

WELCOME CICES

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UAE Constitution Contracts Formation

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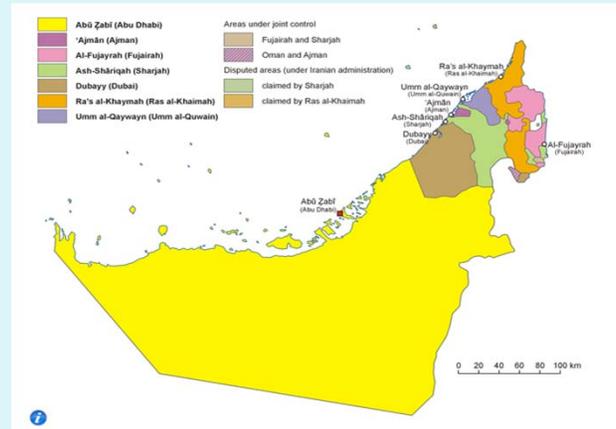
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The UAE Constitution - Overview

- The UAE is a federation established on 2nd of December 1971.
- The Constitution declares the Shari'a to be a principal source for law in the UAE and is essentially a civil law jurisdiction heavily influenced by the Egyptian law system, which has its sources in French and Roman law. Common law principles are generally not adopted.
- It comprises seven Emirates namely; Abu Dhabi, Dubai, Sharjah, Ras Al Khaimah, Umm Al Quwain, Ajman and Fujairah.

The UAE Constitution - Emirates



The UAE Constitution – Contents Summary

- The constitution came into being to explain:
 - the main rules of the political and constitutional organization of the state;
 - purpose of federation establishment, objectives and components on local and regional levels;
 - It elaborates on the major social and economic pillars of the federation and stresses public rights, responsibilities and freedoms as well as the armed and security forces provisions and, jurisdictions between the federation and member emirates.

UAE Construction & Contracts

- Commercial transactions are governed by UAE Federal **Commercial Transactions Law** 'Commercial Code' (No. 18 of 1993).
- Civil transactions are governed by UAE Law of **Civil Transactions** 'Civil Code' (No. 5 of 1985 & No. 1 of 1987).
- In the absence of any specific provisions, the Islamic Shari'a will apply.
- In matters of procedure, the UAE courts follow the Federal **Civil Procedure Law** 'Civil Procedure Code' (No. 11 of 1992 as amended).

UAE Construction & Contracts

- Articles **872 to 896** of the UAE Civil Law 1987 (the "Civil Law") relating to construction works, as well as general maxims and principles set out in the same law, form the basis of the legal framework relating to construction.
- In addition, the provisions of the UAE Commercial Transactions Law would also apply to the extent that the parties to a construction claim can be defined as traders carrying out commercial business in accordance with Articles 6 and 11.

UAE Construction & Contracts

- **CIVIL CODE: ARTICLES 872 to 896** (rough translation by others)
- **Chapter 1 : The Contract Agreement**
- **Section 1 : Definition and Scope of Contract Agreement**
- Article 872 A contract agreement is defined whereby one party makes something or performs a daily pledge to another party.
- Article 873 (1) A contract may be limited to an undertaking by a Contractor to do the works and materials to be provided by an Employer.
 - (2) A contract may also allow for the Contractor to provide materials for the works.
- Article 874 The contract document should specify the Contractor's address, the scope of work, the Contractor's capacity, performance criteria, the Contractor's proposed method of construction and duration to complete the works. The contract document should also identify the payments to be made.

UAE Construction & Contracts

- **Section II : Effects of Contract Agreement**
- **Contractor's Obligations**
- Article 875 (1) If the Employer has agreed to the Contractor providing some or all of the materials. The Contractor shall be responsible for the quality of the materials to the terms of the contract. In all other instances the materials shall be as per the known customs and specifications.
(2) If the Employer is to provide any materials then the Contractor shall ensure they are taken care of and stored as per manufacturer's technical specification. The Contractor shall give back any unused materials. If the materials are damaged or lost then the Contractor shall reimburse the Employer.
- Article 876 The Contractor shall provide all tools and equipment to complete the works unless otherwise stated in the agreement.

