

# THE INTERPRETATION OF CONTRACTS UNDER UAE LAW



By Richard Harding QC

This article sets out the main principles of contractual interpretation under UAE law<sup>1</sup>. The differences from the common law are often under-estimated by foreign lawyers working in the region. The main points to note are that interpretation under UAE law is subjective, it is based on the parties' actual mutual intention; and although the contract terms are the primary indication of that mutual intention, other evidence is admissible, even if the terms of the contract are apparently clear.

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<sup>1</sup> Most of the translations in this article are by the author. The rest are by James Whelan.

I address here 10 main principles.

## (1) UAE Law on Interpretation Is Not Only Based on Egyptian Law.

The civil code of the United Arab Emirates ("the Civil Code") is based on both Sanhoury's Egyptian civil code<sup>2</sup> and the Ottoman<sup>3</sup> Majalla. Sanhoury's civil code was based on the French civil code and concepts of Islamic law; and the Majalla was a codification of the principles of the Hanafi school<sup>4</sup> of Islamic law.

Sanhoury's extensive commentary on his own Egyptian civil code, Al-Wasit, is the most authoritative work used to explain the Gulf civil codes. However considerable care must be taken when relying on Sanhoury's writings in relation to UAE law, as the relevant articles may be based on, or influenced by, the Majalla, and therefore have a different meaning and effect from similar provisions of the French-influenced Egyptian civil code.

## (2) Interpretation Under UAE Law Is Subjective.

The official Commentary on the Civil Code says that "*interpretation of a contract means deducing the mutual intention of the contracting parties.*"<sup>5</sup> This is the same basic objective as French law<sup>6</sup>. It is a subjective approach. Although English common law frequently refers to 'the intentions of the parties', interpretation is in fact objective, asking what a reasonable person would have understood by the words used by the parties.<sup>7</sup>

In the English case of *Chartbrook v Persimmon*<sup>8</sup>, Lord Hoffman explained the difference between these objective and subjective approaches:

...French law regards the intentions of the parties as a pure question of subjective fact... uninfluenced by any rules of law. It follows that any evidence of what they said or did... may be relevant to establishing what their intentions actually were. There is in French law a sharp distinction between the ascertainment of their intentions and the application of legal rules which

may, in the interests of fairness to other parties or otherwise, limit the extent to which those intentions are given effect. English law, on the other hand, mixes up the ascertainment of intention with the rules of law by depersonalising the contracting parties and asking, not what their intentions actually were, but what a reasonable outside observer would have taken them to be.

## (3) UAE Law Is Based on the Parties' Mutual Intention.

Although UAE law requires the identification of the subjective intention, it is the intention of both parties together that matters, not each one separately. If the parties did not have a common intention regarding their obligations, there would usually be no agreement, and no contract to interpret.

Article 258(1) of the Civil Code<sup>9</sup> states:

العبرة في العقود للعقائد والمعاني لا للألفاظ والمباني.

What matters in contracts is intentions and meanings and not words and forms.

The Commentary says in relation to this article:

The meaning is that the intention of the contract is not to be found in the mere words used by the contracting parties, but rather in their true intentions in speaking the words that they spoke at the time of the contract, because the true intention is the meaning and not the words or the form used. Words are mere moulds for meanings...<sup>10</sup>

Both the Commentary and Sanhoury distinguish between apparent<sup>11</sup> intentions and inner intentions. The apparent intention is what is manifested by the parties, particularly by the terms of their contract, whereas the inner<sup>12</sup> intention is the parties' real intention. The Commentary and Sanhoury attribute different importance to these two types of intention.

Sanhoury, explaining the Egyptian Civil Code, said the following:

• "The objective factors which represent the apparent intention, are the source from which the inner intention is deduced."<sup>13</sup> In other words, the apparent intention is evidence of the inner intention.

