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Managing Legal Risk in the Middle East:  
Introduction to legal issues in the UAE

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## Introductions

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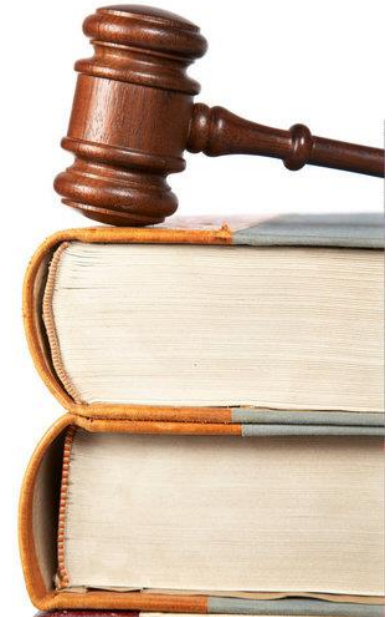
## Webinar Outline



- + Introduction to the UAE legal system and Civil Code;
- + Freedom to contract and contract formation;
- + Contract interpretation and performance;
- + Duty of care/obligations;
- + Limitation clauses: the law and in practice;
- + Limitation periods and decennial liability;
- + Damages (including liquidated damages and interest);
- + Dispute resolution (local courts vs arbitration); and
- + Enforcement and recovery.

## Introduction to the UAE legal system and Civil Code

- + Sharia, the law of the Islamic religion, is the guiding principle in the formulation of all legislation passed.
- + Codified civil law model aims to put in place a comprehensive set of laws that cover all eventualities, consisting of:
  - Federal laws of the UAE; and
  - Local laws and regulations of the individual Emirate.
- + Civil law v common law:
  - Courts / tribunal not bound to follow previous precedent.



## Freedom to Contract – introductory comments



- + Article 257, Federal Law No. 5 of 1985 (the “Civil Code”):
  - *“The basic principle in contracts is the consent of the contracting parties and that which they have undertaken to do in the contract.”*
- + Parties are generally free to agree the terms that govern their contractual relationship.
- + The local courts or a tribunal will generally uphold and enforce terms of a contract.
- + Some restrictions on this principle:
  - terms must not conflict with public policy or decency; or
  - conflict with any mandatory provisions of law.

## Contract Formation – the basics (1)

### + Article 129 of the Civil Code

– *“The necessary elements for the making of a contract are:-*

*(a) that the two parties to the contract should agree upon the essential elements;*

*(b) 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*

*(c) there must be a lawful purpose for the obligations arising out of the contract.”*



### + Article 130 of the Civil Code

– *“A contract shall be made by virtue solely of the confluence of offer and acceptance, subject to the specific provisions laid down for the making of the contract by law.”*

## Contract Formation – the basics (2)

- + Articles 872 to 896 of the Civil Code: contain provisions specifically dealing with "muqawala contracts", or contracts to build.

- + Article 874:

- *“In a muqawala contract, there must be a description of the subject matter of the contract, and particulars must be given of the type and amount thereof, the manner of performance, and the period over which it is to be performed, and the consideration specified.”*

- + No written contract: courts will apply UAE law in the following descending order:

- relevant federal laws;
- local laws;
- construction industry custom; and
- custom generally.



## Authority to bind a Company – important considerations

- + Does the individual who will be signing the contract on behalf of the party that you are contracting with have authority to bind the company?
- + Article 105 of Federal Law No. 8 of 1984, the Commercial Companies Law, provides that:
  - *"The Board of Directors shall assume all the powers necessary to execute the businesses required in satisfaction of the company objectives, save such powers as may be vested by the law or the company Articles of Association in the General Assembly. However, it is not permitted for the Board of Directors to enter into loan agreements whose term exceeds three years nor to dispose of the company properties or place of business or to mortgage the same, release company debtors from their commitments, concile or refer to arbitration unless the same are expressly granted by the company Articles of Association or embodied by nature thereof in the company objectives. In other than those two cases, it is a condition for the conclusion of such actions to obtain the approval of the General Assembly."*
- + If a signatory to a stand-alone arbitration agreement or a contract which contains an arbitration agreement does not possess the requisite authority to bind the entity, the arbitration agreement will be invalid.



## Contract Interpretation and Performance – key principles

- + Intentions and meanings, not words and forms.
- + If ambiguity exists, the court / tribunal has a discretion to *“look behind the terms of the contract”*.
- + Overarching duty of good faith: Article 246 of the Civil Code:
  - *“The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith.”*
- + Unfair contract terms, Article 266(2) of the UAE Civil Code provides that:
  - *“Nevertheless it shall not be permissible to construe ambiguous words in contracts of adhesion in a manner detrimental to the interests of the adhering party.”*



## Standard of Care / Obligations



- + Article 383(1) of the Civil Code:
  - *“If that which is required of an obligor is the preservation of a thing, or the management thereof, or the exercise of care in the performance of his obligation, he shall have discharged that obligation if, in the performance thereof, he exercises all such care as the reasonable man would exercise, notwithstanding that the intended object is not achieved, unless there is an agreement or a provision of law to the contrary.”*
- + Under UAE law, not required to meet fitness for purpose obligations unless terms of appointment states otherwise.
- + In practice = absolute requirements.

## Limitation clauses - the law and in practice

- + Article 390 of the Civil Code provides:

- *“The contracting parties may fix the amount of compensation in advance by making a provision therefor in the contract or in a subsequent agreement, subject to the provisions of the law.”*



- + In general, limitations on liability are acceptable and enforceable under UAE law.
- + **But not uncommon for unlimited liability engagements.**
- + Limits subject to a number of exemptions, including:
  - Decennial liability;
  - Adjustment of pre-agreed limit; and
  - Gross negligence, intentional harm or fraud.

