

Construction contracts: omission, suspension and termination



**ASSIGN
BUSTER**

An analysis of Omission, Suspension & Termination of Construction Contracts under Civil Law of Qatar & UAE

1. Introduction

Qatar has a well-developed and structured legal system. The origin of the Qatar legal system is found in both ancient and traditional sources. It is based on Islamic law and jurisprudence but has adopted many of the principles of the Napoleonic Civil Code (French Civil Code). In addition, Egyptian philosophy of law and procedure (Egyptian Civil Code) had a great influence on the legal and judicial system of Qatar.

The State of Qatar is a traditional country ruled by Al-Thani family and the state leadership being inherited by Al-Thani family since mid-19th century. Qatar's judicial history was influenced by a series of events beginning with the Ottoman occupation of the region in the 19th century. As stated in Background to legal system in Qatar by Qatar Law website " The Ottoman rulers established a system of justice based on teachings of the Hanafi school of Islamic Law. As the Ottoman Empire started to lose its grip on its rule in Qatar and elsewhere in the Arabian Gulf, Qatar underwent a gradual shift towards the Hanbali school of Islamic Law under the influence of the then emerging regional power, Saudi Arabia" (Partners, 2014).

Qatar became a protectorate of Britain after the 1916 treaty and British legal system was established formally after the treaty. The civil courts established by British enforced English laws albeit local courts continued to administer a legal system based on Sharia law (Islamic law) which was the legal system in pre British era. This practice created a dual court system that existed until recent time in Qatar.

<https://assignbuster.com/construction-contracts-omission-suspension-termination/>

Modern Qatar legislative process began in 1961, when Law No. 1 for the year 1961 was issued. Subsequently, several modern legislations covering the administrative, economic and social activities were enacted. Qatar passed the new Judicial Law No. 10 for the year 2003 in October 2003 which revolutionized and unified the judicial system in Qatar. This law became effective in October 2004.

Qatar enacted a new Civil Law in 2004, providing applicability in respect of limitation of time and territorial jurisdiction. Other important definitions such as of natural and juridical persons & principles and legal capacity to sue and be sued were incorporated in to the new Civil Law. Contractual relationships in construction sector were codified as Law No. (22) of 2004 with the passing of Qatar Civil Law.

Law No. (22) of 2004 Promulgating the Civil Code was issued by H/H Hamad Bin Khalifa Al Thani, Emir of Qatar exercising the executive authority vested under the Constitution. As stated in Qatar Law website “ Qatar Civil Code provides guidelines for the establishment of contractual relations and obligations arising therefrom. It specifies basic elements of a contract such as consent, subject matter, and purpose of contracting. It also deals with annulment, construction and binding nature, effect, and cancellation of contracts” (Partners, 2014).

The UAE federation comprising seven Emirates namely; Abu Dhabi, Dubai, Sharjah, Ras Al Khaimah, Umm Al Quwain, Ajman and Fujairah was established on 02nd of December 1971. The Constitution declares the Sharia is the principal source for law in the UAE and a civil law jurisdiction heavily

influenced by the Egyptian law system which was heavily influenced by French and Roman law.

Commercial transactions are governed by UAE Federal Commercial Transactions Law ' Commercial Code' (No. 18 of 1993). Civil transactions are governed by UAE Law of Civil Transactions ' Civil Code' (No. 5 of 1985 & No. 1 of 1987) (Whelan, 2011). In the absence of any specific provisions in Civil Code , the Islamic Sharia law will be applied. In matters of procedure, the UAE courts follow the Federal Civil Procedure Law ' Civil Procedure Code' (No. 11 of 1992 as amended). Articles 872 to 896 of the UAE Civil Law 1987 (the " Civil Law") relating to construction works, as well as general maxims and principles set out in the same law, form the basis of the legal framework relating to construction. Also, UAE Commercial Transactions Law provisions would apply to the degree that the parties to a construction claim could be defined as traders conducting commercial business as per Articles 6 and 11.

