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Overview

Construction law, for the purpose of this text, comprises the laws of the United Arab Emirates and the Arab Gulf states excluding Iraq (Bahrain, Kuwait, Oman, Qatar and Saudi Arabia) as applied to the issues commonly arising out of construction projects. As no clear separation exists between the applicable laws and the general legislative framework in these jurisdictions a review of construction law must cover, as a minimum, the key elements of this general legislative framework. An overview of the applicable legal regime of these jurisdictions is the purpose of this introductory chapter.

But the applicable legislative framework is not merely an interesting backdrop to construction law. An appreciation of the legal systems of the United Arab Emirates and the Gulf states is critical not only to an understanding of the application of construction law in these jurisdictions but also to overcoming preconceptions based on academic and judicial contributions to the topic in jurisdictions where construction law has been a recognised branch of law for many years. Although the disputes and differences that arise on projects in the Gulf are essentially the same as those that arise in other jurisdictions, the applicable laws, although in some respects similar to those elsewhere, have their own unique heritage, resulting not only in differences of emphasis and analysis but also, in some cases, a departure from what might be considered elsewhere to be orthodox principles of construction law.

1.1 Basis of government

Bahrain, Kuwait, Oman, Qatar and the United Arab Emirates each have a written constitution.¹ Although Saudi Arabia does not have a written constitution in a conventional sense, the KSA Basic Law of Government serves a similar purpose but provides that the constitution is the Qur'an and the Sunna.²

Each constitution declares the existence of an independent sovereign state and that state's part in a broader Arab nation. In the case of Saudi Arabia this is expressed as a commitment to 'the aspirations of the Arab and Muslim nation to solidarity'.³

Uniquely among the Gulf states, the UAE Constitution brought the country into existence. The UAE Constitution is, in effect, an agreement between the rulers of the emirates of Abu Dhabi, Dubai, Sharjah, Ajman, Umm Al Quwain and Fujairah. Ras Al Khaimah joined the other six emirates in adopting the UAE Constitution the following year.⁴ The UAE Constitution, reflecting the incorporation of the seven constituent emirates, declares the United Arab Emirates a Federal state, paving the way for the creation of a Federal or Union Government.

Each of the other Gulf states is governed by a constitutional monarch, albeit with varying degrees of consultative and representative input. In Bahrain the constitutional monarch formally operates alongside a democratic form of government.⁵

1.2 Division of powers in the UAE

The powers of the UAE Federal Government are defined in and limited by the UAE Constitution which lays down guidelines for legislation required to establish the machinery of government, including the administration of justice. Except insofar as the rulers of each emirate ceded power to the Federal Government pursuant to the Constitution,⁶ they retained for themselves and their successors power over the internal affairs of their respective emirates:

Each emirate exercises, in accordance with Article (3) of the Constitution, sovereignty over its territorial land and water in all affairs in which the

¹ Bahrain (2002), Kuwait (1962), Qatar (2004), Oman (1996) and the United Arab Emirates (1971). Initially the UAE Constitution was provisional, being renewed and extended at five year intervals until 1996 when the provisional designation was removed.

² KSA Basic Law of Government, Article 1.

³ KSA Basic Law of Government, Article 25.

⁴ 10 February 1972.

⁵ Bahrain Constitution, Article 1c.

⁶ UAE Constitution, Article 122.

Federation is not competent pursuant to the Constitution, including court jurisdiction which is an act of sovereignty. Each emirate is obliged, pursuant to Article (10) of the Constitution, to respect the independence and sovereignty of the other emirates in regards to their internal affairs within the scope of the Constitution.⁷

In consequence, there are two tiers of government in the United Arab Emirates: the Federal Government and each government of the seven emirates.

