Construction Law in Qatar and the United Arab Emirates: Key Differences

by MICHAEL GROSE & RAMIZ SHLAH*

ABSTRACT

As Turkish contractors know full well, the United Arab Emirates and the State of Qatar are centres for mega construction projects. States, contractors and consultants, large and small, have sought to participate in the major developments in each country in the hope of realising profits. Often, common law principles are assumed to be applicable by foreign managers and lawyers alike, but each country is governed by a civil law tradition in the style of most Arab states and the influence of the Shariah tradition cannot be ignored in the development of such civil law traditions. The civil codes of each jurisdiction share many similarities, but they are not the same. This article explores some of the key differences in the civil codes of Qatar and the United Arab Emirates relating in particular to construction law matters.

I. INTRODUCTION

Turkey’s relationship with the Gulf Cooperation Council (GCC) has been described as strategically important and part of a foreign policy objective that seeks to achieve zero-problems with neighbours. The GCC is a regional intergovernmental political and economic union consisting of the following member states: Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates. Trade and investment between Turkey, Qatar, the United Arab Emirates (UAE) and the Kingdom of Saudi Arabia (KSA) has been steadily increasing and exceeds billions of US dollars per year. Turkey is not the only country with its eye on the GCC member states; major global players such as the United Kingdom, the United States, Spain, France, Germany, China, Japan and Korea, too, seek to trade and invest in these jurisdictions. This includes companies small and large from around the world given, amongst other things, the major infrastructure development projects in the GCC countries.

Infrastructure development in Qatar and the UAE is progressing at a staggering pace. In 2013–2014, Qatar’s projected expenditure in infrastructure construction was USD 58 billion, and in 2012 the UAE’s infrastructure construction market was valued

* Michael Grose is a partner in Clyde & Co LLP and Head of the firm’s Projects and Construction Group in the Middle East and North Africa. Ramiz Shlah is a Senior Associate in the Projects and Construction Group.

at USD 23.1 billion. 2 Many companies doing business in the GCC region may have operations or active bids in both Qatar and the UAE. As described in more detail below, there are fundamental similarities between the legal systems in Qatar and the UAE, but there are also important differences. This article explores the differences in construction related principles found in the Qatar and UAE civil codes, specifically, Qatar Law No. 22/2004 Promulgating the Civil Code (Qatar Civil Code) and UAE Federal Law No. 5/1985 regarding Civil Dealings (UAE Civil Code).

Prior to identifying the differences between construction related principles in the respective civil codes, it is necessary to provide some background on each of Qatar’s and the UAE’s legislative influences. First and foremost is the role of Sharia’h:

Behind all the secular legislation stands the [Sharia’h] law of Islam ... in any legal problem that arises in these jurisdictions the question must be asked: ‘To what extent if at all, does the [Sharia’h] apply?’ ... the answer may be: ‘Not at all’ – but anyone who does not ask the question, and satisfy himself as to the answer, acts at his peril and at the peril of his clients. 3

Both the constitutions of Qatar 4 and the UAE 5 state that Islam is the religion of the country and that Sharia’h shall be a main source of its legislation. Whilst Sharia’h has a central role in each legal system and is the inspiration for legislation, it is neither directly applicable nor the exclusive source of legislation. The relationship between the constitutional position of Sharia’h and other sources of law in Qatar and the UAE is an interesting area of study which has been explored but remains ripe for further analysis as each country continues to issue various statutes in relation to the role of Sharia’h on specific matters. 6

In practice, Qatar and the UAE have borrowed heavily from the civil laws of other Arab states, and this is seen most significantly in the influence of the Egyptian civil code in each jurisdiction. 7 Both legal systems are therefore indirectly influenced by the French Napoleonic civil law tradition. 8 It is important to note that no single Arab state simply issued a carbon copy of the Egyptian civil code – there are differences in each state as is described in respect of Qatar and the UAE below. 9 Nonetheless, lawyers often refer to

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4 See Article 1 of the The Permanent Constitution of the State of Qatar.


7 A. Shalakany, ‘Sanhuri and the Historical Origins of Comparative Law in the Arab World (or How Sometimes Losing your Asalah can be Good for You)’ in Rethinking the Masters of Comparative Law, ed. A. Riles, (Oxford: Hart Publishing: 2001), 153.

8 N. Saleh, ‘Civil Codes of Arab Countries: The Sanhuri Codes’ Arab Law Quarterly 8, No. 2 (1993): 165.

9 Ibid., 165.
Egyptian case law and Sanhuri’s treatises in judicial submissions and scholarly writings.\textsuperscript{10}

Against this brief backdrop, we set out the key differences between the Qatar and the UAE Civil Codes regarding construction law matters.

\textbf{II. DECENNIAL LIABILITY}

Decennial liability is a statutory, strict liability enacted by Articles 711–715 of the Qatar Civil Code and Articles 880–883 of the UAE Civil Code. It applies to all architects/engineers, supervisory engineers and building contractors in relation to the erection of buildings or other fixed structures. It imposes joint and several liability on these parties for: (i) total or partial collapse; or (ii) structural defects which threaten the stability or safety of a building or fixed structure for a period of up to ten years after handover. The liability attaches regardless of whether these parties were at fault; the employer consented to the erection of the defective building or installation; or the collapse arose from a defect in the land itself.

This liability cannot be excluded or limited by contract, cannot be relied upon by a contractor against its subcontractors, and is generally not covered by standard insurance policies such as Contractor’s All Risk or Professional Indemnity insurance.\textsuperscript{11} However, if an architect/engineer’s work is limited to design and excludes supervision of the carrying out of works, the architect/engineer will only be liable for defects arising from the design.