The general principle of freedom and sanctity of contract is recognized under the Qatar Civil Code and a contract is treated as the law of the contracting parties. Natural and legal persons are free to agree on whatever they desire, provided that their agreement does not conflict with law, public order and morality. Verbal contracts and contracts as a result of conduct of the parties are mostly recognized and are enforceable in court subjected to establishing / proving the contractual-relationship.

The Civil Law also deals with interpretation of contracts, contractual responsibilities, liability for personal acts, and responsibility for acts of third parties, ownership responsibilities, surety, unjust enrichment, types of sale,

lease, insurance, and rights attached to property, land law, mortgage, wills, legacy, privileges, and gains. It also stipulates performance, compensation and compulsory execution, assignment of rights, innovation and impossibility of performance and statutes of limitation.

Contractors are often faced with employer- driven Omission, Suspension & Termination of the Construction Contracts due to financial constraints and other difficulties encountered by Clients and Contractors in Qatar & Middle East in general.

Medium to large scale public works projects procured by Public Works Authority of Qatar (Ashghal) use General Conditions of Qatar (its own spoke form) published by Contracts & Engineering Business Affairs (CEBA) which were updated and reissued on July 2007 prepared by either in-house lawyers or external law firms. The Qatar General Conditions of Qatar is a close resemblance of International Federation of Consulting Engineers (FIDIC) Yellow, Silver or Red Book contracts. The other major projects procured by state affiliated organizations such as Qatar Foundation, Qatar Gas, RasGas, Qatar Water & Electricity board (Kharamaa), New Doha Aiprt Steering Committee use their own bespoke and “ project specific” forms.

Where a project is awarded on a lump sum basis, the 2007 General Conditions of Contract favoured by employers in Qatar places much of the risk for losses on the contractor, except where losses are adequately covered under the amended provisions to the Contract. A reasonably fair assessment of the General Conditions of Contract by many contractors in Qatar is that it heavily favours the employer. While this may be the case, a contractor may

also be entitled to claim equitable relief in accordance with the Qatar Civil Law No. 22 of 2004.

In the above scenario, it is imperative to analyze the rights and entitlements of Clients & Contractors in circumstances arising from Omission, Suspension & Termination of the Construction Contracts under FIDIC 1987 revision 4 & FIDIC 1999 which are base documents for most of the Bespoke Conditions of Contracts in Qatar and its enforcement under the Civil Law of Qatar & U. A. E.

2. Aim

Analyze the legal aspects of Omission, Suspension & Termination of the Construction Contracts under the Qatar & U. A. E Civil Law.

3. Objectives

There are four objectives of this study:

1. To identify the limit of a Contractors' exposure to the Employer in respect of Omission, Suspension & Termination of the Construction Contracts.
2. To identify the limit of Employer's exposure to the Contractor.
3. Analyze the entitlements between FIDIC suit of Contracts and Qatar & U. A. E. Civil Code
4. To determine reasonable solutions and precautions.

4. Research methodology

The following Literature was reviewed during the initially to ascertain the feasibility of conducting a comprehensive research on the subject dissertation.

1. Binding Force of a Contract – Article 171 of Law No. 22 of 2004 – Qatar Civil Code

“ A contract is the law of the contracting parties, and it may not be revoked or amended, except by agreement of both parties or for prescribed by the law” (Portal, 2014).

2. Dissolution of a Contract – Article 183 of Law No. 22 of 2004 – Qatar Civil Code

Article 183 states that “ In contracts binding on both parties and imposing reciprocal obligations (synallagmatic contracts), where one of the parties fails to perform his obligation, the other party may, upon formal notice to the former, demand performance of the contract or its rescission, and may claim any damages caused by such failure to perform” (Portal, 2014).

