



ICLG

The International Comparative Legal Guide to:

Construction & Engineering Law 2018

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Chief Executive Officer
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

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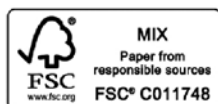
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United Arab Emirates

Hamdan AlShamsi Lawyers & Legal Consultants

Hamdan Al Shamsi



Omar Kamel



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.)

Construction contract forms vary in different sectors and between contractors. Smaller and more personal construction contracts will generally be drafted by the engineer/consultant rather than lawyers, and mid-size and large construction projects may generally apply a FIDIC contract (with amendments to the standard FIDIC contract) or otherwise a specific, independent contract very similar to that of FIDIC.

There is a very small amount of design and build contracts used in the UAE. Design and build contracts can sometimes be found in development projects where the companies are relatively closely bound by many commercial arrangements or are affiliates or in the case of specialised contractors who perform special projects. Design and build contracts generally follow FIDIC.

Design-only contracts are generally handled by the project’s engineer and consultant. Management contracting in its strictest form does not exist because the main contractor is always responsible towards the employer and the rights of subcontractors are limited; therefore, it may be the case that the main contractor appoints subcontractors for the whole scope of works and it is practically not necessarily to have employees. However, in most instances, the main contractors retain the civil and structural scope (unless it is specialised) and subcontract the other works in a project to subcontractors.

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)?

Articles 125–129 and 199–206 of the UAE Civil Transactions Law, No. 5 of 1985 (as amended), sets out the essential understandings

and basics of creating a contract; namely, Article 125 defines the general interpretation of a contract as: a contract is the meeting of an offer issued by one of the contracting parties with the acceptance made by the other party and their concordance in such a manner as to produce the latter party’s effect on the object of the contract, which results in a binding obligation on each party in consideration of the obligation of the other party. A meeting of more than two minds may agree to produce a legal effect. Article 126 states the object of a contract in a way that particularises the main subjects of any contract and in paragraph (d) opens the door widely for any other type of contracts. Article 126 states that the object of a contract may consist of: a) property, movable or immovable, corporeal or incorporeal; b) usufruct of the property; c) a specific act or service; and d) any other thing that is not prohibited by law or violating public policy or morals. Article 127 added more assurance to what is stated in paragraph (d), mentioned above, by stating that: an offence or violation may not constitute the object of a contract. Additionally, Article 128 strictly limits any changes or modifications to the regulation of contracts, as it states that nominate or innominate contracts are governed by the rules contained in this law, and rules exclusively applicable to certain contracts are specified in the special provisions regulating the same, whether in this law or any other. Article 129 lists the essential elements in an agreement; the necessary elements for the formation of a contract are: a) the meeting of minds of the contracting parties on the main elements; b) the object of the contract must be something possible, specified or specifiable, and negotiable; and c) the obligations arising out of the contract must have a licit cause.

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. A contract must not necessarily be in writing as per the Civil Code. 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 of 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)).

As for tenders in construction projects, the usual practice in the UAE is that the employer or engineer on his behalf will provide a Letter of Award to the contractor whom is selected after the tender, which will confirm his appointment and create a contract. The general practice thereafter is that the contractor and employer stamps and/or signs a full contract between one another.

- 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 is widely practised. Generally in law, 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?**

Neither the Civil Code nor any specific law prescribes 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 Construction All Risk (“CAR”) and Professional Indemnity (if there are designs provided by contractor). The contractor is responsible for any deaths that happen to its employees on the site by law. With regard to health insurance for workers, the Dubai Health Insurance Law No. 11 of 2013 is applicable and is mandatory, and the law requires all nationals and residents with a Dubai visa to have 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. All labour relations between employers and employees are governed by Federal Law No. 8 of 1980 on Regulation of Labour Relations (the “LRA”). Employers are required to provide adequate protective equipment and have measures to protect employees against the dangers of accidents in the workplace. The municipality is the main body that regulates health and safety on construction sites and can apply fines and suspend a contractor’s licence if the contractor is found to not have the required health and safety measures required by the municipality. 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. 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. In most instances, the usual practice is 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 is very common and, when it comes to joint ventures or special project vehicles, direct agreements and corporate guarantees are common practice.