## Decennial liability – Article 880 of the Civil Code



- + Decennial liability claims are not subject to limitation clauses.
- + Consultant and contractor are jointly and severally liable for ten years from the delivery of the project for the total or partial demolition of construction works or other permanent works, and any defect which threatens the stability or safety of the work.
- + Parties cannot contract out of decennial liability.

## Adjustment of pre-agreed limit of liability

- + Courts and tribunals afforded a wide discretion to vary limits of liability.
- + Article 390 of the Civil Code provides that, upon application by a party to a contract, judges (or arbitrators) can vary limits of liability by increasing or decreasing the amount of compensation to reflect the actual loss suffered.



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## Gross negligence, intentional harm and fraud



- + The Courts have confirmed that limitation clauses cannot apply to losses arising out of:
  - + gross negligence;
  - + intentional harm; or
  - + Fraud.
- + *Dubai Court of Cassation petition no 134 2006; no 195 2003 and no 15 2002.*

## Limitation Periods - summary

Type of Claim	Relevant Law	Limitation Period
Contract	Article 473 of the Civil Code	15 years
Building Contracts (Defects)	Article 880 of the Civil Code	10 years
Tort (causing harm)	Article 298 of the Civil Code	3 years
Contract of Insurance	Article 1036 of the Civil Code	3 years
Dishonoured Cheque	Article 638 of the Commercial Code	1-3 years

## Damages under UAE law – general principles

- + Article 389 of the Civil Code:
  - “... if the amount of compensation is not fixed by law or by the contract, the judge shall assess it in an amount equivalent to the damages in fact suffered ...”
- + Contractual relationship between the parties, UAE law recognises the concept of:
  - (i) direct damages;
  - (ii) interest;
  - (iii) damages in respect of loss of opportunity and loss of profit; and
  - (iv) moral damages.
- + Tortious claims:
  - Consequential damages plus (i) to (iv) apply.





## Damages under UAE law – liquidated and ascertained damages

- + Liquidated Damages

- + Article 390 of the Civil Code:

*“(1) The contracting parties may fix the amount of compensation in advance by making a provision therefore in the contract or in a subsequent agreement, subject to the provisions of the law.*

*“(2) The judge may in all cases, upon the application of either of the parties, vary such agreement so as to make the compensation equal to the loss, and any agreement to the contrary shall be void.”*

- + Court has discretion (upon the application of one of the parties) to examine the level of pre-agreed, fixed compensation and increase or decrease the amount to reflect the actual loss suffered by a party.

## Damages under UAE law - interest

- + It is accepted that interest generally is prohibited under Sharia law.
- + Federal Supreme Court has confirmed that interest in commercial dealings is allowed and is not contrary to the constitution of the UAE and the legislation can provide for interest where necessary.
- + Article 76 of the Commercial Code provides that:
  - *“A creditor shall be entitled to charge interest on a commercial loan according to the rate provided in the contract. If the rate of interest is not specified in the contract, it shall be reckoned according to the market rate prevailing at the time of the transaction, but in this case shall not exceed 12% until payment is made”.*
- + Article 88 of the Commercial Code states that:
  - *“If the subject of a commercial obligation is a sum of money in an amount known at the time the obligation arose, and the debtor delays in making settlement, he shall be bound to pay the creditor the interest specified in Articles 76 and 77 as compensation for the delay unless otherwise agreed”.*
- + Dubai: 9% interest rate v Abu Dhabi: 12% interest rate.

## Dispute Resolution (federal courts vs arbitration) (1)



### + Federal courts:

- Three Tier Court Structure:
  - Court of First Instance,
  - Court of Appeal; and
  - Court of Cassation.
- No specialist court structure.
- Proceedings must be conducted in Arabic.
- Generally only court-appointed experts allowed to give evidence.
- Court-appointed experts typically have a civil law background and may not possess the requisite specialist knowledge relevant to matter in dispute.

## Dispute Resolution (local courts vs arbitration) (2)

### + Arbitration:

- Preferred method of dispute resolution in the region.
- Arbitrations typically subject to local arbitration rules such as:
  - Dubai International Arbitration Centre (DIAC);
  - Abu Dhabi Commercial Conciliation & Arbitration Centre (ADCCAC); and
  - DIFC-LCIA (within the Dubai International Financial Centre free zone's arbitration and mediation centre).
- Choice of language.
- Choice of tribunal and experts.
- Note: If a party wishes to commence proceedings against a Government entity or department then it must first refer the matter the Legal Affairs Department. Failure to do so will result in delays and challenges to proceedings.



## Enforcement and Recovery



- + Historically, uncertainty over enforcement of awards
- + However, courts are increasingly more willing to recognise and enforce arbitration awards.
- + Encouraging developments:
  - Establishment of the various arbitration centres referenced on the previous slide;
  - A new and discrete arbitration law in the pipeline (albeit this has been in the pipeline for quite some time); and
  - Court's welcoming approach to the New York Convention which the UAE signed up to in 2006.



## Conclusion

- + Significant opportunities in the UAE, however these go hand in hand with the risks.
- + Building contracts and consultancy appointments are more onerous than those entered into in common law jurisdictions.
- + By understanding the legal framework and, where possible mitigating against those risks, parties can benefit from available opportunities and avoid disputes.



## Approaching Webinars:



- + Legal issues for Contractors in the Middle East;
- + *Inshallah* after holy month of Ramadan; and
- + Invitations to be sent out soon.

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