“ The judge may, mutatis mutandis, determine a period of grace within which the obligor shall perform his obligation. The judge may also reject the application for rescission if the obligation not performed is insignificant compared with the obligations considered in their entirety” (Portal, 2014).

3. Termination of a Contract of Works under Articles 703, 704 & 707 of Law No. 22 of 2004 – Qatar Civil Code

4. Termination of a Contract under Articles 892 & 893 of UAE Federal Law No. 2/87 – The Civil Code
5. Dissolution of a Contract under Articles 185 & 188 of Law No. 22 of 2004 – Qatar Civil Code

Article 185 states that “ When a contract is rescinded, the contracting parties shall be reinstated to the position they were in prior to the date of the conclusion of the contract. If reinstatement is impossible, the court may grant indemnity” (Portal, 2014).

Article 188 states that;

- “ The contracting parties may mutually agree to terminate the contract upon its conclusion, provided that the subject matter of the contract remains in the possession of either party.
- Where the subject matter of the contract is lost, damaged or disposed of in part in favour of a third party, the contract may be rescinded to the extent of the remaining part and the share of the party” (Portal, 2014)

6. Dissolution of a Contract under Article 273 of UAE Federal Law No. 2/87 – The Civil Code
7. Dissolution of a Contract under Articles 267 & 268 of UAE Federal Law No. 2/87 – The Civil Code
8. The binding force of a Contract under Article 172 of Law No. 22 of 2004 – Qatar Civil Code
9. The effect of the Contract under Article 246 of UAE Federal Law No. 2/87 – The Civil Code

10. Ruling issued for the year 2006 by Court of Cassation, Dubai

Literature study and analytical research are my major learning methods which play an important role in this report. Analytical research involves analyzing existing case law, facts and information. The data will be collected from primary/secondary sources, interviews with industry experts and case studies/laws.

Literature study and analytical research have been chosen due to complex laws of the country and its interpretation by the Law experts. However, any analysis contained in this dissertation is the author's own opinion and shall not be construed as evidence in a court of law. This paper does not have any legal or contractual standing in interpreting a binding Contract Document.

5. Scope and Limitation

The building construction contracts stipulate express provisions governing the rights of one or both parties to terminate the contract under certain circumstances. These express provisions are categorized as non-contractual rights and contractual rights to terminate a binding contract. The Non-contractual rights to terminate are defined as;

1. Frustration and this occurs when circumstances rather than the default of contracting parties have intervened to prevent the contract being performed as intended originally. When frustration occurs, further performance of the contract is impossible, illegal or radically changed from what the parties contemplated at the time of signing the contract. The contract is automatically terminated once a frustration event occurs and the parties are absolved from further obligations but

accrued liabilities remain with them. The party who is relying on frustration provisions in the contract must be sure of that a frustration event actually occurred when justifying the ceasing of operations under the contract to avoid being in breach (the contract is more expensive to perform is not a frustrating event). It is prudent that the events stipulated under force majeure clauses should not overlap with the frustration events and the events which are provided & their consequences are stated in the contracts shall also not be considered as frustrating events.

It is imperative to define Force Majeure events in the contract and clause 19.1 of FIDIC 1999 First Edition state that the definition of “ Force Majeure” as;
“ Means an exceptional event or circumstance:

- (a) which is beyond a Party’s control,
- (b) which such Party could not reasonably have provided against before entering into the Contract,
- (c) which, having arisen, such Party could not reasonably have avoided or overcome, and
- (d) which is not substantially attributable to the other Party” (FIDIC, 1999).

Force Majeure events are exceptional events or circumstances as listed FIDIC 1999 below and those satisfy the clause 19.1 of FIDIC 1999 sub-clause (a) to (d) above:

“(i) war, hostilities (whether war be declared or not), invasion, act of foreign enemies,

(ii) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,

(iii) riot, commotion, disorder, strike or lockout by persons other than the Contractor’s Personnel and other employees of the Contractor and Subcontractors,

(iv) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor’s use of such munitions, explosives, radiation or radio-activity, and

(v) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity” (FIDIC, 1999).