- 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?**

It is possible for contractors to make use of a clause to retain ownership over the goods and supplies on-site and by contract they can insert clauses stating that the ownership of the goods shall remain theirs until full payment is made.

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 engineers. The employer can sometimes also appoint a project manager, which is common for larger projects. The engineer/consultant is governed by rules within the municipality and the culture in the UAE that they act impartially and make important assessments, one of which is the actual progress of works, which ultimately decides the amount that the contractor can claim. The engineer/consultant is mentioned in contracts and is required to make decisions as to the progress of works and manage the relationship between the employer and the contractor in an impartial manner.

- 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 rather than with employers.

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 arrangements 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. The contractor can find himself paying sums that are much larger than the actual loss suffered and, in such an event, and in accordance with civil law, he may apply to the courts and 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 will 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?

Generally, the employer is given the right to vary the works – almost all employers insert such a clause and construction contractors are more likely to have such a clause, allowing the employer to have the absolute power to make variations. In the absence of such a provision, any variation would be accepted by the courts so long as it does not create an unreasonable burden on the contractor.

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. If the contract is a lump sum contract, then in certain cases, even if works are omitted, they may be implied under certain circumstances.

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 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 custom in such transactions, will be made according to Article 265(2) (Civil Code).

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 of delaying events 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 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?

The general rule is that claims under a construction contract must be brought forward or claimed within the time limit of seven years.

In cases of structural defects (whether in the case of collapse of the structure, or a defect threatening its stability), the contractor is responsible for 10 years after handing over the works. 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.

3.7 Who normally bears the risk of unforeseen ground conditions?

The consultant and contractor will be held jointly liable if the building or installations collapse (totally or partially), or if the defect threatens the stability and safety of the building, whether as a result of ground conditions, or if the employer consented to the erection of the defective buildings. The contractor and consultant will have appointed a soil testing company who may be found to be responsible too.

3.8 Who usually bears the risk of a change in law affecting the completion of the works?

The employer generally bears the risk; a contractor can be relieved from liability, in the absence of any agreements otherwise, if he can prove that the change in law resulted in a loss or delay from his part. However, the employer will usually bear this risk under FIDIC contracts.

3.9 Who usually owns the intellectual property in relation to the design and operation of the property?

The person who owns the intellectual property in relation to the design is the person who created the design; in most instances that is the architect.

3.10 Is the contractor ever entitled to suspend works?

The contractor is entitled to suspend works in most construction contracts and in law (unless stated in a contract to the contrary). In

most instances, the contractor can suspend works for non-payment or breach of contract by the employer.

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. The Civil Code requires that, unless the parties have agreed otherwise, notice of cancellation must be given. Furthermore, 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.

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. The Civil Code also notes that, in the case of partial impossibility, the part of the contract which has become impossible to perform shall be extinguished. It is not possible to successfully argue that a contract which has become uneconomic to perform constitutes *force majeure*; however, such a circumstance can allow for a judge to amend the performance that is required or otherwise amend the amount of compensation for such performance.

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?

Most commercial terms may not be enforced by the new owner unless third-party rights are specifically created in the contract. In respect of obligations created by law, some of these obligations against a contractor may be claimed by a new owner in the absence of any assignment of the terms of a contract.

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. 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.

3.15 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine?

A prescribed level of duty of care may be made by contract and can be enforced against the contractor. The law does not provide a definite duty of care.

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. The Code goes on to state that the primary rule of interpretation is that words should have their true meaning interpreted and a word may not be construed figuratively unless it is impossible to give it its direct meaning. The Civil Code states that there shall be no scope for interpretation of clear words. The Civil Code also 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.