Both tiers of government have their own legislative authority, the Federal Government by virtue of the UAE Constitution and the governments of each emirate by virtue of their retained sovereignty. As a result, there are also two tiers of laws: Federal laws which apply in all emirates, and emirate laws which apply only in the emirate by which such laws are enacted.⁸

The UAE Federal Government is represented by the Supreme Council,⁹ which is composed of the rulers of each emirate and which elects a president and vice-president, each for a five year term.¹⁰ The ruler of each emirate represents that emirate and exercises both legislative and executive authority to the extent not ceded to the UAE Federal Government pursuant to the UAE Constitution.¹¹

The UAE Federal Government's authority covers not only areas of national interest such as foreign affairs, defence and internal security but extends to domestic affairs, covering specified industries such as banking, insurance and publishing. Significantly for the construction industry, the UAE Federal Government has authority over the introduction of laws pertaining to civil and commercial transactions, in effect, submitting the law of contract to the jurisdiction of the UAE Federal Government. Construction law in the United Arab Emirates is, in consequence, predominantly a matter of Federal law.

Nevertheless, power over construction and related activities was not ceded to the Federal Government except for the construction, maintenance and improvement of union roads.¹² Each emirate retains power, therefore, to enact legislation covering the construction industry, provided that such

⁷ Federal Supreme Court No. 116/13 dated 1 October 1991.

⁸ UAE Constitution, Article 151 and Federal Supreme Court No. 4/2012 dated 19 February 2012 in which the constitutional court rejected a submission that by virtue of an emirate law the case could not be heard until it had proceeded through a preliminary notification process as required by an emirate law as this law did not bind the Federal Supreme Court.

⁹ UAE Constitution, Article 46.

¹⁰ UAE Constitution, Article 51. Since the inception of the United Arab Emirates the office of President has by convention been occupied by successive rulers of the Emirate of Abu Dhabi and the office of Vice-President has been occupied by successive rulers of the Emirate of Dubai.

¹¹ The juridical status and representation of the Federal Government and each emirate is addressed in Federal Law No. 5/1985 (the Civil Code), Article 92 and Article 93.

¹² UAE Constitution, Article 120(9).

legislation does not conflict with any Federal laws of general application. Given the significance of the construction sector in the development of a young country it will come as no surprise that each emirate has exercised this residual power to regulate the industry within their respective territories. The Emirates of Abu Dhabi and Dubai in particular, have taken the opportunity to introduce a large number of laws regulating the construction industry within their respective borders.

1.3 Islamic Shari'ah

The Islamic Shari'ah, in essence, is the law of the Islamic religion as derived principally from the Holy Qur'an and the Sunna, the code of conduct established through example by the Prophet Mohammed.¹³

The Islamic Shari'ah plays a central role in the legal system of all the Gulf states. Thus, for example, the UAE Constitution records the status of the Islamic Shari'ah in the following terms:

Islam is the official religion of the Union. The Islamic Shari'ah shall be the main source of legislation in the Union.¹⁴

By virtue of the UAE Constitution and those of Bahrain, Kuwait, Qatar and Oman¹⁵ it is a guiding principle in the formulation of all legislation that the main source for such legislation shall be the Islamic Shari'ah. Thus, the Islamic Shari'ah provides the inspiration for the legislation that applies within these Gulf states. However, notwithstanding its constitutional status, the Islamic Shari'ah is neither directly applicable nor the exclusive source of legislation, which may be supplemented by or draw on sources other than the Islamic Shari'ah.¹⁶

In contrast, the KSA Basic Law of Government expresses the role of the Islamic Shari'ah in the following terms:

The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion. The Constitution [of the Kingdom of Saudi Arabia] is the Quran and the Sunna of His Prophet, peace be upon him.

¹³ A key additional source is the Hadith, comprising records of the teachings of the Prophet Mohammed compiled from indirect sources after his death.

¹⁴ UAE Constitution, Article 7.

¹⁵ Bahrain Constitution, Article 2, Kuwait Constitution, Article 2, Qatar Constitution, Article 1 and Oman Constitution, Article 2.

¹⁶ For a review of the relevant laws and some authorities on the tension between Article 7 of the UAE Constitution and applicable laws see 'Commercial Law in the Arab Middle East', Ballantine (1986) pp. 57 – 65 and 'Arab Commercial Law: Principles and Perspectives', Ballantine and Stovall (2002), pp. 15–41.

This is more than merely a difference of emphasis, reflecting, instead, a direct application of the Islamic Shari'ah to the extent that no relevant temporal laws exist.