• "When interpreting clear conditions, the court of cassation does not allow the first instance court to depart from their clear meaning."<sup>14</sup> "But it is not to be understood from this, that a clear expression cannot be interpreted. The judge may find that he needs to interpret such an expression, no matter how clear it is, as clarity of expression is not clarity of intention. The expression itself may be clear, but the circumstances indicate that the contracting parties were wrong to use this clear expression. They intended a meaning, but expressed it with words which were not right, as these words clearly had a different meaning. In these circumstances, the judge does not take the clear meaning of the words, and must deviate from this to the meaning that the parties intended. In this way he interprets the clear words, and deviates from their apparent meaning, but without distorting their meaning in any way."<sup>15</sup> This part of Sanhoury's explanation is often overlooked. It is commonly thought that where a term of a contract is clear, it is not open to any interpretation. However the correct position is that the judge can deviate from the meaning of the words, and interpret them in light of all the circumstances, provided that he/she does not simply distort their meaning.

However, the position under UAE law, as explained by the Commentary, is much less clear, and may be different from Egyptian law. This is what the Commentary says in relation to Article 266:

• "In Islamic jurisprudence, what matters in the interpretation of a contract is the apparent intention rather than the inner intention." This is an unhelpful generalisation. Sunni Islamic law consists of four orthodox "schools", with generally equal status<sup>16</sup>. Two of the schools, namely the Hanafi and Shafi'i, focus on expressed intentions, whereas the other two, the Hanbali and Maliki, focus on the parties' true

<sup>2</sup> 'Abd Al Razzak Al Sanhoury (1895-1971) was the author of the new Egyptian Civil Code, issued in 1948.

<sup>3</sup> The Ottoman Empire (1299-1923) was centred in modern Turkey, and extended across most of the Middle East and into eastern Europe.

<sup>4</sup> One of the 4 "schools" or divisions of orthodox Sunni Islamic law.

<sup>5</sup> Commentary on Article 266

<sup>6</sup> Pre-2016 French Civil Code, Art.1156

<sup>7</sup> See, for example, *Sirius International Insurance Co v FAI General Insurance Ltd* [2004] 1 W.L.R. 3251

<sup>8</sup> [2009] A.C. 1101

<sup>9</sup> Which reproduces Article 3 of the Majalla.

<sup>10</sup> Whelan's translation

<sup>11</sup> ظاهر *dhahir*, which means apparent, manifest, evident

<sup>12</sup> باطن *batin*, which means hidden, inner, secret

<sup>13</sup> Al-Wasit, Vol.1, §386. All quotations from Sanhoury in this article are from this volume.

<sup>14</sup> §390

<sup>15</sup> §391





*“Although UAE law requires the identification of the subjective intention, it is the intention of both parties together that matters, not each one separately.”*

intentions. The classic example is a sale of grapes. To the Hanbalis this would be unlawful if the parties intended that wine would be made from them, whereas such an agreement would be lawful to the Hanafis, without considering the intended use of the grapes.

- “Inner intentions have no status, as they are personal phenomena that do not concern other people. It is the apparent intention that is relied upon by the contracting parties in their dealings with others. This is a social rather than a personal phenomenon, and it out of this that the contract is made.”<sup>17</sup> This is consistent with the Majalla, but seems to be dismissive of the relevance of the parties’ true mutual intention.

From these parts of the Commentary, it appears that UAE law places a greater emphasis on the expressed intentions of the parties, than Sanhoury and Egyptian law do. However, as set out below, these differences may not be as great as they seem.

#### **(4) The Contract Terms Indicate the Mutual Intention.**

The interpretation of contracts under UAE law is primarily based on the intentions and meanings which are to be derived from the words which the parties agreed to use in their contract. The Commentary on Article 266 says: “The intention of the parties is to be deduced from the indication given by the words used in the contract.”<sup>18</sup>

#### **(5) Other Evidence of the Mutual Intention Is Admissible.**

Under the common law, when “construing any written agreement the court is entitled to look at evidence of the objective factual background known to the parties or reasonably available to them at or before the date of the contract... However, this does not entitle the court to look at evidence of the parties’ subjective intentions...”<sup>19</sup> The principal reason for this approach is that the exercise of interpretation is objective, considering how a reasonable person would have understood the words used.

The Commentary appears to say that UAE law requires the same focus on the words of the contract, to the exclusion of evidence of the parties’ intention. But this would contradict Article 258(1). The Commentary directly addresses this apparent inconsistency, in its explanation of Article 266. Having said that “it is the expression to which regard is had, and from which alone the intention is deduced”, the Commentary continues...

