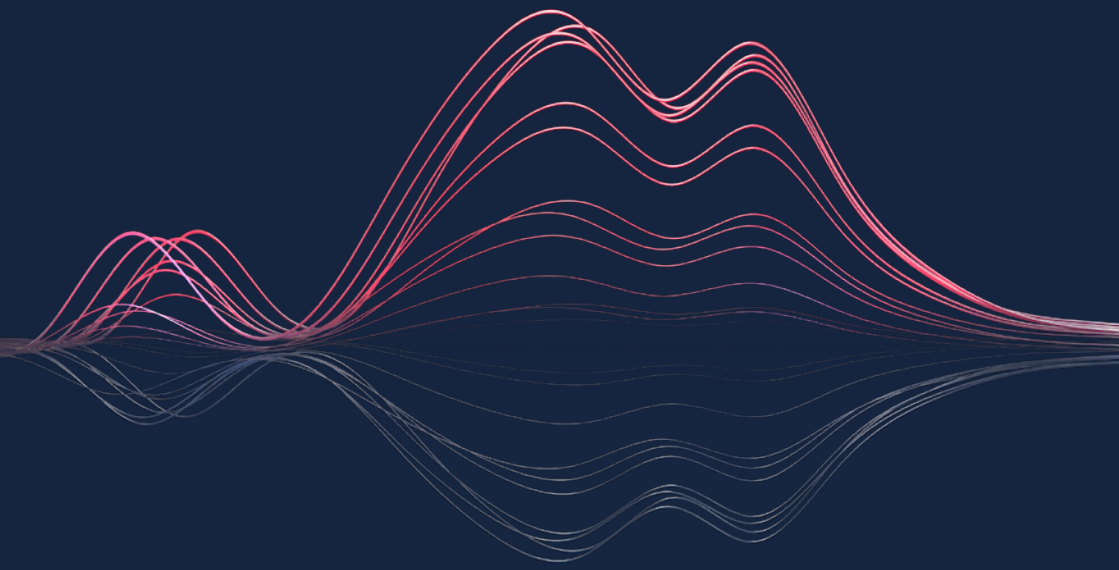
The A-Z of construction law in the United Arab Emirates



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Introduction

The A-Z of Construction Law in the UAE aims to provide a useful guide to various key provisions of the UAE Civil Code which may be applicable in certain circumstances to the interpretation and operation of UAE law governed construction and engineering contracts.

Each letter of the alphabet is prepared as a self-contained explanation of a different construction contract-related concept or topic. Though there is necessarily some interaction between issues, the reader can approach the letters in any order.

The guide draws from the *statutory provisions of UAE law**, judgements of the local courts where they are available, and years of experience practicing construction and engineering law in the UAE, and is written for primarily for lawyers with a common law background. However, whilst legal analysis is at its core it adopts as practical a tone as possible in order to be equally accessible to construction professionals involved in the day-to-day management and administration of construction contracts.

The limitations of the guide will be apparent, not least that many topics remain untouched: 26 barely scratches the surface. Answers and information often give rise to further questions, especially when applied to a particular set of facts, and the guide should never be considered a substitute for taking specific legal advice. The law is ever evolving: this collection reflects a point in time. Please also note that there are difficulties in opining with precision as to the application of aspects of UAE law because the procedure for reporting court decisions and the law itself is not as developed as in some other jurisdictions, and there is no system of binding judicial precedent as is understood in common law jurisdictions.

*Please note, all English extracts in this guide are taken from an unofficial English translation of the UAE Civil Code, reference should always be made to the original Arabic text.

Nevertheless we hope that readers will find this guide accessible and informative, and that it will raise awareness and understanding of key UAE law concepts which will affect the interpretation and operation of construction contracts governed by UAE law.

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"A" is for Architect

All construction projects in the UAE require the appointment of a consultant who will assume the role of 'architect'. The architect (also referred to as the 'architect of record') will be named on the building permit together with the building contractor. A consultancy firm needs a special licence in order to act as an architect of record, and all submissions for permits relating to the construction project are made in the name of the architect of record (see '*Z is for Zoning*'), whether or not the architect prepared the permit application.

An architect is liable under the **decennial liability** provisions of the Civil Code for defects in the **design** of the works (regardless of whether the consultant identified as the architect prepared the designs or not) **and** for defects in the **construction** of the works (to the extent that the consultant identified as the architect has supervised the construction of the works).

Under **Article 880 of the Civil Code** the risk of structural failure to the works (**decennial liability**) is imposed on the architect and contractor in the following terms:

(1) *"If the subject matter of the contract is the construction of buildings or other fixed installations, the **plans for which are made by an architect**, to be carried out by the Contractor **under his supervision**, they shall **both be jointly liable** for a period of ten years to make compensation to the Employer for any **total or partial collapse** of the building they have constructed or installation they have erected, and for **any defect which threatens the stability or safety of the building, unless the contract specifies a longer period**. The above shall apply unless the contracting parties intend that such installations should remain in place for a period of less than ten years.*

*(2) The said obligation to make compensation shall remain **notwithstanding that the defect or collapse arises out of a defect in the land itself or that the Employer consented** to the construction of the defective buildings or installations.*

*(3) The period of ten years shall commence **as from the time of delivery** of the work."*

Article 882 renders void any agreement which attempts to exempt the Contractor or the architect from decennial liability, or to limit such liability (see '*M is for Mandatory*'). The effect of these provisions is that the main contractor and the consultant identified as architect are **jointly and severally** liable for the cost of rectifying a structural defect appearing in a building or installation within **ten years** of the Employer's taking over. This is a **strict liability** under UAE law which will operate even without fault or breach of contract on the part of the main contractor and/or the consultant.

It is common in projects in the UAE for responsibility for design and supervision to be divided between more than one consultant, especially on projects using the FIDIC forms of contract (see '*Y is for Yellow Book*'), where employers will often appoint a design consultant to carry out the traditional 'architect design role' and the Engineer to perform the contract administration and supervisory role (see '*E is for Engineer*'). It is commonly understood in such instances that **an architect that has not administered the construction contract (or supervised the construction) is liable only for design errors, and not for defective workmanship. Joint liability with the Contractor** for design and workmanship is triggered where the **architect is also responsible for supervising** the construction phase.

Thus from an employer or developer perspective, it is prudent to require the **consultant identified as the architect to also administer the construction contract and supervise the works** in order to ensure that the architect remains jointly and severally liable with the main contractor for both design and construction defects in the completed works under the decennial liability provisions of the Civil Code.

"B" is for Boilerplate

The following common boilerplate clauses are commonly included in construction contracts in the UAE.

GOVERNING LAW AND JURISDICTION

The UAE courts are **generally reluctant to uphold an agreement which gives jurisdiction to a foreign court or arbitral tribunal** where the UAE courts would otherwise enjoy jurisdiction (for example, for projects located in or which are otherwise closely connected to the UAE). Where the **UAE courts have jurisdiction, they will usually seek to apply UAE law instead of any other governing law chosen by the parties**. Therefore, whilst the UAE recognises the principle of freedom to contract, in practice local courts are often reluctant to apply foreign laws citing public order or policy. Another key point to note is that the UAE is a **federal legal system and as such the law applicable in any given Emirate will comprise both federal (UAE) laws and Emirate specific laws**. As such, if the contract will ultimately be governed by the "*laws of the Emirate of Abu Dhabi and the federal laws of the UAE as applicable within the Emirate of Abu Dhabi*", for example, this should be explicitly stated.

ENTIRE AGREEMENT

The purpose of an entire agreement clause is to make it clear that the agreement between the parties in relation to the subject matter of the contract is **completely dealt with in that contract and that any prior agreements or negotiations in relation to that subject matter are superseded**. Although under common law an entire agreement clause will usually bind the parties in accordance with its terms, it **may not always do so under UAE law** (as it may not overcome the effect of pre-contract conduct or representations which is or are fraudulent, nor prevent the application of additional terms such as mandatory provisions of UAE law (see '*M is for Mandatory*') or overriding concepts of good faith and custom which are present in all contracts governed by UAE law (see '*G is for Good Faith*')).

INTERPRETATION

The purpose of an interpretation clause is to provide clear rules of interpretation which apply when interpreting the contract. These rules provide certainty and avoid the need

for repetition. It should be noted that under UAE law, the **interpretation and application of contracts is guided not merely by the words of the agreement itself but also by intentions, good faith and the mutual interests** of the parties (see '*G is for Good Faith*').

SEVERABILITY

Article 211(1) of the Civil Code provides that in circumstances where one part of a contract is determined to be void, this renders the entirety of the contract void. The effect of this provision can be avoided if each part of the contract is separately identified such that it can be severed from the contract if determined to be void, and the remainder of the contract will continue on foot. A **severability clause should therefore be included in all UAE law governed contracts to try to ensure that an invalid clause does not render an entire contract invalid**.

NOTICES

There are **two main rationales** for including a notices clause. The first is to establish the valid means of giving notices and the second is to **deem when those notices have been delivered**, which is particularly important given the time bars that are often included in construction contracts for the giving of certain notices (see for example the time limits for notifying claims under the FIDIC forms of contract).

NON-WAIVER/EXERCISE OF RIGHTS

This clause is included to ensure that a party is not deemed or implied to have given up its contractual rights by failing to exercise them. Rights can only be waived if done so explicitly. This is important to **ensure that the courts do not imply a party's consent from a course of conduct**.

"C" is for Concurrent Delay

"Delay" refers to a failure to achieve the contractually agreed completion date. Where a project is in delay the Contractor will typically (if it has not caused or assumed the risk of such a delay) seek an extension to the contractual completion date (referred to as an 'extension of time' (see *'X is for extension of Time'*)), and if the Contractor is able to demonstrate that completion has been or will be delayed due to a cause or event entitling the Contractor to such relief under the contract, an extension of time may be awarded.

Delay can be divided into three categories:

1. Delays **caused by the Contractor** (for which the Contractor should **not be entitled** to an extension of time);

2. Delays **caused by the Employer** (for which the Contractor **should be entitled** to an extension of time which **may** be accompanied by a contractual entitlement to additional payment in respect of associated costs of delay (referred to as "prolongation costs")[1]); and

3. Delays caused by **'neutral' events which are not the fault of either party**. Whether or not the Contractor is entitled to an extension of time (thus making the 'neutral' event an employer risk) in such circumstances is a matter for **negotiation between the parties**.