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- **Contractor's Obligations (continued)**
- Article 877 The Contractor must complete the works in accordance with the contract. If the Contractor fails to carry out the works in accordance with the contract and cannot show that he can correct the problem the Employer may terminate the contract immediately. If the works can be corrected by the Contractor, the Employer may request the Contractor to continue with the contract and undertake corrective measures within a reasonable period. If the Contractor fails to complete these corrective measures within the period defined the Employer may ask a court to terminate the contract or license and entrust the works to another contract to complete the works at the expense of the first Contractor.
- Article 878 The Contractor shall provide a guarantee for his defaulted works whether it was generated due to his own act or omission or due to loss and or damage. The guarantee can be removed if it can be proven that the default or accident occurred due to an unavoidable incident.

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- **Contractor's Obligations (continued)**
- Article 879 (1) If the work of a contractor produces (a beneficial) effect on the property in question, he may retain it until the consideration due is paid, and if it is damaged in his hands prior to payment of the consideration, he shall not be liable for the damages, nor shall he be entitled to the consideration. [*ie Liens, physical attachment or registering a priority right*].
Article 880 (1) If an agreement is to construct buildings or other permanent constructions in which the Engineer is responsible for the design and the Contractor is to execute the works under his supervision then it is deemed that both parties are equally responsible to the Employer with regards to any occurrence happening to the construction within a term of ten years. There will also be an equal responsibility with regards to any defect which may affect the safety or rigidity of the construction. The period of general defects liability can be increased or decreased by the agreement of both parties.

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- **Contractor's Obligations (continued)**
- Article 880 (2) The Engineer's and Contractor's commitment to this responsibility exists even if the defect arises due to the sub-soil or due to the Employer agreeing to accept the building with known defects.
(3) The ten year term commences from hand over of the construction to the Employer.
- Article 881 If the Engineer's responsibilities under the contract is limited only to responsibility for the design and does not include any supervision of the works then the Engineer shall be responsible only for any design defects.
- Article 882 There are no clauses under the contract which limits the Contractor's or Engineer's duties under these clauses.
- Article 883 No lawsuit is permissible if three years has passed after discovery of the defect
- Article 884 The Employer is responsible to receive the works accomplished by the Contractor and given for his disposal. If the Employer refuses to accept receipt of the works despite formal notification and warning from the Contractor and any damages occur that were not intentional on his part and the Contractor had done enough to ensure its safety, the Contractor shall not be considered responsible for its rectification or insurance.

UAE Construction & Contracts

- **Employer's Obligations**

- Article 885 (1) If the Contract is based on a unit price and it is found during the course of the works that it is necessary to increase an expected value due to implementing the agreed design the Contractor should inform the Employer immediately. The Contractor should state the expected increase in the Contract Value. If the Contractor fails to notify the Employer then his eligibility to claim for these expected value increases will be based on the Contract Agreement and any other expenses.
(2) If the amount of an increase, due to implementation of the design, is massive then the Contractor may give permission to the Employer to escape from the Contract and the execution of the works shall stop without delay. The Contractor shall be entitled to receive payment for all works accomplished and estimated in accordance with the Contract terms.
- Article 887 (1) If the Contract is based on a design against a total lump sum value the Contractor shall have no right to increase the value for implementation of the same design.
(2) If there are modifications to the design or an addition made with the consent of the Employer the current agreement should be revised and an addendum to the contract made.

UAE Construction & Contracts

- **Employer's Obligations (continued)**

- Article 888 If in the Contract there are no payment values designated then the Contractor shall be entitled to payment of equal value of the works undertaken and the value of materials used in the execution of the works.
- Article 889 (1) If the Engineer who designed the building and the supervision consultant are unable to establish equal value the Contractor shall be paid the values used in general practice.
(2) If the Contractor is prevented to complete the works for any reason then he shall be entitled to be paid for the works which he has completed in accordance with the design...

UAE Construction & Contracts

- **Section III : Sub Contractor**

- Article 890 (1) The Contractor may give whole or part of the works to another contractor unless this is prohibited under a clause of the Contract or it is not the nature of the works or requires the works to be done by the Contractor
(2) The responsibility of the Contractor shall at all times remain to the Employer.
- Article 891 The Subcontractor shall not be allowed to demand from the Employer something which the Contractor deserves under the Contract.
(Note: *pay when paid* may be contrary to public policy and to Article 891 ... *Privity? Assignment?*)

UAE Construction & Contracts

- **Section IV : The Expiration of the Contract Agreement**

- Article 892 The Contract agreement shall be considered expired on either completion of the agreed works or if it is cancelled or terminated by both parties through an agreement of the courts.
Article 893 If there is a reason which prevents the implementation or completion of the contract one party may request the termination of the Contract depending on the circumstances.
- Article 894 If a Contractor starts the execution of works and any incident occurs, not of his doing, which prevents him from performing and therefore incapable of doing the work he shall be entitled to the total value of any item completed and any costs incurred during implementation which are a benefit to the Employer.