This is not lessened by the rule that matters are considered according to intentions, or that “what matters in contracts are intentions and meanings, and not words and forms”... These rules do not mean that regard is had to the inner intention. Rather, the aim is to have regard to the intentions and meanings which are to be derived from the expressions and text which are used, or from objective evidence or material indications. This does not go beyond an objective search, to a subjective search to try to discern what is in people’s minds, or to discover the errors in their souls.

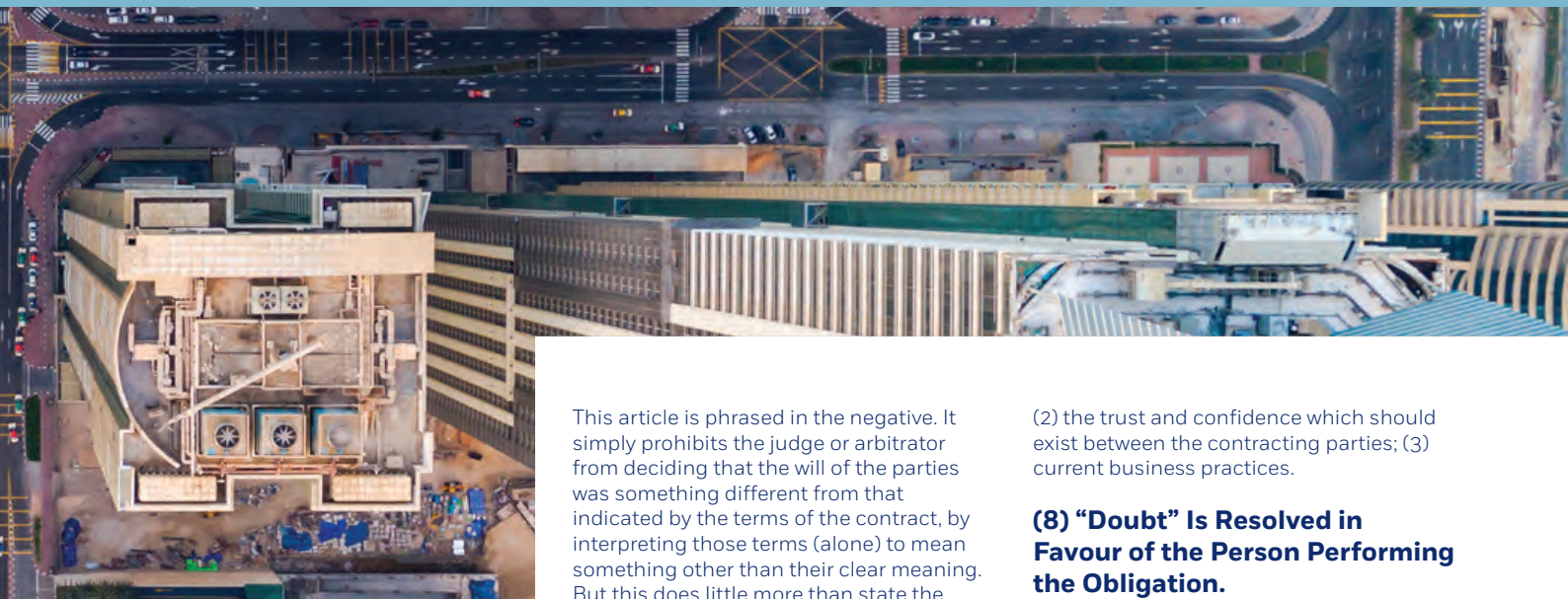
The Commentary makes clear in this last sentence that the aim of the law is not to try to work out what were the contracting parties’ personal intentions. However the contract is to be interpreted not only by reference to the words of the contract, but also, importantly, from an “objective search” of “objective evidence” and “material indications”. The apparent discrepancy between Articles 266 and 258(1) is resolved by the admission of evidence other than the terms of the contract, provided that it is “objective”, and it is not directed to what the parties each subjectively intended.

<sup>16</sup> These schools, or divisions, are known as madhabs (مذاهب) and are dominant in different geographical areas.

<sup>17</sup> Whelan’s translation, slightly amended.