A concurrent delay occurs when **two or more causes of delay overlap** so that the Contractor is delayed by two events, one the fault and/

[1] The issue of whether or not the Contractor is entitled to an extension of time is (both contractually under standard form contracts and under UAE law) a separate issue to whether or not the Contractor is entitled to compensation for delay. The FIDIC Red and Yellow Books, for example, do not explicitly link an entitlement to an extension of time to an entitlement to additional payment for time related costs.

or risk of the Contractor under the contract, and the other the fault and/or risk of the Employer. Standard form contracts commonly used in the UAE such as the 1999 editions of the FIDIC forms of contract are **silent on the issue of concurrent delay**[2] and the issue is not expressly recognised by the Civil Code. This raises the question of whether the Contractor is entitled to an extension of time and/or prolongation costs where there is concurrency between an employer-risk event and a contractor-risk event, both of which impact on the program for the works and cause delay.

In the scenario described above, under UAE law the Contractor would generally be considered to have an **entitlement to an extension of time in relation to the delay which is the fault and/or risk of the Employer, but the position regarding the Contractor's entitlement to prolongation costs in these circumstances is more complicated**. While some commentators believe that the costs flowing from a concurrent delay are likely to be apportioned between the parties by a court-appointed expert in keeping with the underlying principles of the Civil Code (which generally favours proportionality and offers the courts wide discretion to apportion liability accordingly), others have expressed the view that the Contractor will not (without an express entitlement) be able recover its prolongation costs unless the Employer-risk event in question is an employer breach of contract (thereby entitling the Contractor to recover its time-related costs as contractual damages). It is **good practice therefore to include a concurrent delay clause in all construction contracts, since remaining silent on the issue may lead to uncertainty and disputes**. UAE laws do not prevent the parties from specifying in the contract the Contractor's entitlement to an extension of time and/or prolongation costs in the event of a concurrent delay. If, for example, the contract provides that the Contractor is not entitled to any relief where there is concurrent delay, a court or tribunal should give effect to this drafting, in accordance with the principle that contracts should be interpreted in accordance with their terms (Article 259).

[2] The possibility of concurrent delay has been recognised by the 2017 editions of the FIDIC rainbow suite, however question of whether the Contractor is entitled to an extension of time and/or prolongation costs is expressly left as a matter for negotiation.

"D" is for Delay Damages

In practice, all construction contracts require works to be completed by a specified date. Instead of the Employer bringing a claim for general damages (compensation) for late completion of the works by the Contractor (which may be difficult to quantify), it is standard for the Contractor to be liable to pay 'liquidated damages' (**LDs**) for delay. **LDs are damages that are fixed and the quantum is agreed by the parties in advance**. A typical LD clause requires the Contractor to pay or allow the Employer to deduct LDs at a rate per day or week of delay in the completion of the works.

Article 390 of the Civil Code provides that the parties can pre-agree an amount for damages, including for delay. However, although the liquidated damages rate chosen by the parties may be a strong indicator as to what the actual rate will be:

(a) **either party may apply to a court or arbitrator to vary the agreed rate** of liquidated damages so that the **compensation awarded reflects actual loss suffered**; and

(b) in contrast with common law jurisdictions such as England and Wales, there is **no express prohibition in UAE law on penalties and no specific test which the courts will apply in each case to establish whether LDs are enforceable in a particular set or circumstances**

or not. Any attempt to distinguish between "penalty", "liquidated damages", and "compensation" is likely to fail under UAE law as the words are used interchangeably within the Civil Code, in other UAE laws, and as a matter of commercial custom.

Accordingly, the **UAE law position as regards LDs is different from the English law position**, in so far as the Civil Code allows the liquidated damages regime to be altered by a court having regard to the losses actually suffered by the innocent party, whereas under English law a court/arbitrator will generally seek to give effect to the bargain struck between the parties and would be very reluctant to vary a liquidated damages clause which constituted a genuine pre-estimate of the loss likely to be suffered at the time of signing the contract (irrespective of what the actual losses proved to be). The court's power to **vary the agreed level of LDs is discretionary**, and it is the party seeking to have the LDs reassessed must be able to demonstrate that the rate of LDs should be adjusted.

Importantly, Article 390 could potentially apply to situations where a contractor seeks to **cap its liability**, as such a cap could be viewed as a predetermined level of damage for a particular breach. The provisions of Article 390 may provide a significant advantage to employers in circumstances where the actual damages suffered by the Employer exceed the pre-estimated damages and the liability cap. However Article 390 **works both ways**: whilst it allows an employer that has underestimated its loss to request the court to revise that estimate in light of actual losses, it also allows a contractor to claim that (for example) the agreed liquidated damages rate exceeds the Employer's actual losses, and that in those circumstances, the Employer's claim should be reduced to its actual losses.

The prevailing view is that a **contractor's claim for a reduction in the rate of LDs under Article 390 is more likely to succeed than a claim by an employer for additional compensation above the agreed LD rate, since the UAE courts appear to be more concerned with agreements resulting in excessive rather than insufficient compensation**, and are thus more likely to reduce the agreed level of LDs awarded to the Employer than to increase them beyond the agreed rate.

"E" is for Engineer

The FIDIC Red, Yellow and Gold Books all provide for the appointment of the Engineer by the Employer to administer the construction contract (whereas under the Silver Book the responsibility for contract administration rests with the Employer or an employer's Representative). Under the 1999 editions of the FIDIC Red and Yellow Books, the role to be performed by the Engineer for the Employer comprises the following:

- procuring the **design** of the project, and preparing the **specifications and bills of quantities** for the works;
- preparing **tender documents** and advising the Employer on the relative merits of each contractor's **bid during the tender process**;
- **issuing instructions** to the Contractor for the execution of the Works under the Contract;
- **supervising and inspecting** the work undertaken by the Contractor during the project (on the Employer's behalf);
- **determining the Contractor's claims** for extensions of time and/or additional payment; and
- **administering the contract** in relation to certifications and disputes.

Whilst the Engineer is not a party to the construction contract, he is deemed to act as the Employer's agent when performing his duties under the Contract and is appointed (and paid) by the Employer in order to discharge this role. This inevitably leads to **concerns amongst contractors over the Engineer's lack of independence**, and this remains a significant cause of construction disputes in the UAE. The Red and Yellow Books recognise that the Engineer acts on the Employer's behalf and attempts to address this issue by requiring the Engineer to make **"fair" determinations (under the 1999 forms) or to act "neutrally" (under the 2017 forms)**. The 2017 editions also seek to prohibit employers from requiring the Engineer to obtain the Employer's consent before determining a matter or a claim under the contract, however given established market practice in the UAE employers are likely to continue specifying matters for which employer consent is required.

The procurement structure contemplated by the 1999 and 2017 editions envisages the **Engineer being in charge of all activities in the design office and on site**, and the Engineer's role has been **further expanded and enhanced under the 2017 editions** of the FIDIC Red and Yellow Books, which are more prescriptive than the 1999 editions in detailing the role and function of the Engineer and how these are to be discharged.

In many projects where the FIDIC Red and Yellow Books are used in the UAE, the Engineer is assisted by specialist assistants who are responsible for supervision, quality control, measurement and other required functions falling within the Engineer's scope. Where the design, contract administration and supervisory roles of the Engineer are divided between several consultants or individuals who are individually appointed by the Employer, it is **not uncommon for employers to appoint additional persons to carry out duties and responsibilities on site which include those forming part of the function of the Engineer,** and the statutory role of the **architect under the UAE Civil Code** (which is understood to cover both design and supervision of the works: see '*A is for Architect of Record*') also **encompasses certain duties and responsibilities of the Engineer**. As these additional titles and roles are not contemplated within the FIDIC procurement procedure or FIDIC's contract conditions, employers should carefully consider how these functions are to be incorporated within the project framework.

Where the Engineer's role is split between separate consultants, then it would be advisable from both an employer's and contractor's perspective for such persons to **work under the Engineer's team (as sub-consultants)** and be given detailed description of the task or tasks allocated to them from within the scope of the Engineer's responsibilities, rather than to dismantle or undermine the contractual responsibility framework envisaged by the Red and Yellow Books.

"F" is for Force Majeure

Force majeure is a **civil law concept** which traditionally refers to **unforeseen events which are beyond the control of the parties and which adversely affect a party's performance** of its contractual obligations. In general there are three essential elements to a *force majeure* event: (i) it **would occur with or without human intervention**; (ii) its occurrence **cannot have reasonably been foreseen** by the parties at the time of entering into the contract; and (iii) it was **completely beyond the parties' control and they could not have prevented** its consequences. Two important caveats to consider are that a party cannot invoke a *force majeure* clause if it is relying on its own acts or omissions, and the *force majeure* event must be a **legal or physical restraint on performance and not merely an economic** one (however, it is becoming increasingly common for force majeure clauses to deal with questions of commercial impracticability).

Construction contracts typically excuse the Contractor from performance of obligations which are prevented by force majeure events and entitle the Contractor to time (and in certain circumstances cost) relief in the event that the Contractor suffers delay and/or incurs cost by reason of such force majeure event. In cases of prolonged force majeure, the Contractor will often have the right to terminate the contract. Another key provision affected by the doctrine of *force majeure* is the Contractor's responsibility for care of the works and the **obligation to reinstate any damage to the works due to the occurrence of a *force majeure* event prior to completion**. In the UAE these provisions will be affected by the following articles of the Civil Code:

- **Article 273** of the Civil Code provides for the **automatic cancellation** of a contract in circumstances where the performance of the contract is **prevented or rendered *"impossible"* due to an event of *force majeure*** (see '*I is for Impossible*'). In circumstances where performance of the contractual obligations is **partially or temporarily affected** by the event of *force majeure*, any **part of the contract which is, as a result, impossible to perform, will be cancelled**. However, whilst

the party whose performance is affected by the *force majeure* event retains the ability to cancel the contract, it is commonly accepted that the parties can agree to continue the contract despite an element or period of impossibility;

- **Article 249** of the Civil Code is a mandatory provision (see '*M is for Mandatory*') allows the **court to adjust the effect of a contract if *"exceptional circumstances of a public nature which would not have been foreseen occur"*** which make performance of an obligation "oppressive" (but not impossible), in order to ***"reduce the oppressive obligation to a reasonable level"***. This provides the court with the ability to provide relief, in the form of an extension of time to the Contractor, for example, provided that performance within a specified time was part of the Contractor's obligation, and the Contractor is not itself at fault;
- **Article 287** of the Civil Code provides relief in the event of a failure to achieve a required outcome if a person proves that any loss arose out of an **'extraneous' cause in which he played no part**, such as a natural disaster, unavoidable accident, force majeure, act of a third party, or act of the person suffering loss. In such circumstances, provided that the affected **party can prove that its failure to perform the obligation is due to an external cause, he shall not be held liable or be bound to make it good in the absence of a legal provision or agreement to the contrary**; and
- **Article 878** of the Civil Code provides that the **Contractor will not be held liable for any loss or damage resulting from his act or work if it arises out of an event which *"could not have been prevented"***, but does not explain the meaning of an act *"that could not have been prevented"*. Given the uncertainty it would be prudent from the Employer's perspective when drafting the contract to include an acknowledgment that *"an act that could not have been prevented"* as contemplated by Article 878 means an event of force majeure as defined in the contract.