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 is 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 of the buildings they have constructed. If the architect did not supervise the construction of the works, his liability will be limited to any defects in the plans for a period of 10 years.

4 Dispute Resolution

4.1 How are disputes generally resolved?

Disputes in the UAE are generally resolved through UAE-based arbitration centres for construction contracts or through the courts.

4.2 Do you have adjudication processes in your jurisdiction? If so, please describe the general procedures.

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 the 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; arbitration clauses generally refer to rules of a certain arbitration centre. 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 UAE courts enforce arbitration awards and in the very unlikely event, the law offers certain protections and will not

enforce arbitration awards if the award does not comply with the UAE laws and requirements for an arbitration award to be enforced.

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. The UAE may apply a foreign award from a foreign court so long as there was no jurisdiction for the UAE to begin with; as an exception UAE law provides that the parties can opt to resolve their dispute in other courts.

4.6 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to reduce: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

The courts of the UAE are easily approachable and any party may register any claim they wish. The first instance courts may take up to one-and-a-half years to resolve a dispute and provide a judgment; however, in very rare circumstances, they may take longer. A decision by the first instance courts can be appealed and the appeal courts may issue a decision in the same amount of time or less. Therefore, appeal court decisions can again be appealed on points of law to the court of cassation or the supreme courts.

**Hamdan Al Shamsi**

Hamdan AlShamsi Lawyers &
Legal Consultants
Office 1611, 16th Floor
Al Manara Tower, Al Abraj Street
Business Bay, Dubai
United Arab Emirates

Tel: +971 4 346 9262
Email: hamdan@alshamsilegal.com
URL: www.alshamsilegal.com

With nearly a decade of successful litigation experience across the United Arab Emirates, Mr. Al Shamsi has built one of Dubai's most reputable and respected law practices. He is widely regarded as a top litigator in the Dubai Courts, with extensive experience in corporate, banking and finance and insurance law. Mr. Al Shamsi advises both local and international companies and governmental entities in cases involving complex litigation. He appears regularly before the Appeals Court and the Court of Cassation, as well as UAE's Federal Supreme Court. Mr. Al Shamsi has been described as being "...very thorough and highly efficient – Hamdan faced each challenge with strategy, professionalism and confidence which ultimately resulted in our successful outcome". It is no surprise that he has been awarded as one of the most influential young leaders in the Middle East and the young achiever award, amongst many more.

**Omar Kamel**

Hamdan AlShamsi Lawyers &
Legal Consultants
Office 1611, 16th Floor
Al Manara Tower, Al Abraj Street
Business Bay, Dubai
United Arab Emirates

Tel: +971 4 346 9262
Email: OALSwadeh@alshamsilegal.com
URL: www.alshamsilegal.com

Mr. Kamel has a Master's degree in Commercial Law and has been a member of Jordanian Bar since 2001. He is an experienced corporate counsel, possessing strong post-qualification experience in commercial practices in MEA and is profoundly skilled in corporate and restructuring matters, investments, corporate actions, intragroup transactions and service arrangements. Mr. Kamel also specialises in general mergers and acquisitions, strategic transactions and corporate restructurings, draft documents incidental to formation and ongoing business operations of corporations, partnerships, and limited liability companies. He advises on corporate governance matters (including resolutions, preparing board and committee meeting materials and agendas and maintaining corporate records), and has experience in cross-border transactions, real estate and commercial finance transactions covering licensure, development and supply agreements.

HAMDAN ALSHAMSI

LAWYERS & LEGAL CONSULTANTS

Hamdan AlShamsi Lawyers & Legal Consultants was established in 2011. It has since become a name synonymous with success and is well-known in the legal circuit. The success of the law firm is due to its specialisation in advising on commercial issues, insurance, due diligence, family law, intellectual property law, banking, companies law and other matters locally, and its dedication towards offering unparalleled, high-quality and culturally sensitive legal services, while adhering to the highest standards of integrity and excellence.

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- Vertical Agreements and Dominant Firms



59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk