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Original Research Article

The Construction Law in the Middle East

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Abstract

This article analyzes the structuring of Construction Law in Middle Eastern countries. It is an excursus that deals specifically with what the Muqawala contract is, its usefulness and also its history, up to an indication of the most important issues and elements of construction contracts in Middle Eastern countries. Specifically, the most important and legally interesting case relating to the resolution of disputes related to incorrect contractual execution was also analysed. In addition, a further analysis was carried out on Arbitration as one of the most common instrument and also the most common form of dispute resolution in contracts involving international Parties and related to the same on a number of increasingly widespread and increasingly used local arbitration bodies including the Dubai International Arbitration Center and DIFC/LCIA Arbitration Centre.

Keywords: Muqawala, Middle-East, Construction-law, Arbitration, Contract, DIFC, Civil-law, Damages, Penalties, Termination, Commercial, Liability.

1. INTRODUCTION

1.1 The Modern Law in Middle East. From the Sharia (the Islamic Law) to the Civil Code

The Sharia, as also the words meaning report, covers all aspects of human behaviour, governs the Muslim's way of life in literally every detail, from political government to the sale of real property, from hunting to the etiquette of dining, from relations to work and prayer and it also regulates commercial transactions.

As regards the distinction between commercial and non-commercial law, the jurists did, naturally, categorise the Sharia, but the principal divisions were *akhlaq* (morals), *ibada* (religious observance) and *mu'amalat* (transactions) (N. Anderson, 1976).

Knowing therefore the difficulty of finding in the Sharia references adequately suited to contracts and trade, the need arose to adopt a "modernization" of the specific law. So, starting from the assumption that Islamic Law dominates the legal scene in the countries of the Middle East, the same, although continuing to exist and to be diligently followed in a personal manner, has undergone over the years the approach of a modern legislation, which by establishing the foundations on the Sharia (شريعة) has provided for the inclusion of a Civil Code also known as Al-Sanhouri's Civil Codes which sets out general contractual principles and covers specific business arrangements.

This Code places particular importance on direct and indirect damages, which commercially and contractually become the focus of every economic relationship between the Parties and consequently the main cause of dispute.

In fact, article 283 of the Civil Code states that the "Harm may be caused directly or indirectly" and the second paragraph that "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".

Various provisions set out in the Commercial and Civil Codes are mandatory to all contracts. However, the Civil Code sets out 25 Articles that specifically govern all *Muqawala*.

1.2 The Muqawala Contract

Contract of Muqawala is one of the nominate Contracts regulated by the Civil Law among the Middle East and deals with construction matters, such as

construction of buildings and infrastructure and other construction works.

Specifically, the Civil Code set first of all the definition and scope of Muqawala contract, the contractor's obligations, the obligations of the owner, the subcontracting and the termination/end of contracting.

Related the UAE case, it's important to underline that from articles 872 to 896 of the Civil Code are stated the basis on which the construction contracts and so the Muqawala contracts are currently regulated in the UAE. However, in the same way it is important to specify that Muqawala contracts do not exclusively cover construction contracts (Ma. El- Gamal, 2003).

They apply generally to any contract for services, like assignment also.

As specified above, at a more specific level, Chapter Three of the Civil Code attempts to enumerate, inter alia, the obligations of the parties, the conditions for subcontracting, and the termination of Muqawala contracts (Wb. Hallaq, 2004).

1.3 The liability and Penalties on Muqawala contracts

The most frequently discussed Muqawala provisions, and those that cause the most concern regarding the use of the standard contract for construction/procurement, concern what is widely known as the "ten-year liability". Specifically, this is a key principle of the Civil Code which imposes an objective joint liability between the contractor and the supervising architect for 10 years from the "delivery" of the work.

In the same way, the same joint liability also falls on the employer who has approved the projects, which then causes damage, or has accepted the final delivery of the works vitiated by discrepancies.

This provision as mandated for Muqawala contracts cannot be negotiated or changed in any way nor limit the 10 year liability timeline, but rather instead does not apply if the parties intend that the building/work/construction will remain for less than 10 years.

The penalty clauses, in addition to liability, are the most significant part and also an element of contractual dispute. One of the most evident problems concerns article 390, second paragraph, of the civil code, which gives the judge the right to vary the sanction defined by the contracting parties, thus creating confusion with respect to the one established between the parties and the one assessed by the judge in court of dispute. Such discretion to vary a predefined contractual obligation will leave the affected party dissatisfied with the outcome of his case even if the delay penalty had been clearly quantified in the contract.

Normally the maximum penalty of ten percent of the damage is also established by the Civil Code with reference to the indications set in the Muqawala contract, but also and above all if there is agreement between the parties on these limits in the contract.

And this leaves open the case that a different judge may make a different assessment of the guaranteed penalty rate, and this also and above all in the absence of a judicial precedent system in the UAE legal system. It can also be seen that Articles 872-896 concerning Muqawala contracts do not provide penalties for delay and therefore the judge has to rely on the general contract law provided by the code, which does not specifically apply to construction contracts. It can therefore be seen that the art. 390, no. 2, applies without distinction to both construction contracts and contracts for the sale of goods, regardless of the complexity of the former.

1.4 Subcontracting

Subcontracting is permitted by UAE law, unless the contract between the employer and the contractor expressly prohibits subcontracting. These provisions are dictated in the context of the Muqawala contracts, by articles 890 and 891. Despite this mention, however, the subcontracting rules have not been completely defined legally except regarding the responsibility of the parties. The contractual relationship between contractor and subcontractor is limited to these two parties and does not extend to the employer, while the contractor's liability is present towards the employer for the work performed by the subcontractor. "Pay when paid" or "back-to-back" clauses are valid under UAE law and can be used in favor of the contractor, when the contractor has not been paid by the employer. In this case, speaking precisely of a liability of the employer for non-payments, the subcontractor has the power to initiate legal proceedings against the employer in the name of the main contractor, thus making an indirect claim, as resulting from articles 392 and 393 civil code. Furthermore, the subcontractor can request payment directly from the employer if the contractor has given up his right.

In addition, subcontractors may legitimately claim damages for actual losses and loss of profits against the contractor if the main contract between the employer and the contractor is unilaterally terminated, thus achieving greater protection (H. *Hassan, 2002).*

1.5 Termination

As regards the termination, regulated by articles from 268 to 271 of the Civil Code, the same can take place as judicial termination or resolution by mutual consent of the parties.

The UAE courts will recognize out-of-court settlement by mutual consent of the parties if the contractual provisions governing the settlement mechanisms are clear, express and detailed.

A specific case in this sense, dictated by article 886 of the Civil Code, then reports the possibility for the employer to terminate the contract in cases of exponential increase in the agreed price. In addition, with a precise reference to UK law and FIDIC clause 15.5, in relation to termination, the period of notice which must be given by the employer to the contractor in the event of termination is written in a clear and precise manner. Therefore, this leaves no ambiguity as to the procedures both parties must follow after settlement.

In any case, however, in any of the cases mentioned, once the contract has been terminated by court decision or by mutual consent, the terms and conditions of the canceled / terminated contract will no longer govern the relationship between the parties after termination.

2. MATERIALS AND METHODS

2.1 The use of the bargaining

From an analysis of the current legislation and local contracts, and specifically the most important in the construction sector, namely that of Dubai, a gap is highlighted given by a minimum number of articles intended as law on civil transactions of the United Arab Emirates, only twenty-four articles which refer to construction contracts, and which apply to the building sector. However, it is a common result that in order to remedy situations not covered by the aforementioned articles, the judiciary very often refers to the general theory of bargaining. These are general provisions of the law provided for in various decrees, ministerial decisions and in the civil code. In any case, however, due to the uniqueness of construction contracts, these general provisions are inadequate in dealing with specialized contracts involving various players in the construction sector and, albeit with certain references to specific contractual indications, very often there are contractual disputes caused precisely by the non-specific legal indication on the sector.