"G" is for Good Faith

It is common to see the term 'good faith' used in dispute resolution clauses and in contracts involving future performance of the parties, including construction contracts. However, the traditional view under English law is that an agreement to negotiate in good faith is unlikely to be enforceable on the grounds of uncertainty, incompatibility with the principle that each party must be free to advance its own interests in negotiations, and because it would be too difficult to assess damages for breach of such an obligation because the outcome of negotiations cannot generally be foreseen. English law thus does not recognise a distinct implied obligation to conclude and perform contracts in good faith, and the bar for proving a breach of an express contractual duty of good faith has traditionally been extremely high, despite being thrown into a degree of doubt by recent case law.[3] As such, the duty of good faith is an area of law still lacking in certainty in common law jurisdictions.

In contrast, a **duty of good faith clearly applies in the United Arab Emirates by virtue of Article 246** of the Civil Code which provides that all contracts ***"must be performed in accordance with its contents and in a manner consistent with the requirements of good faith."*** The upshot of this is that a contractual right will be **unenforceable to the extent that it is performed in bad faith**. The role that good faith plays under UAE law must always, therefore, be considered in addition to the written words of the contract. But what do "*the requirements of good faith*" mean in practice for the parties to a contract?

The key point to note in this regard is that the requirement to act in good faith relates to the **way in which the parties exercise their contractual rights, but will not alter the substance or interpretation** of the contractual rights and obligations of the parties provided such rights

[3] Recent English case law has shown that where there is an express contractual duty to act in good faith, the court will be prepared to look at whether the parties have acted reasonably in exercising their rights in light of the nature of their relationship and their conduct over the course of the contract.

and obligations are clear from the wording of the contract or from the intention of the parties[4]. Similarly, the mere exercise of **good faith is unlikely to succeed as a defence to a breach of contract claim**.

The purpose of the overriding duty of good faith is generally understood to be to **regulate the parties' behaviour in performing their contractual obligations** (rather than to guide the courts in interpreting the contract): by seeking to regulate the way in which a party's contractual rights are enforced, the duty of good faith is intended to **prevent one party to a contract from seeking an unfair advantage over, or exploiting, the other**. This is consistent with the provisions of Article 106 of the Civil Code[5].

Whether contractual rights will be found to have been exercised in accordance with the principle of good faith is likely to depend on **commercial custom and the nature of the transaction**: if the right in question is exercised in a manner which is **not in keeping with prevailing custom in the construction industry** and is regarded as being **unconscionable**, then the party's conduct may be perceived as **bad faith and may be held to be unenforceable**, or may influence a court or arbitrator's **determination of remedies** including the assessment of damages. When drafting contracts governed by UAE law it may therefore be prudent to include a 'deeming' clause by which the parties agree that the exercise of certain specific and identified rights by either party under or in connection with the contract will be deemed to have been exercised lawfully for the purposes of Article 106 and in a manner consistent with the requirements of good faith as required by Article 246.

[4] Articles 258, 259 and 265 of the Civil Code identify contractual drafting and the intention of the parties as the main criteria to be taken into account when interpreting the wording of any contract and its clauses (see 'W is for Writing').

[5] Article 106 indicates that even in circumstances where a contractual right exists, the way in which that right is subsequently exercised by a party to the contract may be considered unlawful if the intention or purpose of the exercise of the right is to infringe the other party's rights; if the exercise of the right is contrary to Shari'ah, the law, public order or morals; if the interests served or benefit gained by the exercise of the right is disproportionate to the harm/damage that will be suffered by the other party, and/or if the exercise of the right would exceed acceptable limits of custom.

"H" is for Harm

Article 282 of the Civil Code sets out the basic doctrine that a party will be held **liable for any harm caused to another**. This is the closest equivalent to the common law doctrine of liability in tort. *Harm* in this context is not limited to physical harm, but **can include financial or economic harm:** the only test appears to be one based on causation. For tort based liability (or "*harmful acts*", using the terminology of the Civil Code) to be established, there must be:

1. a breach of a duty/obligation imposed by law;
2. loss sustained by a party; and
3. causation between the breach and the loss.

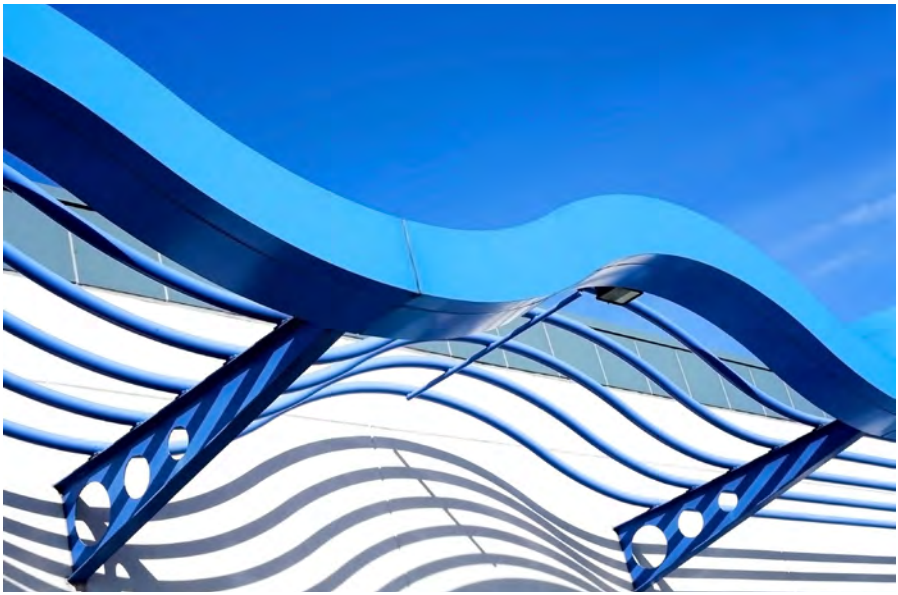
The UAE courts have clarified that **tort based liability only applies** in cases where: there is **no contract** in place between the claimant and the defendant, or there is a contract in place but the **contract does not address the situation** in question, or in cases of **fraud and gross breach of duty** (which trigger the application of tort based liability notwithstanding the existence of a contract).

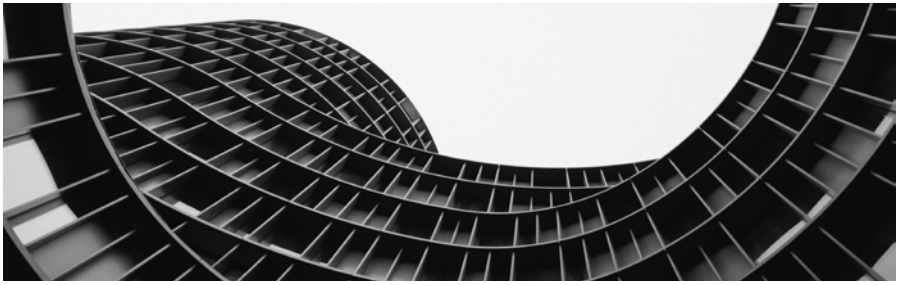
The key distinctions between contract and tort based liability under UAE law are as follows:

- **tort based liability cannot be excluded or limited. Article 296** of the Civil Code provides that "*any agreement purporting to provide exemption from liability for a harmful act shall be void.*" Although Article 296 only refers to the exemption of liability, it is commonly understood that this rule **also applies to the limitation of tort based liability under Article 282** (where there is no applicable contractual term addressing the situation in question). It could therefore be argued that even clear and concisely drafted clauses that seek to limit liability for a harmful act could be invalid under UAE law, particularly in light of Article 390 (as discussed above – see *'D is for Delay Damages'*); and
- contractual claims arising out of commercial transactions will be time-barred within 10 years from the breach of contract, whereas **tort based claims will be time-barred within 3 years from the discovery of damage** (see *'L is for Limitation'*).

In general therefore, a **contractor will be liable for all harm arising from its work**, irrespective of whether the harm was caused by a wrongful act or not, unless the harm arises out of an act that could not be prevented.

In relation to the assessment of compensation in circumstances where an act of the Contractor causes harm to the Employer, Article 283(2) of the Civil Code (which is not expressed to be mandatory and thus is likely to be capable of contracting out of) distinguishes between damages payable for "direct" loss and damages payable for "consequential" loss. Article 283(2) provides that if the harm is **'direct' loss and/or damage**, it must **unconditionally be made good**; and if the harm is **consequential loss and/or damage**, the responsible party will **not be liable to make good such loss unless that act had a wrongful, malicious or deliberate element** (not merely negligence) at the time the act was committed. This is a difficult burden of proof to discharge. If the harm is **both** direct and consequential, the rules relating to direct harm would appear to apply and the harm must be unconditionally made good.





"I" is for Impossible

Article 273 of the Civil Code provides for the **automatic cancellation** of a contract in circumstances where the performance of the contract is prevented due to the occurrence of an event of ***force majeure*** **that makes the performance of the obligations absolutely impossible** (as opposed to merely burdensome). In practice, it is typically understood that the following conditions would need to be satisfied in order for such a cancellation to take effect:

- The obligor (typically the **Contractor** in a construction context) **must prove** (on the balance of probability) the impossibility of performing the contractual obligation(s) in question.
- The impossibility of performance must be due to an **'unavoidable external' cause** (and not a result of any act or omission of a party to the contract) whose impact is not confined the party in question and would prevent performance by any party in such circumstances.
- The event must be **unforeseeable** (rather than merely improbable).

Article 273(2) provides that in circumstances where **performance is partially affected by such an event, any part of the contract which is as a result impossible to perform will be cancelled**, and that the party whose performance of the contract is temporarily rendered impossible by an event of *force majeure* retains the ability to cancel the contract. The fact that Article 273 does not specify that an agreement contrary to the provisions of the article will be considered void suggests that it is not a mandatory provision of the Civil Code, and as such it is unlikely that the contract will be automatically cancelled if the

contract is stated to continue despite an element or period of impossibility (see '*M is for Mandatory*').