UAE Construction & Contracts

- **Section IV : The Expiration of the Contract Agreement (continued)**
- Article 895 If there is a dispute on any claimed compensation amounts each party has the right to submit his claim within the limits established by custom.
- Article 896 (1) The Contract will be terminated if the Contractor dies and it was agreed that he will do the works himself or it is found that his personal qualifications are irrelevant to the Contract.
(2) If the Contract does not make mention of the requirement for personal qualifications of the Contractor the Employer has the right to request dissolution of the Contract if there are not sufficient guarantees that the Contractor's legal bequeathed can carry out implementation of good work.
(3) In both cases the legally bequeathed shall be entitled to the total value of completed works and expenditure in accordance the terms of the Contract and required custom.

UAE Construction & Contracts

- **Various Articles**
- **Article 106:**
- Neither party may exercise its rights under the contract in a manner which is oppressive or abusive to the other. Exercise of a right shall be unlawful if, among other things, the interests desired are disproportionate to the harm that will be suffered by the other party. Thus, if an otherwise valid and meritorious claim is disallowed solely by reason of purely technical breach of a notice provision, this may be unlawful, especially if the likely financial harm to the Contractor is disproportionate to the interests in upholding the Employer's contractual right to receive timely notice.
- **Article 246:**
- Neither party should act in bad faith. This could mean validity to a 'notice' by way of minutes of a meeting or a monthly report, i.e. it would be an act of bad faith not to accept this.
- **Article 318 and 319:**
- Unjust enrichment is unlawful i.e. rejection of a valid claim just because the time limit for notification has not been met; payment for additional work is to be made.

The UAE Constitution & Contracts

- Specialised laws and Decrees - such as Law No. 6 of 1997 relating to contracts with Government Departments in the Emirate of Dubai and law No. 4 of 1983 for the Emirate of Abu Dhabi.
- Articles 203 - 219 of the Civil Procedure Law (Law No. 11 of 1992) (the "CPL") relates to Civil action, Arbitration and appointment of arbitrators as well as authentication of arbitral awards.
- *Note: On 19 November 2006, the UAE formally acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the terms of the Convention became law throughout the UAE.*

The UAE Constitution & Contracts

- Federal judgments delivered by the federal courts in the UAE (*Abu Dhabi, Sharjah, Fujairah, Ajman, Umm Al Quwain*) are subject to an appeal to the Abu Dhabi *Supreme Court of Cassation* (Federal).
- Judgments delivered by the Dubai Court of Appeal are subject to an appeal to the *Dubai Court of Cassation*.
- There is no *Cassation Court* in Ras Al Khaimah.

UAE Construction & Contracts

- Judges in the UAE federal and local courts apply the provisions of the specific laws, established usage or custom as well as the Islamic Shari'a.
- **Priority of 'Laws of the land':**
 - Federal law;
 - Emirate laws;
 - Construction industry custom;
 - General custom;
 - Laws pertaining to civil matters.

Choice of Contract Form

- **Partnering approach:** common goals; collaborative; integrated project team; spirit of trust, good faith, fairness and mutual co-operation, no-blame culture. All 'use' KPIs, Value and Risk Management.
- **PPC 2000;** Pre-Possession Agreement. Partnering Charter, a multi-party contract relating to a single project through **risk** management;
- **NEC3 (ECC);** Option X12, Programme led contract. Schedule of Partners & Core Group Members; between more than two parties on the same project.
- **Be Collaborative;** Client/Purchaser and Supplier, co-operative and collaborative manner. Supplier is responsible for the **risk** register.
- **GMP;** Ceiling price reached through VE, agreed preliminaries and benchmarking etc
- **Cost +;** Mutual agreement on preliminaries and ceiling price.
- **Hybrids;** targets, incentives, pain gain etc.
- **FIDIC ...**

Contract Formation

The essentials of a valid **simple contract** are:

- 1.1 Offer & unconditional acceptance;
- 1.2 Consideration;
- 1.3 Intention to be bound (to create legal relationship);
- 1.4 Legality of purpose (Contract must be legal);
- 1.5 Capacity of the parties to contract;
- 1.6 Reasonable Certainty (Sufficiency) of Terms;
- 1.7 Possibility of performance.