In practice, the laws of the Gulf states, with the exception of Saudi Arabia the history of which sets it apart from the other Gulf states, not only borrow heavily from the laws of other Arab countries, in particular those of Egypt, but also in many cases reflect the needs of an expanding and diversifying economy in which domestic and foreign businesses play a crucial part. As a result, these laws share many common features not only with those of other Gulf states but also with the laws of countries further afield. Despite these external influences there is no doubt that the primary legislation of Bahrain, Kuwait, Qatar, Oman and the United Arab Emirates draws on principles derived from the Islamic Shari'ah.¹⁷

The influence of the Islamic Shari'ah is further underpinned by legislation requiring the domestic courts to apply its provisions alongside applicable laws, customs and principles. Thus, it is provided in relation to UAE Federal Courts:

Federal courts shall enforce the provisions of the Islamic Shari'ah and the Federal Laws and other laws in force and shall enforce customary rules and general legal principles that are not in contradiction of the Islamic Shariah.¹⁸

In practice, this requirement finds expression in the reliance of judges on one of the four schools of Islamic jurisprudence: Hanbali, Hanafi, Shafi'i and Maliki. Precedence is given in the United Arab Emirates to the jurisprudence or teachings of the schools of Imam Malik and Imam Ahmad bin Hanbal and in Saudi Arabia to the latter.¹⁹

Resolution of conflicts between local laws and provisions of the Islamic Shari'ah in circumstances where these are incompatible is a matter left to the discretion of the judiciary. Although uncertainty occasioned by differences of opinion or interpretation is not unknown such controversies are few and, in most cases, now historic.²⁰

¹⁷ By way of example, see the discussion of contractual liability at Chapter 5.1 [Contractual principles: Binding obligations].

¹⁸ UAE Federal Law No. 6/1978, Article 8. Also, the UAE Civil Code, Articles 1, 2, 3 and 27, Federal Law No. 10/1973, Article 75 and Dubai Law No. 3/1992, Article 4. A similar provision is found in other Gulf states e.g. Qatar Law No. 16/1971, Article 4. See also the KSA Basic Law of Government, Article 48.

¹⁹ UAE Civil Code, Article 1.

²⁰ Residual areas of law impacted by the Islamic Shari'ah include building defects (Federal Supreme Court No. 59/16 dated 28 June 1998), time limits (Federal Supreme Court No. 721 & 815/26 dated 22 January 2006), awards of interest (Federal Supreme Court No. 18/25 dated 19 June 2004), blood money or *diyya* and issues that are not capable of being referred to arbitration (Dubai Cassation No. 146/2008 dated 9 November 2008). Contracts and arbitration awards must be consistent with public order, which includes the Islamic Shari'ah by virtue of the UAE Civil Code, Article 3.

Despite the status accorded to the Islamic Shari'ah, instances of it having an impact on day-to-day business activities in the Gulf are, with the exception of Saudi Arabia, rare.²¹ The conduct of business is, instead, governed by legislation, albeit that such legislation and its application are required to be consistent with the Islamic Shari'ah.

1.4 Civil law

The legal system of each Gulf state, with the exception of Saudi Arabia, is based predominantly on the civil law model, adapted to reflect the region's Islamic and Arab heritage. This civil law system co-exists with a broadly common law system that has been adopted within the Dubai International Financial Centre,²² placing the United Arab Emirates among a limited collection of countries having civil law and common law systems operating in parallel, each having a defined but often overlapping jurisdiction.²³

In a civil law jurisdiction the legislator's aim is to put in place – or codify – a comprehensive and universally applicable set of laws and regulations governing all citizens.²⁴ This is accomplished by enacting wide-ranging laws or codes that are a blend of provisions targeting specific issues, with others aimed at establishing general principles, which together guide judges to a broadly consistent and fair result. A broad residual discretion over the interpretation and application of the provisions of the civil code vests in the judiciary. In each civil law state²⁵ a civil code or equivalent piece of legislation, derived mainly from Roman law, is the cornerstone of its body of law.