In addition to automatic cancellation for impossibility under Article 273, the Civil Code also confers on **each party to a construction contract a right to terminate the contract '*if any cause arises preventing the performance of the contract or completion of the performance thereof*' (Article 893)**. Thus if the performance of the Contractor's obligations becomes impossible, in the absence of contractual provisions to the contrary, either party may cancel or terminate the contract without the need for a court order or agreement between the parties. It is unclear whether the impossibility of performance must be in relation to all obligations under the contract or only some of them (and in the latter case whether there is any materiality threshold), so this issue should be expressly addressed in the construction contract.

The **consequences of a termination due to impossibility** under Article 893 are similar to those for automatic cancellation:

- **Article 274** provides that in circumstances where a contract is terminated (whether automatically by operation of the law or by the parties) the parties must be returned to the position they were in before the contract was executed, or compensation must be paid if this is not possible (for example, if work has been performed under the contract);
- **Article 894** provides that where the contract is terminated due to the Contractor's performance being prevented by an external cause, the Contractor will be entitled to be paid the lesser of (a) the value of work done and materials supplied up to the date of termination, and (b) the value derived by the Employer from such work and materials; and
- **Article 895** allows the courts to award compensation in favour of innocent parties injured by the cancellation of a contract, particularly if this would be consistent with custom in the construction industry.

The UAE courts have indicated that contractual *force majeure* provisions will generally prevail over these statutory provisions, so **if the parties to a construction contract wish to avoid the statutory consequences of *force majeure* type events, then it is important that these are expressly provided for in the contract.**

"J" is for Joint Liability

Article 291 of the Civil Code provides that ***"if a number of persons are responsible for a harmful act, each of them shall be liable in proportion to his share in it, and the judge may make an order against them in equal shares or by way of joint or several liability."***

Pursuant to Article 291, the general position under UAE law (save in respect of the decennial liability provisions of the Civil Code (see *'A is for Architect'*)) is that damages for defects in the works are not necessarily payable on a joint and several basis where both a designer and another consultant or contractor are independently liable for the same defect.

Whereas the wording of Article 291 allows the courts to impose **proportionate or joint and several** liability in circumstances where more than one contractor or consultant is held to be responsible for a defect in the works, in our experience the **UAE courts tend to favour a proportionate approach whereby the Employer's losses are apportioned by the court between the parties responsible for the defect**. This may be contrasted with the general position under common law which imposes joint and several liability on each culpable party irrespective of each party's proportionate contribution to the loss suffered, with the party being sued then able to recover the share of the liability for which it was not responsible from the other contributing party through a contribution claim.

As such, 'net contribution' clauses commonly found in collateral warranties (and which seek to limit a party's liability to the share of the loss for which that party is responsible) are enforceable in the UAE subject to the same conditions as apply to any other limitation or exclusion of a party's liability, namely that they do not seek to limit or exclude liability for causing harm to another (see '*H is for Harm*'), liability arising from a mandatory provision (see '*M is for Mandatory*'), and/or liability for fraud or gross mistake.

The following provisions of the Civil Code will affect the approach adopted by the courts in relation to allocating contractual liability and assessing compensatory damages under Article 291:

- **joint liability** (between the designer and contractor) applies in the case of **decennial liability for structural defects** (see *'A is for Architect'*). The Employer can join both the architect and the Contractor in actions for compensation without being obliged to decide whether the defect is caused by the design or construction of the works;

- the **court may adjust the level of damages to reflect any contribution of the claimant to the loss under Article 290**. If, for example, an employer claiming against a contractor caused or contributed to the loss by its own act or omission, he might not be awarded damages or the damages may be reduced proportionately. If the claimant seeks the full amount of its loss from one contributing party only, that party (as respondent to the claim) **may join other parties to the proceedings for the purpose of applying for an apportionment** at the Court's discretion; and
- **Article 287** provides that a party may **escape liability for harm caused to the other party if it can prove that any losses resulted from *"extraneous causes"*** including acts of third parties. Article 287 is not mandatory and can be contracted out of, and thus appears to allow parties to agree that one party will be liable for all loss, even where such loss is not caused by an act or omission of that party.

"K" is for "Knock-For-Knock"

A *knock-for-knock* clause (sometimes known as a mutual indemnity or cross-indemnity) is an agreement that **loss or damage should stay where it falls, regardless of who was "to blame"** for the incident in question. Typically, one party (**"A"**) agrees to indemnify the other (**"B"**) for any damage to A's property, plant or equipment and for injury to A's personnel, and in return B indemnifies A for damage to B's property, plant or equipment and for injury to B's personnel. **Loss and damage suffered by A or its employees and sub-contractors (together *"A's group"*) is borne by A, regardless of fault, with no recourse to B, and vice versa**. A's insurance protects A's group against losses, and A's insurers waive their rights of subrogation against B and B's group. In this way, knock-for-knock clauses operate as a mutual 'hold harmless' regime where each party is responsible for its own property, plant, equipment and personnel, and indemnifies the other party against loss and damage to such items.

It is common for EPC contracts in the UAE (particularly in the oil and gas sector) to include knock-for-knock clauses, principally for the following reasons:

- each party is likely to carry employer's liability or workers' compensation insurance covering work-related death and personal injury to its own employees, and will typically insure their own property against damage and

destruction: knock-for-knock provisions can provide clarity from an insurance perspective as to when claims can be made on such policies; and

- they offer the parties greater certainty regarding the division of responsibility for risk in the works since liability is allocated by the contract and there is no need to attribute fault and establish causation in the event of death, personal injury or property damage which saves time and expense associated with such claims.

Since knock-for-knock clauses are consistent with commercial custom in EPC contracts in the UAE oil and gas sector, they are generally understood to be enforceable under UAE law provided that they are drafted in a way which does not contravene any mandatory provision of the Civil Code (see '*M is for Mandatory*') and seek to exclude a party's liability for matters which cannot be excluded under UAE law.

Article 296 (exclusion of liability for harmful acts – see *'H is for Harm'*) and Article 383 (exclusion of liability for fraud or for willful or gross mistake – see *'L is for Limitation'*) are particularly relevant in this context: in order not to fall foul of these mandatory provisions, the **parties must ensure that any knock-for-knock clause is drafted to clearly identify and set out the liabilities and losses which are intended to be covered by the indemnities**, so as to prevent the knock-for-knock agreement being rendered void on the basis that it seeks to exclude a party's liability in tort for harm caused to another (see *'H is for Harm'*)[6], or that it seeks to indemnify a party in circumstances in which such party would otherwise be liable for losses caused by fraud and/or gross negligence (which cannot be excluded or limited under Article 383 of the Civil Code), for example.

[6] To the extent that such liabilities are clearly identified in the drafting of the clause, they are likely to be construed as contractual exclusions of liability as opposed to an exclusion of liability in tort, and the risk of the clause being held to be void pursuant to Article 296 will be significantly reduced.

"L" is for Limitation

In construction contracts, the term '*limitation*' is commonly used in the following two contexts:

Limitation of the parties' liability: clauses excluding or limiting a party's liability for specified losses or breaches are generally effective and relatively commonplace in UAE construction contracts, however under the Civil Code contracts **cannot limit or exclude liability** arising from:

- **mandatory** provisions of UAE law (such as decennial liability under Article 882) (see *'M is for Mandatory'*);
- **fraud or gross mistake** (Article 383). In this context, the UAE courts have understood fraud to involve a refusal by an obligor to perform a contractual obligation provided such a refusal constitutes bad faith (see *'G is for Good Faith'*), even if the obligor does not intend to cause damage to the other party. Gross mistake has been described as consisting of a high degree of negligent, careless and reckless conduct without regard to the potential consequences[7]; or
- **acts causing harm** where there is no applicable contractual term which addresses the situation in question (Article 296) (see *'H is for Harm'*).

Any clause excluding liability for loss arising from the circumstances identified above will be **void**, and even clear and concisely drafted clauses that seek to limit liability in such circumstances may be found to be invalid under UAE law. When considering limitation of liability provisions, the parties should also have regard to the **court's powers to adjust the award of damages due to a party under Article 390** if the actual loss suffered differs from a contractually pre-agreed amount of damages (see *'D is for Delay Damages'*), and to render **unenforceable contractual provisions which are contrary to public order or morals** under Article

[7] This is broadly consistent with the limitation of the Contractor's liability under the FIDIC rainbow suite contract conditions, from which fraud, deliberate default and reckless misconduct are expressly excluded.

205(2) – a limitation of liability for death or personal injury is often cited as an example of such a provision.

Limitation period for making claims: limitation periods impose time limits within which a party seeking to bring a legal action or assert a right must do so. If a claim is brought out of time, the defendant will be able to plead the defence of limitation and the claim will be 'statute-barred'. The general position under the Civil Code is that **contractual claims arising out of commercial transactions will be time-barred within 10 years unless a specific provision states otherwise**. In a commercial construction contract claim for defective works, the limitation period will run for 10 years from the date when the contract was breached, which for non-apparent (or latent) defects is understood to be the date of taking over.[8] The limitation period under UAE law for initiating a claim for **major defects affecting the stability or safety of a structure is 3 years from the collapse or discovery of the defect**. This means that contractors and architects can still be "on the hook" in respect of decennial liability for almost 13 years after completion of the building.

It is important to **distinguish the contractual limitation period** (the period during which the Contractor will remain liable for the cost of repairing defective work) **from the defects liability period**, which refers to the period specified in a construction contract (typically 12 months from taking-over) during which the Contractor will be required to repair any defects notified to it by the Employer. The latter is not explicitly recognised by the Civil Code so appropriate defects liability provisions will need to be expressly included in construction contracts in order for defects liability period provisions to apply.

[8] Article 487 prohibits agreements to extend or reduce a statutory time limit, which suggests that an agreement that denies a party a right to commence legal proceedings in respect of a construction contract before the expiry of 10 years from taking-over will be void.

"M" is for Mandatory

The UAE Civil Code generally **recognises freedom of contract** (Article 257). However, that freedom is restricted to the extent that an agreement will be unenforceable if:

(a) it **conflicts with a mandatory provision** of the law in accordance with Article 31; or

(b) it is contrary to **public order or morals** pursuant to Article 205(2); or

(c) it is performed in **bad faith** pursuant to Article 246(1) (see '*G is for Good Faith*'); or

(d) a right is exercised in an **unlawful manner** pursuant to Article 106, including where the benefit realised is disproportionate to the harm suffered by others, or where the interests sought to be realised conflict with the Islamic *Shari'ah*.

'Mandatory provisions' of the law **apply to all contracts** and are intended to serve a protective function in order to preserve public order. Any parts of an agreement which conflict with or are inconsistent with such mandatory provisions will either be rendered **automatically void**, or will provide the **courts with the power to adjust** the agreement to ensure consistency with mandatory provisions.