1.1 Offer & Unconditional Acceptance

- Definite offer - accepted unconditionally, *the meeting of two minds (consensus ad idem).*
- Qualified (conditional) acceptance, *a counter-offer (invitation to treat?)*
- Genuine agreement and consent, *i.e. no duress.*

1.1 (a) Offers and Counter Offers

- Always reaffirm the conditions and terms that shall prevail upon acceptance.
- Beware of the terms and conditions attached to an offer, particularly a final offer.
- Battle of the Forms ... He that fires the last shot!

1.1 (b) Acceptance by conduct

- An offer may be accepted by :
 - *Despatching goods in response to an offer*
 - *Carrying out work on receipt of an order*

1.1 (c) Offers and Counter Offers

Chichester Joinery Co v John Mowlem (1987)

- The last shot was fired by the sub-contractor with an “Acknowledgement of Order”
- This effectively re-imposed the terms of their own quotation which had been countered by Mowlem’s Order document
- Mowlem did not object to the acknowledgement, believing that their order prevailed; unfortunately for Mowlem, it did not.

1.2 (a) Consideration

- **Definition:**
 - *“Consideration is some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other”.*
 - an exchange of an act;
 - a promise of an act; or,
 - a forbearance not to carry out an act.
- *Examples of valid consideration would be the payment of money, a promise to pay money, a promise to perform work, or forbearance from deducting damages. The monetary value of the consideration is not material for the formation of a contract as long as it has some value.*

1.2 (b) When is Consideration needed?

The essential element of consideration should be borne in mind with particular regard to the following:

- Fairness of the bargain is irrelevant – e.g. AED 5 for a Rolls Royce;
- Simple contracts (as opposed to contracts by deed) require each party to give consideration for a contract to be binding;
- A gratuitous promise is not normally enforceable;
- Hence, the presence of any consideration demonstrates that the promise is not simply gratuitous;
- In every simple contract each party's promise is the consideration for the other party's promise. In other words there is an exchange of promises.

1.3 Intention to be bound

(1 of 2)

- No binding contract will exist unless it has been made in contemplation of legal consequences;
- A mere statement of intention made in the course of conversation will not normally constitute a binding promise, though acted upon by the party to whom it was made.

1.3 Intention to be bound

(2 of 2)

- In written **commercial** transactions...

intention to create legal relations **is** presumed, however in social and domestic arrangements it is the opposite, the courts have presumed that the parties did **not** have intention to create legal relations.

1.4. Legality of purpose



- The contract must be legal;
- Illegal by Law:

An illegal term in a contract will be void and effectively struck out. E.g., any detail or specification which contravenes UAE Law is invalid. If the Contractor or Subcontractor **knowingly** incorporates the illegal detail then there may be no obligation on the Employer to pay for that work.

1.5. Capacity

- Companies can only contract in accordance with the services allied to their Licence.
- Minors, drunks and lunatics cannot enter into a contract. That is to say, any purported contract entered into by persons in those or similar categories will be declared void by the courts.

1.6. Reasonable certainty of terms (1 of 2)

- It is necessary that the parties agree on its essential terms.
- The essential terms must not be so vague as to be incapable of ascertainment.
- Provided the essential terms are agreed, the courts may imply ancillary terms to give what is called “**business efficacy**” to the contract e.g., where the contract sum and the extent of work are agreed but no contract period has been fixed. The court may determine what is a reasonable time in all the circumstances for completion.

1.6 Reasonable certainty of terms (2 of 2)

Court of Cassation, Case Study - 34011999: here the judgment confirmed that when interpreting contracts, the correct approach based on Article 265 of Federal Law No. 5 of 1985 (the Civil Code), is that:

- “if there is scope for interpretation 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 in such dealings.”

1.7 Possibility of performance (1 of 2)

- A party to a contract is entitled to have the contract performed in the manner described in the contract. That party cannot be compelled to accept a different mode of performance.
- The parties may, by agreement or waiver, substitute a different mode of performance for that originally agreed and by so doing create a new contract, providing that valuable consideration is present in so doing.
- Whether, what has been done constitutes performance of the contract is a question depending in each case on the construction of the terms of the contract and/or the facts of the situation.