2. Repudiation and this occurs when a party to the contract commits a serious breach of contract that entitles the innocent party to consider the contract as terminated with immediate effect and sue for damages due to breach of the contract. The following will be considered as clear repudiation of a construction contract

- Contractor’s refusal to carry out contract scope;
- Vacant the site or un-authorized removal of plant by the contractor;
- Procuring other contractors to carry out the whole or part of the scope of work originally contracted;
- Employer’s failure to give access to the site (possession of the site).

The Contractual rights to terminate are classified as;

1. Termination for Cause and the clauses stipulated in the contract vesting powers/rights to terminate the contract for breaches of specified contractual obligations such as unjustified/ unrecoverable delays attributed non-performance of the works. The parties may exercise their rights to terminate in other circumstances too, such as occurrence of a force majeure event.
2. Termination for Convenience or 'at will' clauses may be incorporated in to construction contract vesting powers to one party to terminate the contract without having to establish any cause or breach for termination for the other party. This clause is very useful in the event that the;
 - the employer changes the use of the land (eg. Condominium development to a hotel development)
 - the employer's inability to secure financing for the whole project or secure anchor tenants
 - the contractor finds the project will be unprofitable or too risky
 - the project has been suspended for a prolonged period with no prospect of it being recommenced.

There is a very close relationship between suspension and termination and, depending on how the clause is drafted. The end result of a suspension clause may be much the same as a termination clause in that either party will have the right to terminate the contract at the end of the agreed suspension period. The justification for suspension clauses will be broadly

similar to termination such as a change of circumstances on the ground that makes continuing with the works impossible in the short term.

Notwithstanding the above, suspension may be used by one party to allow it space to consider how to proceed with a project, which should be acceptable to the other party if kept within bounds.

The scope of this research is to identify the legal provisions to secure the rights and entitlements provided under Qatar Civil Code and UAE Federal Law in Omissions, Suspensions and Terminations and limited to the construction contracts under the jurisdiction of the subject countries.

The main limitation is the Language. The Qatar and UAE Laws are written in Arabic and official translation in English language is not available. The author relies on many unofficial translations of Qatar and UAE Laws for the purpose of this research. Arabic language prevails over the any language in a Court of Law in Qatar and UAE.

6. Conclusion

The Contractor shall be compensated for;

1. Re-measured work done
2. Preliminaries
3. Material delivered / ordered
4. Under- recoveries
5. Costs/increases
6. Removal of Contractor's equipment
7. Repatriation of staff/labour
8. Loss of damage (loss of profit)

9. Costs resulting from suspension

after recovering the following from the contractor

1. Advance Payment
2. Previous payments
3. Employers recoveries

All these compensation and recoveries are stipulated in FIDIC Conditions of Contracts (or amended bespoke versions) and enforceable under Law No. 22 of 2004 – Qatar Civil Code and UAE Federal Law No. 2/87 – The Civil Code. The Contractors (and the Employers) as the case shall be able to seek the solace of Law even if the Contract Agreement they entered in to is heavily bias towards the Employer as the Law of land prevails over any contractual relationship between parties.

7. References

FIDIC. (1999). Conditions of Contract for Construction. In I. F. Engineers, *General Conditions* (pp. 56-58). ISBN 2 – 88432 – 022 – 9.

Partners, S. A.-A. (2014). *Background – Legal System in Qatar* . Retrieved 08 25, 2014, from www.qatarlaw.com: <http://www.qatarlaw.com/background-legal-system-in-qatar>

Portal, Q. L. (2014, 08 25). Law No. 22 of 2004. Doha, Qatar.

Whelan, J. (2011, 07). *The Civil Code*. Retrieved 08 27, 2014, from http://lexemiratidotnet.files.wordpress.com/2011/07/uae-civil-code-_english-translation_.pdf