With the exception of Saudi Arabia, the Gulf states have each adopted a civil code. As these are all modelled on the Egyptian Civil Code (1949), which itself is a derivative of the French Civil Code (1804), the civil codes

²¹ Matrimonial, inheritance and other personal status cases are dealt with by the Shari'ah division of the domestic courts, further reducing the day-to-day implementation of the Islamic Shari'ah by the commercial and civil courts.

²² Other financial free zones may follow suit, notably the Abu Dhabi Global Market, which was established in 2013.

²³ A similar duality, albeit in reverse, is found in the United States of America where Louisiana is a civil law state within a largely common law system, and in Quebec which maintains a civil law system in contrast to the rest of Canada, and in the United Kingdom, where Scotland has a mixed common law and civil law system.

²⁴ The word 'civil' derives from the Latin *civis*, which roughly translates as citizen. The origins of civil law lie in the early attempts to codify Roman law, which ultimately led to a successful codification in the form of the French Civil Code (1804).

²⁵ Notable civil law jurisdictions include France, Germany, Egypt and Japan. China has a modified civil law system.

of Bahrain, Kuwait, Qatar, Oman and the United Arab Emirates²⁶ are broadly similar. As the civil code is the backbone of any civil law jurisdiction, it follows that there is a considerable degree of similarity in the principles of law applicable to construction contracts in each of Bahrain, Kuwait, Qatar, Oman and the United Arab Emirates. In Saudi Arabia, in contrast, construction contracts are governed directly by principles of Islamic law.

Acknowledged to be greatly outdated,²⁷ the French Civil Code has, nevertheless, avoided significant revision, at least in relation to those provisions that are commonly applied to construction contracts and disputes. Notwithstanding the modernising influence of Professor Al-Sanhuri on the Egyptian Civil Code, including his introduction of some elements of Islamic jurisprudence,²⁸ the civil codes of the Gulf states consequently remain firmly rooted in the 19th century. It is axiomatic that these civil codes do not always provide a clear solution to a dispute arising from a modern construction project.

In contrast to civil law, common law is based primarily on the content of judgments which are binding on the courts in accordance with a strict hierarchy, limiting the element of discretion exercised by the judiciary.²⁹ Common law develops incrementally, as it has done from its medieval origins, by means of such judicial pronouncements or precedents with limited intervention from the legislature. Although the legislature prevails in the event of any conflict with precedents, the latter remain the cornerstone of a common law system. Laws tend to be precisely and narrowly drafted with the result that the scope for discretion when applying such laws is limited and that precedents are preserved.

There is no equivalent of a civil code in common law countries, each piece of legislation being limited to a specific topic or a relatively narrow range of topics. Thus, whereas common law courts instinctively look to resolve disputes based on principles derived from previously decided cases, courts

²⁶ 'Civil Codes of Arab Countries: The Sanhuri Codes', N. Saleh, ALQ, Vol. 8, No. 2 (1993), pp. 161–167.

²⁷ John Bell, 2008. *Principles of French Law*. 2nd Edition. Oxford University Press. p. 24.

²⁸ For a review of the origins of the UAE Civil Code and the Egyptian and Ottoman influences, particularly the Ottoman Majalla see 'The New Civil Code of the United Arab Emirates', W. M. Ballantyne, ALQ Volume 1, Issue 3, p. 245 which notes that the UAE Civil Code marks a resurgence of the Islamic Shari'ah as the main source of law, 'Application of Islamic Law in the Middle East – Interest and Islamic Banking', S. Majid, [2003] ICLR, 177 and 'Tort Law in the United Arab Emirates', a paper delivered to the Society of Construction Law (SCL) by Richard Harding QC on 9 July 2010 and available on the SCL website.

²⁹ Notable common law countries include the United States of America (in all federal courts and in state courts except for Louisiana), Australia and New Zealand. India is a common law jurisdiction in all federal courts and in most state courts. Within the United Kingdom, England and Wales have a purely common law system.

in civil law jurisdictions, including those in the Gulf, instinctively look first to the civil code and then any other relevant codes.

The result is that for a lawyer with a common law background civil law can appear imprecise and unpredictable, perhaps even intellectually inferior due to a lack of detailed legal analysis and limited reference to centuries of accumulated legal wisdom. For a lawyer with a civil law background, common law may appear to be hidebound by intricate and often outdated rules making it not only inflexible and impenetrable to the businesses and consumers that it serves but also vulnerable to a charge that it is founded on a pretence that judgments are actually derived from the dispassionate application of precedents rather than on subjective considerations of fairness and common practice.

1.5 Domestic courts

Domestic courts in the Gulf do not disregard their earlier judgments entirely but neither are they are compelled to follow them. It is common for previous judgments, particularly those of a final appellate court, to be deployed in support of submissions but the purpose is to lend support to a statement of principle derived from codified laws, rather than to invite rigid adherence to a binding precedent. This reflects the practice of showing deference to previous judgments of a Court of Law.³⁰

Evidence of the application of a consistent approach can be found in the courts' practice of prefacing a judgment with a restatement of an 'established' principle, signalling the implementation of prior decisions to a common or recurring issue and in the supervisory role conferred on the highest courts in each Gulf state over important issues of legal principle.³¹

In a case that came before the UAE Federal Supreme Court³² in 1991 the appellant relied on a number of inconsistent judgments concerning the award of interest unsuccessfully to invoke the appointment of a special panel of the Supreme Court, which can be established to deal with a departure from an established principle or to resolve conflicting decisions.³³ It is envisaged, therefore, that decisions of the Supreme Court establish principles and that the intention is for there to be consistency between decisions. This is consistent with the civil law doctrine of *jurisprudence constante* which,

³⁰ The Court of Merits comprises the Court of First Instance and the Court of Appeal, both of which determine issues of fact and law, in contrast to the Court of Cassation or Supreme Court which is restricted to determining issues of law only and, therefore, is referred to as a Court of Law.

³¹ For example, Qatar Law No. 10/2003, Article 9(1).

³² Federal Supreme Court No. 294/12 dated 28 May 1991.

³³ UAE Federal Law No. 10/1973, Article 65.

in turn, is similar to the common law doctrine of *stare decisis*, the main difference being that in the case of the latter a single judgment is sufficient to establish a precedent whereas in the former a series of consistent decisions is generally required.³⁴

In consequence, a consistency of approach to many issues that commonly arise can be discerned from judgments of the domestic courts notwithstanding the absence of a formal system of binding precedent.

In a manner consistent with the less prescriptive approach of civil law the body of principles built up from decisions of the final appellate court or Court of Law tends to offer selective guidance on the application of the codified laws rather than establishing the type of carefully crafted rubrics, supplemented by multiple clarifications, that pervade almost every aspect of common law. The Court of Merits, which must interpret and apply the codified laws and the principles established by a Court of Law, in consequence, is less constrained in its decision-making by this civil law regime than any common law counterpart. Although reference is made, on occasion, by the Court of Merits to judgments of a Court of Law, the latter themselves do so very rarely.

Insufficient attention is generally given to these differences of approach, not merely in the context of claims or disputes but also in the preparation of construction contracts, most of which are governed by local law, whether by choice or by default. As common law precedents have no value in the domestic courts of the Gulf, principles applicable to construction contracts and disputes that are well-established by precedent under common law are not merely inapplicable but are sometimes in conflict with local law.

Furthermore, the terminology typically used in construction contracts and upon which the mechanisms of the contract rely may not have the same meaning or effect in the domestic courts as in courts in other jurisdictions. It cannot be taken for granted, for example, that commonplace concepts, such as a defects liability period, are interpreted in a manner that is consistent either with the framework of standard form contracts or with customary usage. Neither are terms of art, such as 'time is of the essence' or 'fitness for purpose', which have a well-established meaning and effect in many common law jurisdictions, necessarily understood and applied in the same way by the domestic courts of the Gulf.

³⁴ For an example of *jurisprudence constante* in operation see Dubai Court of Cassation No. 56/2004 dated 26 December 2004 in which the court stated that it was applying an established principle when declining to apply principles of delict where the parties had entered into a contract. For the same approach to different but equally well-established principles see, for example, Federal Supreme Court, Appeal No. 322/1999 dated 26 January 1999 (contract interpretation is a matter for the Court of Merits) and Dubai Cassation No. 18/2000 dated 21 May 2000 (where the wording of a contract is clear there is no scope for applying a different meaning).

1.6 Financial free zones

Financial free zones present an exception to the nature and hierarchy of the governing laws described above. The first such financial free zone was established in 2004 within the designated boundaries of the Dubai International Financial Centre.

By virtue of an amendment to the UAE Constitution³⁵ provision was made for the Federal legislature to disapply Federal laws within designated financial free zones.³⁶ Further enabling legislation³⁷ created an independent jurisdiction, exempt from all civil and commercial Federal laws and subject instead to the exclusive legislative authority of the Ruler of Dubai.

Business performed by construction industry participants within the DIFC, including works executed or services performed for projects located within the DIFC is, accordingly, governed by the law of the DIFC³⁸ in the absence of any contrary agreement between the parties and is subject to the jurisdiction of the DIFC Courts.³⁹

Included within the body of laws applicable within the DIFC is the Contract Law,⁴⁰ the Implied Terms in Contracts and Unfair Terms Law,⁴¹ the Law of Obligations⁴² and the Arbitration Law⁴³ that are of particular application to the construction industry. These and other laws adopted within the DIFC are derived from a variety of sources, including common law:

DIFC operates on a unique legal and regulatory framework with a view to creating an optimal environment for financial sector growth. Such framework was achieved through a synthesis of Federal law and Dubai law which permitted DIFC to have its own civil and commercial laws

³⁵ UAE Constitutional Amendment No. 1/2004.

³⁶ This power is not geographically restricted. The Abu Dhabi Global Market was established as a financial free zone by UAE Federal Law No. 15/2013 and is expected to adopt a legal model similar to that of DIFC.

³⁷ UAE Federal Law No. 8/2004, UAE Federal Decree 35/2004 and UAE Cabinet Resolution No. 28/2007.

³⁸ Dubai Law No. 12/2004, Article 6 and DIFC Law No. 10/2005 (Amending and Restating DIFC Law No. 4/2004), Articles 9 and 10.

³⁹ Since October 2011, by virtue of Dubai Law No. 16/2011, amending Dubai Law No. 12/2004, Article 5(A)(2), an agreement to vest jurisdiction in the DIFC courts is permitted notwithstanding the absence of any connection between the DIFC and the parties, the subject matter or any other aspect of the transaction.

⁴⁰ DIFC Law No. 6/2004.

⁴¹ DIFC Law No. 6/2005.

⁴² DIFC Law No. 5/2005.

⁴³ DIFC Law No. 1/2008.

modelled closely on international standards and principles of common law and tailored to the region's unique needs.⁴⁴

The DIFC Courts similarly operate in accordance with a blend of best international practice. Significantly, this includes a system of binding precedent, giving the jurisdiction a key common law characteristic.

The amendment to the UAE Constitution that facilitates the creation of a financial free zone is not geographically confined. The Abu Dhabi Global Market was, accordingly, established in 2013 on the basis of the same enabling legislation⁴⁵ and in 2015 the laws that will apply within its jurisdiction began to be issued.

A similar regime exists in Qatar.⁴⁶ The Qatar Financial Centre:

operates to international standards and provides a first class legal and business infrastructure ... the QFC's commercial and regulatory environment and systems conform to international best practices and are separate from and independent of the host Qatari systems.⁴⁷

Regulations enacted within the Qatar Financial Centre cover contracts, companies, arbitration, employment, insolvency and many others.

⁴⁴ <http://www.difc.ae/laws-regulations>. The sources of law include, as a last resort, those of England and Wales, the birthplace of common law: DIFC Law No. 3/2004, Article 8(2).

⁴⁵ UAE Federal Law No. 8/2004, UAE Federal Decree No. 15/2013, UAE Cabinet Resolution No. 4/2013, and Abu Dhabi Law No. 4/2013.

⁴⁶ Qatar Financial Centre Law No. 7/2005.

⁴⁷ www.complinet.com/qfcra.

<http://www.pbookshop.com>