Mandatory provisions can be clearly identified where the Civil Code

provides explicitly that an agreement of a specified type is **void**; or any agreement having a **proscribed effect is prohibited**. The extent to which certain other provisions of the Civil Code are mandatory so that they apply regardless of the contract between the parties is less clear as in many circumstances there are **no clear statements in the Civil Code regarding which provisions are mandatory and which are not**, and/or which mandatory provisions will override the terms of an agreement to the contrary and which will only apply where the issue in question is not referred to in the contract.

On balance, if a statutory provision **does not expressly state that any attempt to contract out of it is void**, a reasonable starting position would be to view this provision as **non-mandatory** (and therefore able to be contracted out of by the parties).

Relevant mandatory provisions in the context of construction contracts include those relating to:

- relief from **unfair contract terms** (Article 248) (see *'U is for Unfair Contractual Provisions'*);
- relief from circumstances of an **exceptional nature** (Article 249) (see *'F is for Force Majeure'*);
- exclusion of liability for **harmful acts** (Article 296) (see 'H is for Harm');
- exclusion of liability for **fraud or for wilful or gross mistake** (Article 383) (see *'L is for Limitation'*);
- agreement of **compensation** (Article 390) (see *'D is for Delay Damages'*); and
- exclusion of liability for structural failure or defects (**decennial liability**) (Article 882) (see *'A is for Architect'*).

"N" is for Nominated Subcontractor

The majority of subcontractors on a construction project are selected and appointed by the Contractor: the Employer traditionally plays no part in the selection and appointment process other than simply giving consent to the identity of the subcontractor to the extent that it is required under the terms of the main contract. Nominated subcontractors are subcontractors who are **selected by the Employer but who are appointed directly by the Contractor** under a subcontract to perform a specific scope of works.

The FIDIC Red and Yellow Books distinguish a 'nominated' subcontractor from a 'domestic' subcontractor (a subcontractor who has been selected by the Contractor) by affording the former the right to have **amounts due to it under a nominated subcontract certified by the Engineer under the Main Contract, and in certain circumstances the right to direct payment by or on behalf of the Employer**[9]. There is no corresponding right for the Employer to intervene in the payment process for the benefit of a domestic subcontractor.

Nomination allows employers to retain control over the selection of specialist subcontractors or suppliers on construction projects without having to directly appoint and interface with the nominated subcontractors or to administer their subcontracts. This raises the question of whether, as a matter of UAE law, the Employer assumes responsibility for the acts and omissions of a nominated subcontractor on the grounds of the Employer's role in their selection.

Article 890(2) of the Civil Code provides that the Contractor remains liable to the Employer for the for the acts or defaults of *any* subcontractor, his agents or employees, as if they were the acts or defaults of the Contractor (this principle is known as

[9] For example, see Sub-Clause 5.4 of the 1999 Red Book, and Sub-Clause 5.2.4 of the 2017 Red Book.

vicarious liability). In the case of a nominated subcontractor, the general rule is that the Contractor's vicarious liability remains in place since **Article 890(2) does not draw a distinction between nominated and domestic subcontractors**: if a nominated subcontractor is a 'subcontractor' for the purpose of the contract (as appears to be the case under the FIDIC forms, which stipulate that a 'nominated subcontractor' as a type of 'subcontractor'), the **Contractor is likely to be held liable for a nominated subcontractor's default**. The Contractor should therefore exercise its rights under the main construction contract[10] to refuse the Employer's nomination of a subcontractor with whom the Contractor is uncomfortable where it has reasonable grounds to do so.

However, the Contractor's vicarious liability in the event of a nomination may not be as clear cut as the preceding paragraph (and the Civil Code) appears to suggest, since the **UAE courts have recognised a difference between nominated and domestic subcontractors in relation to the Contractor's liability for delay damages** in circumstances where the delay has been caused by and attributed to a nominated subcontractor. In the decision of the Dubai Court of Cassation in case No. 266 of 2008, for example, the court held that "*when the subcontractor is selected by the Employer or its consultants, the Employer shall be liable for any delay in the performance of the subcontracted part and the main contractor shall not be liable for any delay fines if they can prove that the delay is caused by such subcontractor and the main contractor played no part in the delay.*"

Whilst there is no system of binding judicial precedent in the UAE and the court did not appear to provide any specific criteria for disregarding the general rule of vicarious liability set out in Article 890(2), this decision may be cited to support the view that under UAE law, in the absence of any agreement to the contrary, a contractor is not liable for delay damages attributable to delay caused by a nominated subcontractor.

[10] See Sub-Clause 5.2 of the 1999 Red Book and Sub-Clause 5.2.2 of the 2017 Red Book.

"O" is for on-demand and on-default

Employers on UAE construction projects generally require contractors to provide performance bonds, bonds securing the Employer's advance payments, and also occasionally bonds in lieu of retentions from interim payments due to the Contractor. In general, the vast majority of **advance payment bonds and retention bonds are 'on-demand' instruments. Performance bonds, in contrast, may be 'on-demand' or 'on-default'** depending on the agreement reached between the parties. The maximum aggregate value of the performance bond is typically calculated as a percentage of the contract price under the construction contract.

An **'on-demand'** bond is one according to which a demand (or a call) made under it must be honoured simply on **presentation of a conforming demand** even if there is a dispute under the construction contract as to the Employer's entitlement to payment. Contractually, an **on-demand bond is a primary, independent payment obligation** undertaken by the bondsman akin to an indemnity – the obligation imposed on the bondsman is simply to pay a sum of money upon the making of a demand and there is **no requirement under UAE law** for the demand to be accompanied by a statement by the beneficiary of the basis on which the demand is made (for example, by asserting a breach of the underlying contract as is required under the forms annexed to the FIDIC Conditions of Contract).

Under an **'on-default'** bond, the Employer is **not entitled to make a call** for payment by the bondsman **unless and until the Employer suffers loss as a result of the Contractor's default** under the construction contract or by reason of the construction contract being terminated due to the Contractor's default or insolvency. An 'on-default' bond is a **secondary obligation akin to that undertaken by a guarantor** under a guarantee (under which a claim or demand can only legitimately be made once there is proof of breach under the construction contract or proof of another trigger event). Whilst an on-demand bond will provide the Employer with greater security than an on-default bond, there is likely to

be a higher price premium passed back to the Employer for procuring an on-demand bond as the bank will require a counter-indemnity from the Contractor which will be factored into the contract price.

Payment under an on-demand bond can typically only be resisted by the bondsman if it has clear evidence that the demand is fraudulent or the construction contract clearly and expressly prevents the Employer from making a demand. Article 417(1) of the Commercial Code provides that *"The bank shall not be entitled to refuse payment to the beneficiary for reasons relating to the bank's relation with the client or the client's relation with the beneficiary"*, so the bank cannot refuse liquidating the performance bond on the basis that there is a dispute between the Contractor and the Employer for example. The **bank is obliged to make the payment to the Employer in accordance with the terms of the performance bond itself** and has no interest in, and should not consider, the terms of the construction contract between the parties.

However, some banks in the UAE have been known to **resist calls on on-demand bonds on the basis that certain formalities for issuing and serving the demand have not been complied with**, so employers should ensure when making a call on a bond in the UAE that the demand is in accordance with the terms of the contract and/or the bond and that the individual who signs and presents the demand has clear and demonstrable the authority to do so. Provided that the relevant demand formalities are complied with, it is standard practice for local banks to make bond payments within 5 working days of the demand.

A contractor who has "*serious and certain reasons*" for believing that the Employer intends to liquidate an on-demand bond unjustifiably or fraudulently can apply to the court seeking an **attachment order to stop the liquidation of the performance bond**, as provided for in Article 417(2) of the Commercial Code. Examples of "*serious and certain*" grounds include the fact that the project has been completed and handed over, large pending payments are due to the Contractor or, there are letters or documents showing that the Employer has no right to liquidate. In the event that the performance bond is liquidated, the remedy available to the Contractor is to file a case (or file for arbitration if the contract provides for arbitration) and seek the repayment of the amount of the performance bond, along with interest or damages, as the case may be.

"P" is for Payment

In general the methods of payment usually adopted for construction work in the UAE are substantially similar to payment procedures contemplated by industry standard form contracts and those used in other jurisdictions, however the following local law issues should be noted:

- **Article 885 of the Civil Code** provides that *"the Employer shall be obliged to pay the consideration* ***upon delivery of the property*** *contracted for, unless there is an agreement or a custom to the contrary"*. Article 885 does not impose a time limit for making payments, so whilst the parties can agree and enforce a payment schedule and payment terms which details their respective obligations, in the **absence of such agreement or customary practice to the contrary, the time for payment is on delivery of the works**. Whether or not "delivery of the property" means the whole of the works is not specified, so where there is no agreed payment schedule an employer could argue that it is not required to pay the Contractor until it has obtained the benefit of using the whole of the works, free from major defects. Conversely, a contractor may claim that under this article it is entitled to payment on delivery of part of the works, especially if the contract provides for staged completion of the works in defined sections. In order to provide certainty on this issue, a **sufficiently detailed payment mechanism and schedule** should be (and typically is) agreed and specified in all construction contracts.

- It is **customary in the UAE** for employers to make **advance payments secured by bonds or bank guarantees** as an interest-free loan to the Contractor to cover some of the costs of the Contractor's mobilization and procurement of lead-in items. The **advance payment is typically repaid through percentage deductions** in subsequent payment certificates. Subsequent payments are based on the Engineer's (or employer's representative's) certification of measured quantities of work completed or by milestones achieved, and are generally paid in arrears. A **retention is typically**

deducted from each payment and withheld by the Employer until taking-over, when half of the retention is usually returned to the Contractor, and the other half of the retention is usually retained by the Employer until the expiry of the defects notification period.

- Contractual **payment security mechanisms**, whether by way of a payment bond, parent company guarantee from the Employer, or escrow and project bank account arrangements, are **unusual in the UAE**, though this is more as a result of commercial custom than any legal restrictions on such forms of security.
- Unlike in some jurisdictions such as England and Wales, there is **no statutory regulation of conditional payment clauses in the UAE, so the payment terms in subcontracts often include 'pay when paid'** clauses allowing the Contractor to manage its cash flow by making the obligation to pay its subcontractors conditional on the Contractor's receipt of payment from the Employer.