<sup>18</sup> Whelan

<sup>19</sup> Lewison, The Interpretation of Contracts, 6th ed., Chapter 3, Section 17



## (6) Evidence of Pre- and Post-Contracting Events Is Admissible.

Under the common law, evidence is generally not admissible as an aid to the interpretation of the terms of a contract,<sup>20</sup> if it relates to pre-contractual negotiations<sup>21</sup>, or actions taken after concluding the contract<sup>22</sup>.

However there is no such prohibition under the civil law<sup>23</sup>, or the law of the UAE. Any relevant evidence of the parties' mutual intentions may be considered. But evidence of the parties' separate and subjective intentions will not be relevant. However it will often be the case that evidence of words used, or actions taken, before or after the contract was concluded, will be of little practical relevance to the interpretation of the words which the parties actually agreed.

## (7) External Factors May Aid Interpretation.

One of the most widely quoted, but misunderstood provisions of the Civil Code is Article 265(1), which says:

إذا كانت عبارة العقد واضحة فلا يجوز الانحراف عنها عن طريق تفسيرها للتعرف على إرادة المتعاقدين.

If the words of a contract are clear, the will of the parties may not be ascertained by an interpretation which deviates from them.

This article is phrased in the negative. It simply prohibits the judge or arbitrator from deciding that the will of the parties was something different from that indicated by the terms of the contract, by interpreting those terms (alone) to mean something other than their clear meaning. But this does little more than state the obvious. The judge cannot deliberately misread the terms of the contract to give them a meaning of his choosing.

However this article does not prohibit reference to evidence of the parties' mutual intentions from outside the contract. In light of such evidence, the mutual intention of the parties may not be clearly represented by those terms.<sup>24</sup>

Article 265(2) then says:

أما إذا كان هناك محل لتفسير العقد فيجب البحث عن النية المشتركة للمتعاقدين دون الوقوف عند المعنى الحرفي للألفاظ مع الاستهداء في ذلك بطبيعة التعامل وبما ينبغي أن يتوافر من أمانة وثقة بين المتعاقدين وفقاً للعرف الجاري في المعاملات

However if there is a reason for interpreting the contract, then it is necessary to look for the common intention of the contracting parties, without stopping at the literal meaning of the terms, being guided by the nature of the transaction and the trust and confidence which should exist between the contracting parties in accordance with current business practice.

This article does not simply relate to the position where the terms of the contract are not clear. Its words do not mirror Article 265(1). Instead, it says that it applies "if there is a reason for interpreting the contract". That reason may be a lack of clarity in its terms, or it may be a conflict between the terms and other evidence of the parties' mutual intention. In such cases, Article 265(2) provides that the judge or arbitrator is not limited to the literal meaning of the words used, and he/she can take into account three additional factors<sup>25</sup>: (1) the nature of the transaction;

(2) the trust and confidence which should exist between the contracting parties; (3) current business practices.

## (8) "Doubt" Is Resolved in Favour of the Person Performing the Obligation.

Article 266(1) of the Civil Code says:

يفسر الشك في مصلحة المدين.

Doubt is to be resolved in favour of the person who is to perform the obligation.

Accordingly, the person who benefits from this article will depend on the nature of the applicable obligation.

The Commentary says: "That which is certain is not removed by a doubt. Thus, if there is a doubt as to the indebtedness of a debtor, the certainty that he is innocent of the debt will not be overcome by a doubt about it."<sup>26</sup> From this, it is apparent that Article 266(1) is not really a rule of interpretation at all. Rather, it simply reflects the basic burden of proof, and presumption of non-liability, unless liability is proved.

But this rule can be applied in the context of construction contracts, where certain matters have not been agreed. Sanhoury gives this example<sup>27</sup>: "If a person is required to construct certain roads without it being determined how these roads should be constructed, or who should maintain them, then that person may perform his obligations in the way that is easiest for him, to lighten his burden."

<sup>20</sup> Lewison, Chapter 3, Section 9

<sup>21</sup> e.g. *Prenn v Simmonds* [1971] 1 W.L.R. 1381

<sup>22</sup> e.g. *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd*. [1970] A.C. 583

<sup>23</sup> See Lord Hoffman in *Chartbrook*, above.