1.7 Possibility of performance (2 of 2)

- Occurs, where the circumstances imply a requirement for performance by an exact time;
- Failure to perform gives rights to the other party.
- The general principle is that performance must be carried out within a reasonable time. The exceptions to the general principle for a reasonable completion time arise where time is expressed in writing as “of the essence”;
- Where time was not originally of the essence in a contract and one party has been guilty of undue delay, the innocent party may give notice requiring the contract to be performed within a reasonable time, in which case time is said to become ‘of the essence’.

Awaiting the tender result ...

- Tender is submitted;
- Post Tender Negotiations are finished;
- Banking & Finance issues are in place;
- Bond is running;
- Staff are eager;
- Vehicles and equipment are on stand-by;
- Potential new staff are being interviewed;
- Accommodation Contracts are renewed;
- Suppliers are being squeezed...

Letters of Intent



Avoid letters of intent wherever possible “a dangerous vehicle to rely on for the formation of a contract”

Letters of Acceptance (1 of 4)



In most instances it should be possible to negotiate and compile a comprehensive formal Contract Agreement: hence, a scantly written **Letter of Acceptance** should be the exception, not the standard approach

Letters of Acceptance (2 of 4)

- Different letter types, 'Acceptance', 'Confirmation', 'Agreement', etc, check the purpose and content:
 - A simple statement of intention is uncertain;
 - *British Steel Corporation v Cleveland Bridge (1984)*
 - A request for work to be carried out may be binding depending on parties conduct;
 - Beware: A statement confirming that contract terms and conditions will be FIDIC etc ... does not necessarily invoke those conditions.
 - *Bryen and Langley v Martin Rodney Boston (2004)*

Letters of Acceptance (3 of 4)

- An expression in writing of a party's present intention to enter into a binding contract with clearly stated scope, agreed terms and conditions including clearly identified terms and conditions yet to be finalised.
- A Letter of Acceptance might be used where we want work to commence before the full scope, terms and/or conditions are settled, i.e.:
 - Scope of Works yet to be fully designed;
 - Pressure on immediate start;
 - Long lead-in period for materials;
 - Contract sum yet to be finalised, etc;

Letters of Acceptance (4 of 4)

- The letter should include clear details of:
 - final offer and acceptance letters/documents and terms;
 - *back-to-back* conditions of main contract, attach clauses that apply!
 - payment terms and procedures;
 - authorization to proceed with specific defined activities;
 - defined limit of expenditure and subsequent arrangement;
 - defined period of letter validity and subsequent arrangement;
 - termination & winding down clause;
 - Bonds, advance payments;
 - time for submittals, programme, insurances/indemnity etc;
 - intellectual property rights, warranties;
 - liquidated damages and/or penalties, per day, limit;
 - start and completion/section dates;
 - provisions for variations and instructions;
 - applicable Law, no privity of contract, time is of the essence, etc;
 - signatures to confirm acceptance of the terms and conditions

Express or Implied Terms?

- Express terms are generally those which the parties have written into a contract.
- Implied terms which, although are not specified in writing or orally, can nevertheless be as binding as express terms.
- The courts will analyse the *agreement*, unearthing what is necessary and obvious for the satisfactory performance of that particular contract.
- Implied terms arise, or may be implied, in the following ways:

By the Courts ...

- The presumption of the true intentions of the parties when such intentions are not fully expressed, ie in legal terms this is known as '*business efficacy*' (this is **not** the same as reasonableness)
- The term must be so obvious that if the parties were making the contract and a *bystander* were to suggest the inclusion of the term, the parties would have replied '*oh of course*'.
- Certain contracts contain specific implied terms automatically, e.g. Who pays for petrol in a rent-a-car.

By Custom ...

- If a rule of custom is relevant, but the contract makes no reference to it, the courts may imply the custom into the contract;
- However, the order of precedence will prevail. The rules for terms implied by custom are as follows:
 - Evidence that the custom exists (whether the parties knew this or not).
 - Courts cannot incorporate the custom if the contract contains express terms which rule out the custom.

By Statute

- The Government implies terms into a contract.
- The terms are not based on intentions of the parties, but on rules of law / public policy

Re-cap ...

- The UAE Constitution provides for the Laws and organisation;
- A simple contract can be written, oral or implied, or a combination of *all*;
- It is always best to properly set out terms and conditions and check the essentials are covered;
- All contracts must comply with the Law, most state that it shall be construed in accordance with the Law; Hence, an awareness of the Law is essential;
- Contract disputes may be subject to DAB &/or arbitration or Court jurisdiction.

The End

THANK YOU

Questions & Answers



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