"Q" is for Quantum Meruit

The expression *quantum meruit* refers to a **reasonable sum of money to be paid for services rendered or work done** when the amount due is **not stipulated in a legally enforceable contract. The Civil Code provides that the courts may in certain circumstances award a money payment** to a construction contractor or consultant where the amount of such payment is not determined by a contract. This occurs most commonly where work is performed in the absence of a formal contract or where a construction contract is terminated before the works are completed. The provisions of the Civil Code which are most likely to be cited by the courts when awarding a monetary payment on a *quantum meruit* basis are as follows:

- **Article 888**, which provides that if the price for the work is not specified in the contract, *"the Contractor shall be entitled to fair remuneration, together with the value of the materials he has*

provided as required by the work." Thus, if the Employer was to instruct a **variation** for works which were not contemplated at the outset of the agreement and for which there are **no relevant rates for payment specified in the contract**, then the Contractor will be entitled to fair or reasonable rates plus the value of materials for that variation. However, **no guidance** is given as to what constitutes **fair remuneration** or whether the Contractor is **entitled to profit**.

- **Article 889(1)**, which is a corresponding provision to Article 888 in relation to **consultants' remuneration** *"in accordance with custom"* in circumstances where a fee has not be pre-agreed by the parties. Additionally Article 889(2) allows a consultant to claim *'fair remuneration'* for work performed in circumstances where an unforeseen event prevents the architect from completing his work in accordance with the plan prepared.
- **Article 894**, which provides that if the Contractor commences performance of the works and then becomes incapable of completing the works due to an **extraneous cause** in which he played no part, *"he shall be entitled to the value of the work which he has completed and the expenses he has incurred in the performance thereof up to the amount of the benefit the Employer has derived therefrom"*. It is not entirely clear whether a payment on termination provision that attempts limit this entitlement will be void under UAE law. This will depend upon whether Article 894 is construed as mandatory (see *'M is for Mandatory'*), or whether it is subject to any agreement to the contrary.

"R" is for Retention of Title

Retention of title rights permit contractors to claim that **until they have been paid they retain title to goods and supplies used in the works** and thus have the right to remove such goods and materials from the site pending payment.

In general, **UAE law provides for retention of title**: the passing of title in goods and materials will follow payment to the supplier for the goods and materials, and a seller may resell goods to a third party if they have not been paid for by the purchaser. **Article 513 of the Civil Code** expressly recognises and preserves the right of a materials supplier to retain ownership in its supplies by agreement in this way:

513(1): *"If the price is deferred or payable in instalments, the seller may stipulate that the transfer of ownership to the purchaser be suspended until he pays the whole price, notwithstanding that the goods have been delivered."*

513(2): *"If the price is paid in full, the transfer of ownership to the purchaser shall operate retrospectively to the time of the sale."*

Thus, if the parties so agree, a supplier may retain ownership of materials delivered to site until payment is made in full. However, parties to a construction contract in the UAE will often agree to **override the retention of title provisions** of the Civil Code, and the statutory principle that the Contractor need not hand over the works until they have been paid for by the Employer is usually reversed by the terms of the construction contract which will typically provide that title in goods and materials supplied for the works passes to the Employer prior to their incorporation into the works. For example, the FIDIC Red and Yellow Books provide that plant and materials become the property of the Employer upon the earlier of the date on which such plant and materials are delivered to the site or the Contractor is entitled to be paid for the plant and materials by virtue of their inclusion in a payment certificate. Therefore, notwithstanding the statutory position, in many UAE construction contracts the passing of title in goods and materials provided for the works does **not** always follow the payment of money for such goods and materials.

Article 879(1) of the Civil Code provides a contractor with the additional potential remedy of a **statutory lien over property** in circumstances where its work has produced a beneficial effect on the property, so that the **Contractor is entitled to retain the property he has improved** pending payment by the Employer, and if the beneficial effect on the property is lost before such payment is made, the Contractor will not be liable for the loss nor will it be entitled to payment for the improvement made to the property.

"S" is for Set-Off

Under UAE law, if the Employer under a construction contract owes money to the Contractor, the Employer can set-off against the sums due to the Contractor the sums the Contractor owes to the Employer pursuant to:

- **Article 370** of the Civil Code, which provides for a **mandatory statutory right of set-off** (without the need for agreement or a court order) **in relation to mutual obligations** (i.e. obligations of the same type and description, such as mutual debts of each party vis-à-vis the other) which are *"equally due and of equal strength or weakness"* in circumstances where that set-off is not prejudicial to the rights of a third party; and
- **Article 372** of the Civil Code, which allows the **courts to apply a judicial set-off** between the Employer and the Contractor, either between separate legal actions (cross-claims) or between competing claims in a single action (such as in relation to the amount properly owed by the Employer to the Contractor). Judicial set-off may thus be ordered where **some of the requirements of a mandatory set-off are absent**, such as in the case of a separate cross-claim which the Employer has against the Contractor, or in the event that the Employer claims that there are defects in the Contractor's work such that the work itself is worth less than the amount the Contractor claimed for it (i.e. there is a determination that the proper value of the work is worth less than claimed, rather than a deduction from the proper value of the work).

A number of conditions need to be satisfied in order for a mandatory set-off to apply and this may in practice make the occurrence of a **mandatory set-off relatively unlikely**, though how literally the courts will interpret the requirement for the obligations to be *"equally due and of equal strength or weakness"* is not entirely certain. Where the requisite conditions are not satisfied however, the parties may agree to exercise a **voluntary set-off, or the courts may order a judicial set**-off under Article 372.

Rights of **set-off are commonly included in construction contracts**, and project participants in the construction industry often seek

to exercise their right of set-off to reduce the extent of their **payment obligations** to one another. Sub-Clause 2.5 (*Employer's Claims*) of the 1999 FIDIC Red and Yellow Books and Sub-Clause 20.2 (*Claims for Payment and/or EOT*) of the 2017 editions detail how the Employer should make a claim for payment against the Contractor under the Contract and provides that such payment can be set-off against a certified sum (i.e. an amount included by the Engineer in a Payment Certificate) provided that the following conditions are complied with:

- the Employer must give **notice and particulars** to the Contractor relating to any claim for payment as soon as practicable after the Employer has become aware of the event or circumstance which gives rise to the claim; and
- the Employer must also provide **substantiation** including the basis of the claim and details of the relief sought.

Once notice has been given, the Engineer makes a determination, and the Employer cannot make any deduction by way of set-off or any other claim unless it is in accordance with the Engineer's determination.

Sub-Clause 14.3 of both the 1999 and 2017 FIDIC Red and Yellow Books appears to contemplate a **broader right of set-off** than that envisaged by the sub-clauses relating to Employer's claims (as detailed above) by referring to the Contractor's obligation to include in any application for interim payment any deductions that have *"fallen due under the Contract or otherwise"*. This language suggests an ability to **set off contractual damages arising out of a cross-claim** the Employer may have against the Contractor.

"T" is for Third Party Rights

Due to the complex nature of most large developments, there are typically a number of parties with an interest in the successful delivery of a construction project. In addition to the developer or employer, parties such as funders, purchasers, tenants and operators typically require that their interests in the development are contractually protected through **contractual rights of recourse against the construction team, usually in the form of collateral warranties or third party rights**.

Historically under English common law a contract could not confer rights or impose obligations on anyone other than the parties to the contract. In order to avoid developers having to provide long term warranties in respect of latent defects in a constructed development, it became the practice of developers to impose on their contractors and consultants an obligation to provide interested third parties with contractual warranties in respect of the work that they carried out, thus creating a **privity of contract between the various interested third parties and those responsible for the design and construction of the project** so that third party beneficiaries could recover losses arising out of defective work or services directly from those responsible for the defects. Such contractual warranties run in parallel to, or are stated to be 'collateral' to the main contract or appointment and are fairly commonplace in the UAE construction industry, primarily because the **industry adopted English law practices at a time when English law contracts did not confer rights on any party other than the signatories to the contract**.

However, as a matter of **UAE law collateral warranties are generally not required** in order to confer enforceable rights on third parties in the absence of any contractual relationship between third party end users of construction projects and the project participants, as the **doctrine of privity of contract does not apply in the UAE** in the way it traditionally has done in common law jurisdictions. Article

252 of the Civil Code provides that whilst a contract *'may not impose an obligation on a third party', 'it may create a right in him'*, and **Article 254 allows third parties with an interest in a construction project to claim directly against the party which undertook the works or services if the contract allows it**, even though such persons are not party to the construction contract. These provisions of the **UAE Civil Code effectively provide for third party rights in the same way as English law now does following the implementation of the Contracts (Rights of Third Parties) Act 1999**, which is now widely used in the England and Wales construction industry to grant rights of recourse to third parties against contractors and construction professionals without the requirement to procure the execution of individual collateral warranties.

Under UAE law, a third party with an interest in a construction project can acquire enforceable rights directly against the relevant members of the construction team pursuant to the construction contract if the contract expressly provides for it, or if the term in question confers a benefit on the third party: privity of contract does not restrict the beneficiary's right to take action to have the right enforced. Such **third party rights make available to the third party beneficiary any remedies that would have been available to it in an action for breach of contract** as if it had been party to the contract, and therefore have the same effect and application as the rights contained in a collateral warranty.

However, lenders, purchasers and tenants in the UAE are generally reluctant to rely on the rights afforded under Article 254, in part due to **concerns over the assignability of such third party rights**[11] and due to doubts over the **ability to confer step-in rights under Article 254**[12], and as such at the time of writing construction contracts in the UAE typically require contractors and consultants to provide such interested third parties with executed collateral warranties in respect of the works and/or services they have carried out.

[11] Article 254 is silent on the issue of whether such rights are assignable by the third party beneficiary or not.

[12] Funders have been particularly wary of accepting third party rights instead of collateral warranties on the basis that step-in rights carry duties on the beneficiary to discharge the obligations of the Employer (namely payment) and only rights can be conferred under Article 254.

"U" is for Unforeseen Ground Conditions

Unforeseen ground or site conditions encountered by the Contractor may affect the method of constructing the project, and in extreme cases may require that the design of the entire project has to be changed. Either of these consequences is likely to result in the Contractor incurring additional cost and suffering delay.

The general position in common law jurisdictions is that in the absence of contractual provisions to the contrary, the Contractor bears the cost and time risks arising out of unforeseen ground conditions and remains bound by the agreed price and completion date stipulated in the contract. Furthermore, the Contractor's obligation to complete the project in accordance with the specification will remain unaffected, notwithstanding that the unforeseen ground conditions may mean that the design of the project may need to change.

In the UAE, ground conditions provisions (particularly in relation to the allocation of cost and time risk) are generally a matter for negotiation, however regard must be had to provisions of the **Civil Code, including decennial liability provisions and certain mandatory provisions**. By virtue of the former, the Civil Code provides that even if the **collapse or defect affecting the stability or safety of a structure is due to a defect in the land itself** (rather than a defect in the works), the **Contractor and architect (designer) will be liable** for any destruction or defect in buildings they have constructed or fixed installations they have erected (Article 880). The UAE Civil Code does **not**, however, deal with the issue of who bears the **cost and time consequences of unforeseen ground conditions** during the construction period. These are typically governed by express risk allocation provisions in the contract and are thus a matter for negotiation.