3 RESULTS AND DISCUSSION

3.1 Dispute Resolution

On the basis of the particular type of contract analysed, it is good to pay attention to the fact that, precisely given its particularity, it is common for it to give way to disputes between the parties, especially regarding liabilities, penalties or termination. The emblematic case of Dubai is a school case as it represents an increasingly fast developing economic society, with the consequent stipulation of construction contracts (specifically) between foreign subjects. This multiplicity of cultures and languages therefore requires the inclusion in the contracts, very often, of an arbitration clause, which refers the disputes between the Parties to an Arbitration, which by its nature has international value. However, it is essential to highlight that, unlike many other world legislations, in this case, regardless of the explicit agreement of the parties to refer a dispute to an international arbitration or foreign court, both the courts of the Dubai International Financial Center (DIFC) and the UAE courts will accept jurisdiction to hear the dispute if the dispute falls within the jurisdiction of the UAE courts and there is a legal nexus with the UAE, on the basis that the rules relating to the jurisdiction of the courts of the United Arab Emirates are of a public order nature (Articles 31 to 41, Code of Civil Procedure), and this in open derogation from the arbitration clause inserted by the parties. If the parties have agreed to submit a dispute to arbitration in the UAE, a UAE court will still cancel the parties' agreement and accept jurisdiction over the matter if the defendant does not object to the jurisdiction of the UAE court and does not raise the existence of the arbitration agreement at the first hearing where the defendant is duly represented.

In any case however, disputes arising from procurement contracts with governmental and/or quasi-governmental entities are generally referred to the courts of the United Arab Emirates with the direct exclusion of arbitration, or possibly with the concession of only the use of internal arbitration in the respective emirates.

3.2 The common use of foreign Judgement

The United Arab Emirates, and in particular Dubai, have increasingly expressed themselves internationally, attracting investors/builders from all over the world. This internationality has very often led to the modification/adaptation of construction contracts with clauses that refer to foreign legislation, despite referring to a contract/activity carried out in the UAE.

To this end, it should be noted that the Civil Code allows this contractual inclusion in article 19, paragraph 1, however mentioning cases of exception to the same and specifically the cases in which there are contracts relating to rights in rem (i.e. relating to assets located in the UAE) or contracts entered into with a UAE governmental or quasi-governmental entity.

In these specific and named cases UAE law applies to procurement contracts with governmental and quasi-governmental entities and the parties cannot agree on a different choice of law. At the federal level, the ministerial decision n. 20 of 2000 relating to the rules on public procurement (Federal Procurement Regulations) and the resolution of the cabinet n. 32 of 2014 establishes the requirements for contracts concluded with the federal government, ministries and federal agencies of the United Arab Emirates in order to better fix the indications about these exceptions.

Locally, Abu Dhabi, Dubai and Sharjah have separate procurement laws applicable to tenders issued by local public authorities. In general, local procurement laws are broadly similar to federal procurement regulations, although some issues may be addressed differently in each jurisdiction.

If the party invoking a foreign law contractual choice before a UAE court fails to prove it and determine its effects, UAE law will apply regardless of the agreement of the parties. In conclusion, the UAE courts have held in several cases that UAE law will apply instead of a foreign choice-of-law clause despite the agreements made between the parties in the contractual arena.

However, all of the above applies only to the extent that it does not contravene Islamic Sharia law, public order or morals of the UAE (Article 27, Civil Code).

In this context, internal public policy, as interpreted in the UAE, includes, inter alia, matters of personal status, freedom of trade, circulation of wealth and individual property rules, to the extent such matters do not contravene to the mandatory provisions and essential principles of Islamic Sharia which inspire the laws of the United Arab Emirates.

3.3 Arbitration as major instrument of dispute resolution in contracts

Taking into consideration the specific case of Dubai, it is possible to note very often and increasingly frequently the use of the arbitration award as a dispute resolution, which differs depending on whether it is precisely related to the DIFC or elsewhere in the United Arab Emirates. To this end, and to allow the correct use of the arbitration itself, the need has arisen for the judicial body to carry out a control, not already of the arbitration decision but of the modalities of functioning of the arbitration. For this reason, domestic arbitral awards cannot be enforced unless ratified by the competent court of the UAE (Article 215, Code of Civil Procedure). Furthermore, domestic courts have the right to refer to the arbitrator(s) any matter which, in the opinion of the court, has been omitted (Article 214, Code of Civil Procedure). However, with regard to arbitral decision issued outside the DIFC, it is essential that the court review the award and ensure that the award does not contravene public policy and that there is a written arbitration agreement signed by individuals who have the capacity to stipulate agreement and that the same award has been issued within the six-month term established by the code of civil procedure (in the absence of a valid extension agreement).

And that the award and all its pages are signed by all the arbitrators (C. Mallat, 2000).

Domestic arbitral awards are final and binding and not subject to appeal; the court does not review the merits of the case but rather how the arbitration is conducted. However, if the court finds the award to be void for any reason relating to public policy or the structuring of the arbitration, the court will deal with the dispute in the case based on the exhaustion of the arbitration agreement.

For example, in the context of construction contracts, and FIDIC contracts in particular, UAE courts have recently held that the intention of the parties to submit the dispute to arbitration may be implied when there is a clear reference to the application of the FIDIC General Conditions in any correspondence between the parties to the dispute (Celine Abi Habib Kanakri *et al.*, 2017).

4. CONCLUSION

In order to take a point of the situation it is possible to highlight what are in fact the key concepts of the building law of the United Arab Emirates and which must be addressed in order to highlight the mandatory rules and the rules of public order (or those that can be considered as such by a UAE court) which must be complied with by the parties.

Specifically, it should be noted that, through specific analogies with English law, a fundamental topic is represented by the additional costs and their impossibility to be recovered for the execution of an already agreed agreed project. In principle, any request for additional costs or fees for the execution of the originally agreed project is prohibited under the lump-sum contract (art. 887 of the civil code).

It should be noted that the Muqawala contract recalls the effective importance of the figure of the engineer who establishes a real agent-principal relationship with the employer, so as to bind the employer himself to the engineer's deeds/decisions.

In addition, the role of the concept of good faith, and the consequent obligation of the parties to fulfill their contractual obligations according to the concept of good faith (article 246, civil code) is always of significant importance.

Substantial point of interest is also the concept of silence, which under UAE law cannot generally be considered as acceptance, although silence in a situation where a statement is clearly required should be considered as acceptance (Article 135, Civil Code).

Of no small importance is also the concept of "pacta sunt servanda", which properly finds its highest expression in commercial transactions. Indeed, the contract is understood as the main source of obligation, provided that it does not contravene the mandatory laws of the United Arab Emirates. The parties must therefore

abide by the terms of their contract and fulfill their contractual obligations, or they will otherwise be held liable for breach of contract. In addition, an important and fundamental fact is that the law of the United Arab Emirates applies in the case of a tacit agreement. If the law is silent, local custom will apply. If these are silent, international customs must be taken into account, provided they are not contrary to public order and public morals (Article 2 of the Commercial Code; Articles 50 and 51 of the Civil Code).

To conclude, it should be noted that at the basis of a contractual stipulation, specifically in construction contracts, it is essential to include first of all an optimal clause regarding the applicable law and the dispute resolution clauses, seeking the best option between the foreign law and the arbitration award, and that this choice follows a correct and functional analysis of commercial and technical due diligence in order to avoid contractual breaches and even worse in incorrect dispute resolution dynamics, very common in contracts of this nature, in which the Parties may be of different origin and legal extraction.

And again, as regards the penalties related to the contract, a contractual penalty for the delay in the delivery of the works can be activated and ordered by the court if the contractor has fulfilled all his contractual obligations, without prejudice to the punctual delivery of the works/ project.

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