

AN INTRODUCTION TO CONSTRUCTION LAW IN THE GULF

RICHARD HARDING QC

The Plan

- Introduction to the Middle East
- The construction boom (and bust)
- Origins of the law
- Modern laws
- Construction law issues
- How to argue the law

1. Introduction to the Middle East

2. The construction boom (and bust)

3. Origins of the law

Shari'a

- شريعة = Islamic system of law
- A basis for law in most Arab countries
- In practice, its direct application to commercial contracts is very limited

Qur'an

- Islam's holy book
- Muslims believe:
 - word of God
 - revealed to His prophet Muhammad
- Literal meaning is 'recitation' - the Prophet recited the words to his followers
- In Arabic: Muslims believe it cannot be adequately translated

Sunna

- *Sunna* = the way of life of the Prophet.
- Recorded in *hadith* – report of:
 - statements of the Prophet
 - actions of the Prophet

4. Modern laws

Al-Sanhouri's Civil Codes

- Egypt
- Syria
- Libya
- Kuwait
- Iraq
- Jordan
- United Arab Emirates (inspired)
- Bahrain (inspired)
- Qatar (inspired)
- Sudan (inspired)
- Oman (inspired)

مادة ٢٩

الجهل بالأحكام الشرعية ليس عذراً

UAE, Article 283

- (1) Harm may be caused directly or indirectly.
- (2) If the harm is caused directly, it must unconditionally be made good, and if it is caused indirectly there must be a wrongful or deliberate element...

1 - يكون الإضرار بالمباشرة أو التسبب.

2 - فإن كان بالمباشرة لزم الضمان ولا شرط له وإذا وقع بالتسبب فيشترط التعدي أو التعمد أو أن يكون الفعل مفضياً إلى الضرر.

UAE, Article 284

إذا اجتمع المباشر والمتسبب يضاف الحكم إلى المباشر.

- If the harm is both direct and consequential, the rules relating to direct harm shall apply.
- Where the committant and a causal committant are present, responsibility shall be attributed to the committant.
- If a person performs any act personally and is implicated therein with the person who is the cause thereof, the person performing such act is responsible thereof.
- If there is both a direct actor and an indirect actor, the legal consequences are to be attributed to the direct actor.

5. Construction Law Issues

Construction Issues

- *Muqawala* contracts
- Irrelevant concepts
- Concurrent delay
- Termination

(1) *Muqawala* contracts

- General rules PLUS specific rules for specific types of contract, e.g. *Muqawala* (المقاولَة)
- UAE CC Art.872

A *muqawala* is a contract whereby one of the parties undertakes to make a thing or to perform work in return for compensation which the other party undertakes to provide.

(1) *Muqawala* contracts

- General provisions of the Civil Code apply:
 - Formation of contracts
 - Interpretation of contracts
 - Requirement of good faith
 - Measure of damages
 - etc.
- Specific *muqawala* articles take precedence

(2) Irrelevant Concepts Under Middle East Laws

- 'Unenforceable penalty'
- 'Time at large'
- 'Prevention'
- 'Time of the essence'

(3) Concurrent delay

- Qatar Civil Code, Article 257:

The court may reduce the amount of the compensation or may not award compensation, if the creditor, through his own fault, contributed to or increased the loss.

يجوز للمحكمة أن تنقص مقدار التعويض أو لا تحكم
بتعويض ما، إذا كان الدائن بخطئه قد اشترك في إحداث
الضرر أو زاد فيه

(3) Concurrent delay

- The Employer can rely on QCC Art.257 to reduce the time-related costs recoverable by the contractor in a period of true “concurrent delay”
- Reduction is likely to be 50% as both causes are of equal effect
- Applies also to Employer’s LDs/damages
- Doesn’t achieve what employers think

(4) Termination

- Often argued:
 - *Employer must apply to the court to terminate, unless the parties have expressly agreed otherwise*
 - *If he doesn't, termination is wrongful*
- Obviously impractical
- Is there any legal basis?

(4) Termination

- UAE CC Art.892

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.

[Whelan]

ينقضي عقد المقاولة بإنجاز العمل المتفق عليه أو بفسخ العقد
رضاء أو قضاء.

(4) Termination

- My translation, avoiding misleading English legal terminology

A muqawala contract is **finished** by the completion of the agreed work, or by the **dissolving** of the contract, by consent or by the court.

(4) Termination

- Sanhuri, Book 1, p.709

فالفسخ له أثر رجعي، ويعتبر العقد المفسوخ كأن لم يكن

...dissolution has retrospective effect. The dissolved contract is to be considered as if it had not existed.

(4) Termination

- Termination under FIDIC contracts
 - Does the contract cease to exist?
 - Are the parties paid on a restitutionary basis?

(4) Termination

- Agreement to change the parties' obligations:
 - not contrary to any provisions of UAE law
 - does not require the permission of a court or arbitrator

6. How to argue the law

Top Tips

- Know your tribunal
- Clarify the legal issues
- Don't rely on translations
- Don't just accept what local lawyers say
- Ask for doctrine, not authorities
- Ask: why?
- All law is logic and fairness

AN INTRODUCTION TO CONSTRUCTION LAW IN THE GULF

RICHARD HARDING QC