals in the UAE.
To commence a claim, the claim should be filed in the relevant court with jurisdiction to hear the dispute. One must set out the basis for the dispute and the remedy sought. A court fee is levied and is calculated on the basis of a percentage of the value of the claim and this percentage varies in different jurisdictions. The first hearing will normally be set two to three weeks after the claim is filed. The presiding judge may appoint an expert to assist the court in analysing the presented facts, particularly in cases where technical knowledge is necessary, such as construction contracts. Depending on the complexity of the claim, judgment from the Court of First Instance may take between nine and 18 months, but this period may be longer if an expert was appointed by the Court.

Parties to court proceedings are afforded the right to appeal. Appeals against a decision of the Court of First Instance must be made to the Court of Appeal within 30 days from the date of judgment. Any such appeal may be made in relation to issues of fact or law.

Appeals against Court of Appeal decisions may be made on matters of law only and must be submitted to the Court of Cassation within 30 days from the date of judgment. Court of Appeal decisions usually take between two and four months, provided no expert has been appointed by the Court. If an expert has been appointed it usually takes a minimum of three months before judgment is handed down. The Court of Cassation normally takes six months to one year to hand down judgment. The right to appeal is automatic and does not require any special permission, provided that the value of the claim is above AED 20,000 for the Court of Appeal and AED 200,000 for the Court of Cassation.

Acknowledgment
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Thanos joined Galadari upon moving to the region from one of the most prominent law firms in Greece and is Head of Construction and International Arbitration. He has more than 20 years of experience in both front-end and contentious construction matters in Southeast Europe, MENA and the GCC in international construction projects, including public and private projects, residential and commercial developments, concessions and PPPs, infrastructure projects, power plants, hospitals and hotels, across the entire project life cycle (from pre-bid and joint venture agreements to contract management and claims preparation to mediation and arbitration). He also has a strong arbitration practice in construction and commercial matters and is listed with the Dubai International Arbitration Centre as a qualified Arbitrator.

In addition, Thanos has over 20 years’ experience in high-profile, cross-border acquisitions and multibillion-dollar transactions and privatisations, across a wide variety of key industry sectors within Europe, the UAE and the GCC, such as construction, cement, energy, banking and hospitality across the entire transaction cycle, from drafting and negotiation to arbitration.

Niel is part of the Construction and International Arbitration team at Galadari. He specialises in construction and engineering law, bringing with him over 10 years’ legal experience, including project finance-related work and dispute resolution practice. Niel was in the Project Finance team at Edward Nathan Sonnenbergs Incorporated, Africa’s largest law firm, before he joined Galadari. Prior to this, Niel spent time with a specialist consulting firm in the construction and engineering law field where he gained valuable on-site contract management and claims-related experience on mega infrastructure, power generation, and large mining projects in South Africa.

Niel’s project finance experience includes reviewing, drafting, negotiating and commenting on the FIDIC and NEC3 standard form construction contracts including EPC/Turnkey, O&M Agreements, Client/Consultant contracts, subcontracts, and goods and services supply contracts. His dispute resolution experience includes representing large employers and contractors in management, drafting, and defending of claims arising out of construction projects through multi-tiered Alternative Dispute Resolution mechanisms such as adjudication and arbitration.

Niel holds an LL.B. (Unisa) and an MCom (UJ), and is an admitted attorney.
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