The FIDIC Red and Yellow Books entitle the Contractor to claim an extension of time and additional cost to the extent that these were due to *"physical conditions which are Unforeseeable"* (Sub-Clause 4.12). *"Unforeseeable"* is defined as *"not reasonably foreseeable by*

an experienced contractor by the date for submission of the Tender" (1999 edition), or *"not reasonably foreseeable by an experienced contractor by the Base Date"* (i.e. 28 days prior to the latest date for submission of the Tender) (2017 edition). These **commonly-used standard forms of contract in the UAE thus treat unforeseen ground conditions as an employer risk from a time and cost perspective.**

However, many employers in the UAE (including many **government entity standard forms** of public works contract) seek to **alter the position set out in the FIDIC Red and Yellow Books** to significantly alter the risk allocation between the parties such that the **Contractor is not entitled to an increase in the contract price or to an extension of time** for additional costs and delays incurred by the Contractor as a result of physical conditions (including sub-surface conditions) and other conditions of or affecting the site, **whether they ought reasonably to have been discovered or foreseen or not**. Such amendments typically make the Contractor responsible for obtaining all information as to risks, contingencies and other circumstances which may influence or affect the execution of the Works.

The FIDIC Silver Book also provides that the cost and time risks arising out of unforeseen ground conditions in completing the works are to be borne entirely by the Contractor who remains bound by the agreed price and completion date. The **Silver Book** goes a step further than the typical employer amendments to the Red and Yellow Books described above by also seeking to **absolve the Employer of responsibility for any information or 'Site Data'** supplied to the Contractor by the Employer or on the Employer's behalf. The position adopted by the Silver Book is typical of the position commonly adopted in bespoke EPC contracts in international projects, however provisions of the **Civil Code such as Article 878** (which provides that the Contractor will not be held liable for any loss or damage resulting from his act or work if it arises out of an event which could not have been prevented) may have an impact on enforceability of wholesale risk transfer such as under the Silver Book. In particular, the possibility of a successful force majeure claim by the Contractor pursuant to **Article 249** must be taken into account (see *'F is for Force Majeure'*).

"V" is for Variation

The term 'variation' generally refers to **changes in the scope** of works, though contractual definitions can be much wider. The FIDIC Red and Yellow Books adopt the following definition: "*any change to the Works, which is instructed or approved as a variation under Clause 13*". Sub-Clause 13.1 provides that a Variation may include:

- changes to the quantities, quality and other characteristics of any item of work;
- changes to the levels, positions and/or dimensions of any part of the works;
- omission of any work unless it is to be carried out by others;
- any additional work, plant, materials or services necessary for the works (including testing and exploratory work); and/or
- changes to the sequence and timing of the execution of the works.

The Contractor may not make any alteration and/or modification to the works without being instructed to implement a variation, and as a general rule, if a contractor has been instructed to implement a variation which does not amount to an omission, he will be entitled to recover payment for it. Although all standard construction contracts, including the FIDIC forms, make provision for the instruction of and payment for variations, **the following provisions of the Civil Code may apply in the absence of express agreement** or if for some reason there is no operative price adjustment mechanism in the contract:

- **Article 886** provides the Contractor with an express entitlement to additional payment where the contract price is to be calculated on a schedule of rates basis (namely, agreed unit rates and a bill of quantities) and, the actual quantities "*substantially exceed*" the estimated quantities. However, the Contractor will be barred from claiming this entitlement if it fails to immediately notify the Employer of a substantial increase in quantities. In addition, where the increase in quantities is substantial, the Employer is entitled to withdraw from the contract and suspend works. In the absence of any relevant contractual definitions, no guidance is provided on the meaning of "*substantial*" and it is unclear what percentage increase is necessary before the Contractor would be entitled to an increase in the contract price or at what point the Employer can elect to withdraw from the contract and suspend works
- **Article 887(1)** prevents the Contractor from claiming any additional payment for works which are a necessary part of the execution of the plan (i.e. the scope or specification) on which the contract is based. In general therefore, the **opportunities for a contractor to secure an adjustment to a lump sum price are limited**, and the risk that the work proves more difficult than expected due, for example, to unforeseen ground conditions, or more expensive due to price escalation, is borne by the contractor.
- **Article 887(2)** allows for variations to the works requested by the Employer (by providing the Employer with a right to unilaterally instruct a variation to the works) and those requested by the Contractor, as long as the Employer has agreed to the Contractor's request for a variation. Any additional or varied work that is agreed is subject to the same conditions as the original scope of works

In contrast with some common law jurisdictions, there is **no prohibition in the Civil Code on the Employer omitting work** through a 'negative variation', even where the Employer performs the omitted works itself or instructs a third party to do so. However, whilst contractors may accept that employers retain the ability to omit certain works for reasons of commercial viability, they generally resist a right for the Employer or a third party to perform the omitted works, and the exercise of such rights may in some cases be considered contrary to the pervasive principle of **good faith** (See *'G is for Good Faith'*).

"W" is for Writing

There is **no express requirement under UAE law for a construction contract to be evidenced in writing**: offer and acceptance are capable of creating a binding contract notwithstanding that they are contained in separate documents, or made orally, provided that the evidence demonstrates mutual consent. **Article 129** sets out the requirements for the formation of a valid contract in the UAE. The necessary elements for the making of a contract are:

- that the two parties to the contract should agree upon the essential elements (Article 141 indicates that as long as the essential elements of the agreement have been determined by the parties, a contract will be deemed to have been made, even in circumstances where some details have not been agreed to);
- the subject matter of the contract must be something which is possible and defined (or capable of being defined) and permissible; and
- there must be a lawful purpose for the obligations arising out of the contract.

Thus if the parties **do not wish for a contract to be formed until such time as they have negotiated and confirmed agreement on all points, they should expressly agree that position in writing**. If this is not done and a dispute arises, the parties risk having their rights and obligations determined by a court.

In relation to construction contracts in particular, **Article 874** provides that a *muqawala* contract (i.e. a contract of work, including any construction contract) also requires:

(1) a description of the subject matter of the contract,

(2) particulars of the type and amount of work to be completed,

(3) the manner and time for performance to be specified and

(4) the price to be specified.

In practice, the absence of a formal written contract is likely to result in uncertainty, especially if the negotiations have produced a written record of some but not all of the contemplated terms, or if offers and counter-offers are exchanged over a prolonged period. In such instances,

it may be difficult to identify the precise point at which a contract is brought into existence, and the courts will determine whether the parties' conduct is sufficient to constitute offer and acceptance and thereby a concluded contract.

The provisions of **Articles 258, 259 and 265** relating to the interpretation and construction of contracts clearly indicate a **presumption that contracts are to be expressed in writing:**

Article 258 indicates that when construing or interpreting a contract the intention of the parties is the main criterion.

- Article 259 makes it clear that a contract will be interpreted first and foremost in accordance with its provisions. If the meaning of the words of the contract are clear, a court is unlikely to attempt to construct/interpret any other meaning.
- Article 265 indicates that a UAE court will not explore potential interpretations for the meaning of a clause in a contract in circumstances where that clause has a clear meaning on its face. If the words of a clause are not plain, the court may make enquiries as to the mutual intentions of the parties.

An important **exception** to the principle that contracts need not be in writing is where the parties intend to resolve disputes by **arbitration**. In such an instance, a **formal written agreement will be required** since in the absence of a signed contract, it will be extremely difficult to argue that there is a valid and binding arbitration agreement, as the UAE courts treat arbitration as an exceptional remedy requiring a number of formalities, including a written arbitration agreement signed by authorized representatives of each party.

"X" is for Extension of Time

Extension of time provisions in construction contracts are provisions for extending the time for completion where specified delays beyond the Contractor's control cause delay to completion. Contractual extension of time provisions provide certainty as regards the grounds under which the Contractor is entitled to claim an extension of time, and regulate the application of liquidated damages for failure by the Contractor to complete the works within the time for completion (see *'D is for Delay Damages'*). Extensions of time may be awarded prospectively (as the contract proceeds) and/or retrospectively (following completion of the works).

There is **no statutory entitlement to an extension of the time for completion under the UAE Civil Code**, and the provisions of the Civil Code relating to construction contracts do not provide for any specific extension of time mechanism. In order for the Contractor to have a **legally enforceable claim** to an extension to the time for completion, an appropriate extension of time mechanism should be **expressly included** in the construction contract.

Generally, contractual extension of time provisions require the Contractor to notify the Employer or contract administrator when a delay occurs and make a written claim for an extension to the time for completion in accordance with the requirements of the contract. Contractors will typically risk losing their entitlement to an extension of time (or additional payment) if they fail to comply with strict (and occasionally onerous) provisions relating to notification and particulars of claims. Where a contractor has **failed to comply with a strict condition precedent for obtaining an extension of time**, it may be offered some relief under UAE law if it can establish that the Employer has acted in breach of the statutory requirement to **exercise its contractual rights in good faith** (see *'G is for Good Faith'*).

Subject to compliance with the contractual claims procedure, whether or not a contractor is

entitled to an extension to the time for completion will depend on the causes of delay, which may be categorised as follows:

(1) delays caused by acts or omissions of the Contractor (for which the Contractor is typically excluded from claiming an extension of time);

(2) delays caused by acts or omissions of the Employer (for which the Contractor is typically awarded an extension of time); and

(3) delays caused by 'neutral' events outside of the control of both parties (such as adverse weather, industry-wide disputes and *force majeure* events). Whether an extension of time will be granted for delays caused by such events is a matter for negotiation between the parties.

In common law jurisdictions, in the absence of a contractual extension of time mechanism for employer-caused delays, then in the event of delays occurring under (2) above, time will be set 'at large' and the Contractor would be required to complete the works within a reasonable time, rather than within the contractual time for completion which would effectively fall away, thus preventing the Employer from deducting liquidated damages for delay. This is known as the **'prevention principle'** and although there is no **direct equivalent under UAE law**, certain provisions of the Civil Code which prevent a party benefiting from its own breach of contract may be invoked and a court or tribunal may consider the overall consequences of the delay and decide to award the Contractor an extension of time (and possibly prolongation costs) for employer-caused delays notwithstanding the terms of the contract.

It should be noted that whether or not the Contractor is entitled to an **extension of time is a separate issue to whether or not he is entitled to compensation for delay** (which is usually dealt with under 'loss and expense' provisions of a construction contract), and it is common for employers in the UAE to amend standard FIDIC claims provisions by removing the Contractor's entitlement to costs associated with extensions of time in certain circumstances.