<sup>24</sup> It is for this reason that the civil law does not include a concept equivalent to rectification. It is not needed.

<sup>25</sup> The Commentary has little to say on these factors.

<sup>26</sup> Whelan

<sup>27</sup> §400



## (9) The Rules of Construction Are Limited.

Unlike the common law, which has numerous rules as to how a contract is to be construed, the civil law and the law of the UAE rely to a greater extent on the judgement of the trial judge (or arbitrator) to decide what was the mutual intention of the parties, as a matter of fact.<sup>28</sup>

However Sahouri refers to various “internal factors” which may be relevant to the interpretation of contracts. The following are a couple of examples:

- “Trust in business requires that a person does not profit from ambiguity in the wording of a contract. Honesty in business requires a contracting party not to take advantage of ambiguous wording as long as he was able to understand its true meaning, or could have understood it.” Any ambiguity is therefore to be construed in a way which assumes that both parties were honest businessmen/ women. This is the presumed intention of the parties.
- “The words of the contract explain each other. No expression can be interpreted separately from the other expressions, but must be interpreted as part of the contract. A general expression may be limited by a preceding or following expression, and an expression may be an exception to something which is mentioned before or after it...” A party cannot rely on a single term of a contract, where other terms modify its meaning.

## (10) The Law Adds Obligations to Contracts.

Not all of the obligations owed by one contracting party to the other, are expressed in the contract. Certain further obligations are added by the law.

For example, Article 264 of the Civil Code states:

المعروف بين التجار كالمشروط بينهم

*“Unlike the common law, which has numerous rules as to how a contract is to be construed, the civil law and the law of the UAE rely to a greater extent on the judgement of the trial judge (or arbitrator) to decide what was the mutual intention of the parties, as a matter of fact.”*

That which is generally accepted between businessmen has the same effect as contractual terms agreed between them.

The effect of this article is to add, as an obligation, anything which is recognized by those in the relevant trade or industry as being an obligation. The example given in the Commentary is this: “...where a person gives a thing to another for his use without discussing the cost of hire. The person making use of it must pay a fair amount for it.”<sup>30</sup> This article may therefore be the basis for an obligation to pay a fair or reasonable sum for work in respect of which no price has been agreed.

Article 246(2) adds obligations to those which are set out in the contract. It says:

ولا يقتصر العقد على الإلزام المتعاقد بما ورد فيه ولكن يتناول أيضا ما هو من مستلزماته وفقا للقانون والعرف وطبيعة التصرف.

A contract is not limited to requiring the contracting party to do what it says, but also includes the necessary requirements for the contract, in accordance with the law, custom and the nature of the transaction.

This article adds obligations which are a necessary part of the contract. As a result, they are broadly equivalent to what the common law refers to as “implied terms”<sup>31</sup>. Accordingly, under UAE law, construction

contracts may include obligations to co-operate, and not to prevent completion. Such terms may therefore form the basis for contractors’ claims for the costs of disruption or prolongation<sup>32</sup>.

### Summary<sup>33</sup>

This article has addressed the following essential principles of contract interpretation under UAE law:

- UAE law on interpretation is not only based on Egyptian law.
- Interpretation under UAE law is subjective.
- UAE law is based on the parties’ mutual intention.
- The contract terms are the primary indication of the mutual intention.
- Other evidence of the mutual intention is admissible.
- Evidence of pre- and post-contracting events is admissible.
- External factors may aid interpretation.
- Doubt is resolved in favour of the person performing the obligation.
- The rules of construction are limited.
- The law adds obligations to contracts.

<sup>28</sup> As a result, there are few judgments of the Gulf courts addressing the principles of contractual interpretation. See Construction Law in the United Arab Emirates and the Gulf, Michael Grose, p.37.

<sup>29</sup> §396

<sup>30</sup> Whelan

<sup>31</sup> See, for example, Keating on Construction Contracts, 10th ed., §3-055 to §3-087

<sup>32</sup> See the author’s paper/slides on the SCL(Gulf) website: Delay and Disruption Claims - The Law in the Gulf, 30 May 2012

<sup>33</sup> A more detailed version of this article is available on request from Keating Chambers.