"Y" is for Yellow Book

'Yellow Book' refers to the FIDIC *Conditions of Contract for Plant and Design Build for Electrical and Mechanical Plant and for Building and Engineering Works, Designed by the Contractor*, a widely-used industry standard form contract in the UAE construction industry which is intended for design and build projects (i.e. where responsibility for design rests with the Contractor, who is required to design the project in accordance with the requirements specified by the Employer) with payment being made on a lump sum basis, usually against a schedule of payments. The other most commonly used FIDIC contracts in the UAE are:

- *Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer: The Construction Contract* (the **"Red Book"**). The Red Book follows a substantially similar structure as the Yellow Book and is intended for projects where the main responsibility for design rests with the Employer (or its Engineer). Thus, the works are usually completed by the Contractor in accordance with the Employer's design. However, the works may also include elements of Contractor's design, though the testing and commissioning provisions are less detailed than under the Yellow Book. The work done is quantified, with payment made on the basis of a bill of quantities (although it is also possible for payment to be made on a lump sum basis). The Red Book is the most commonly used standard form of construction and engineering contract where most (or all) of the works are to be designed by (or on behalf of) the Employer; and
- *Conditions of Contract for Engineering Procurement and Construction/Turkey Projects* (the **"Silver Book"**). The Silver Book is intended for Engineering Procurement and Construction ("EPC") arrangements. Under an EPC contract, the Contractor is responsible for the entirety of the works and design required to provide the Employer with a facility that is ready for operation at the "turn of a key" upon taking-over. Accordingly, the Contractor's risk for time and cost is considerably greater than the risk it would assume under

the Yellow Book (see, for example, our comments under *'U is for Unforeseen Ground Conditions'*).

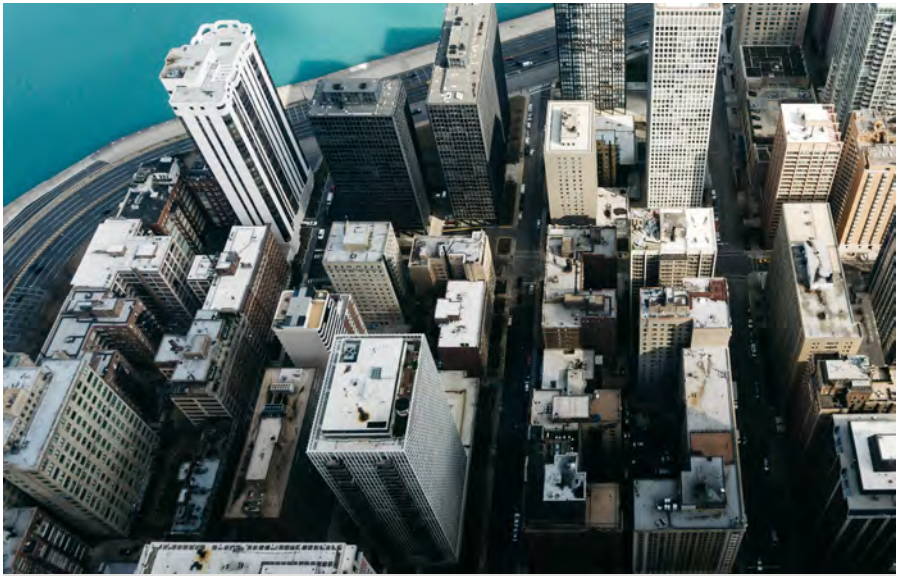
The first editions of these contracts (which remain the most prevalent standard forms in the UAE) were published in 1999 along with FIDIC's *Short Form of Contract* (the **"Green Book"**)[13] and are commonly referred to as the "Rainbow Suite". FIDIC published updated editions of its 1999 Rainbow Suite in December 2017 but these have not yet been widely adopted in the UAE market. An overview of the key changes introduced to the 1999 Rainbow Suite by the 2017 editions is available on DLA Piper's website, at https://www.dlapiper.com/en/dubai/insights/publications/2018/01/fidic-2017-first-impressions-a-gcc-perspective/. Since the publication of the initial 1999 Rainbow Suite, FIDIC has also introduced further forms of contract including:

- *Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, Multilateral Development Bank Harmonized Edition* (the **"Pink Book"**);
- *Conditions of Contract for Design, Build and Operate Projects* (the **"Gold Book"**);
- *The Dredger's Contract* (the **"Blue Book"**); and
- *The Client/Consultant Model Services Agreement* (the **"White Book"**)[14].

However, these more recent forms of contract are not (at the time of writing) regularly used in the UAE market.

[13] The Green Book is intended for engineering and building work of relatively small capital value and is thus suitable for relatively simple or repetitive work, or work that will not require input from specialist subcontractors.

[14] FIDIC have released the 2017 edition of the White Book but it remains to be seen whether this form is more widely adopted than its 2006 predecessor.



"Z" is for Zoning

A zoning permit is generally **required before the construction or alteration** of any structure, the use of a new property or change in use of any property. In outline, the following legislative and governmental controls apply to strategic planning/zoning in Dubai and Abu Dhabi:

Dubai

Currently in Dubai there is **no published legislation or guidelines** in relation to the process and procedures of obtaining planning and zoning permission. As the process is not clearly stated in legislation, much of the process is based on **practice and custom**, which in 'onshore Dubai' is broadly as follows:

- An owner or developer obtains an '**affection plan**' from Dubai Municipality, which is a **high level general site** plan that is issued with basic information containing the plot number, the land use classification and any other particular zoning requirements that are required by Dubai Municipality such as the height allowance,

parking requirements and any setback requirements. In addition, the affection plan will **state what permissions from the particular government authorities or third parties will need to be obtained prior to approval**, including Dubai Electricity and Water Authority, Civil Defence, Etisalat, the master developer (if applicable) and the Environmental Department of Dubai Municipality. There are no general rules regarding the requisite authorisations as each affection plan is issued on a plot by plot basis. Depending on the location of the plot, there may be additional approvals that will need to be obtained. The affection plan may also state whether environmental impact studies are required and whether there are any aesthetic requirements that must be complied with.

- As part of the review process for the issue of building or work permits, other **statutory authorities** (telephone, civil defence, road transport, electricity, water, and sewerage) are all required to **provide approvals for the scheme.**
- Once completed, a **completion certificate must be obtained from the relevant municipality**, which is based on a comparison of the drawings originally submitted to obtain the building permit (and any subsequent, approved revisions) and the actual structure which has been built. Again, as part of this process, the approval of other statutory authorities is required to demonstrate compliance of what has been built with the original approvals. **Without a municipality completion certificate, use and occupation of the building by end users is not permitted.**

Abu Dhabi

In Abu Dhabi, the **Department of Urban Planning and Municipalities (DUPM)** has planning powers. The DUPM was mainly set up to drive and support Abu Dhabi's urban development strategy and urban growth and also deals with the larger strategically important applications. Part of the DUPM's mandate is to ensure public and private land and infrastructure development **proposals are in line with the Emirate's long term development vision**. This vision is encapsulated within their comprehensive **urban structure framework plans**: Plan Abu Dhabi/Al Ain/Western Region 2030 (Capital 2030).

Major developments are subject to a review process established by the DUPM. Every development must **fit within the framework contained within Capital 2030**, as well as adhering to other government regulations, policies and guidelines (such as those of the Department of Municipal Affairs (DMA) which is the regulatory body that supervises the three regional municipal councils and municipal administrations).

The DUPM has established a streamlined **process to review development proposals**, depending on the nature of the development. This 4-step process in short includes a review which will be tailored to small, medium and large applications, comprising:

1. **The information meeting**
   The DUPM will hold an initial meeting as soon as a development site has been acquired, where the DUPM will explain plans and policies that will determine site development potential and outline the upcoming development review. It also helps set the parameters for supportable development and alerts the applicant to the documents/agencies that should be consulted.

2. **Preliminary development options**
   The applicant will then prepare site analysis (including elements such as transportation, habitat, climate and infrastructure) to prepare preliminary development options for the site. Two options for general land use and site layout must be provided.
   The DUPM will review the options to check compliance with the Emirate's urban planning policies (e.g. Capital 2030, land uses, densities, DUPM guidelines for design and construction, the International Codes of the International Code Council, the Abu Dhabi Environmental Health & Safety Management System, and Estidama (an environmental concept/plan)). The applicant and the DUPM select the preferred development option and work together to prepare a complete concept review application.

3. **The concept plan**
   This application covers all of the systems-level components of a development consent. It will include site and massing plans, a comprehensive approach to open space and community facilities. The DUPM and up to

20 other review agencies evaluate the plan to check that it complies with other plans and polices and agree on the seven key elements of the plan which include: land use; density; building form; site layout/design; services; strategies; and phasing.

4. **The detailed plan**
   Applicants with small and medium sized projects then prepare and submit detailed site and building plans for review. This step also confirms that any conditions of approval have been met. For large projects, this stage of the process is aimed at helping applicants translate concept masterplans into detailed regulations and guidelines. For small and medium sized projects once these steps have been satisfactorily carried out, this is the end of the planning review process and they can move on to apply for municipal building permits from the relevant municipality. Additional developer and DUPM/municipal review is required for large projects to ensure compliance with DUPM-approved regulations and guidelines before applications for building permits can be made. The building permit is required from the relevant municipality before carrying out any new builds, significant alterations or changes of use.

All DUPM approvals are now subject to **specified time limits** (2 years for individual projects and 3 years for master plans) during which **construction works must be commenced**. If construction works are not commenced within the prescribed period, the DUPM approval will automatically expire.

About DLA Piper

DLA Piper is a global law firm with lawyers located in more than 40 countries throughout the Americas, Europe, the Middle East, Africa and Asia Pacific, positioning us to help clients with their legal needs around the world.

We strive to be the leading global business law firm by delivering quality and value to our clients. We achieve this through the delivery of practical and innovative legal solutions that help our clients succeed.

In the Middle East we have over 100 lawyers operating from offices in the GCC countries. Our lawyers are fully versed in their local and cultural business communities and bring a deep understanding of the laws of the countries in which we operate – understanding that is informed by international insight and an appreciation of global best practice.

Home to one of the largest construction teams in the region, we advise developers, contractors, government bodies, financiers and consultants on all aspects of their projects. Our market leading experience extends across all sectors including energy, infrastructure and development.

From identifying project risk, to selecting the best type of delivery method, to agreeing terms and conditions, we devise and negotiate agreements that focus on delivery and reward in demanding construction schedules and balance the needs of various stakeholders.

Our team is also there for you when things go wrong, helping you to minimise disruption to your business whilst resolving claims and disputes that arise on any aspect of your project.

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