Both civil codes state that a claim will be time barred after three years from the occurrence of the collapse or the discovery of the defect. Parties must therefore realise that the risk of a claim being made could extend up to the thirteenth year after delivery in cases where, for instance, a defect arises the day before expiry of the ten year time period.\textsuperscript{12}

Whilst the provisions relating to decennial liability in each of the Qatar and UAE Civil Codes are substantially similar, there are three differences.

First, Article 713 of the Qatar Civil Code states that a contractor will only be liable for defects that arise from execution (i.e. not from defects in design) unless the defects ‘are of the kind that should not be unknown to him in accordance with the principles of trade’. There is no similar exemption for a contractor’s liability in the UAE Civil Code.

Second, whilst both the Qatar and UAE Civil Codes limit an architect/engineer’s liability in cases where their works are limited to design, Article 712 of the Qatar Civil Code states that such limitation of liability shall not apply in cases where the defect arises from a method of execution set out by the architect/engineer. There is no similar condition contained in the UAE Civil Code, but it would appear likely that in practice a

\textsuperscript{10} Abdel-Razzak Al-Sanhuri (1895–1971) is a legal scholar who drafted the Egyptian civil code of 1949. He also influenced and/or had an active participation in the preparation of the Libyan, Syrian, Iraqi and Kuwaiti civil or commercial codes. For more information on Sanhuri’s influence, see N. Saleh, ‘Civil Codes of Arab Countries: The Sanhuri Codes’, \textit{Arab Law Quarterly} 8, No. 2 (1993): 161 – 167.

\textsuperscript{11} Contractor’s All Risk insurance usually provides cover for damage to property (e.g. buildings and other structures on the property) and liability arising from third party claims for injury and death or damage to third party property. Professional indemnity insurance covers the cost of compensating clients for loss or damage resulting from the provision of negligent services or advice.

\textsuperscript{12} See Article 714 of the Qatar Civil Code and Article 883 of the UAE Civil Code.
UAE court would find an architect/engineer liable in such circumstances.

Third, Article 711(3) of the Qatar Civil Code states that decennial liability ‘...shall not apply to any right of recourse the contractor may have to subcontractors’. This means that decennial liability is not passed down to subcontractors/subconsultants. Although the UAE Civil Code does not contain similar language, it is understood that in practice a UAE court will not hold a subcontractor/subconsultant to the same strict standard as a main contractor or design consultant.

III. DAMAGES

Damages is another area where a key difference arises between the Qatar and UAE Civil Codes. Both codes allow parties to agree an amount of compensation, i.e. liquidated damages, in advance of the occurrence of loss (e.g. by agreement in a contract or subsequent agreement) save in cases of fraud or gross fault.\(^\text{13}\) However, where parties have agreed an amount of compensation in advance of the occurrence of a loss, both the Qatar and UAE Civil Codes allow courts to reduce the pre-agreed compensation if it is proven that the damages incurred are less than the pre-agreed amount of compensation.\(^\text{14}\)

This is different to a situation where the loss incurred exceeds the pre-agreed amount of compensation. In the Qatari Civil Code No. 22/2004, Article 267, a limitation on damages forms a ceiling, not a floor, whereby the court is not permitted to award damages in excess of the pre-agreed amount. In the UAE Civil Code, however, Article 390 permits a judge to ‘vary such agreement so as to make the compensation equal to the harm, and any agreement to the contrary shall be void’. This means that, in principle, a UAE court could increase or decrease the amount of pre-agreed compensation on application by either party. The courts’ power to vary the agreed amount of compensation is described as arising from ‘the basic rule of jurisprudence ... that compensation must be equivalent to the damage in fact suffered’.\(^\text{15}\)

It is not apparent why the Qatari legislator opted to limit courts’ discretion to increase the pre-agreed compensation, but this provides for greater legal certainty and less legal risk to contractors in Qatar. Whilst there is case law to support UAE courts’ power to decrease the amount of damages payable below the value set out in a liquidated damages clause,\(^\text{16}\) no case law is known to the authors whereby a UAE court has awarded damages in excess of a liquidated damages clause.\(^\text{17}\)

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\(^{13}\) See Article 265 of the Qatar Civil Code and Article 390 of the UAE Civil Code.

\(^{14}\) See Article 266 of the Qatar Civil Code and Article 390 of the UAE Civil Code.


IV. PRIVITY OF CONTRACT/ SUBCONTRACTOR CLAIMS AGAINST EMPLOYER

The common law concept of ‘privity of contract’ is a key characteristic of contract law in such jurisdictions. It means that ‘a contract cannot (as a general rule) confer rights or impose obligations arising under it on any person except the parties to it’.\(^\text{18}\) English law has departed from this strict interpretation by passing the Contracts (Rights of Third Parties) Act of 1999, thereby allowing a third party on whom benefits are conferred to enforce its rights against the party conferring the benefit.

The traditional common law approach to ‘privity of contract’ was not generally adopted in civil law jurisdictions, which instead codified the principle of *stipulation alteri*, i.e. ‘a contract may stipulate performance for the benefit of a third party, so that the third party acquires the right directly to demand performance’.\(^\text{19}\) Article 180 of the Qatar Civil Code and Article 254 of the UAE Civil Code codify this principle by stating that a stipulation in favour of a third party shall confer upon that third party a direct right against the undertaker for the performance of that stipulation in the contract, unless there is a contrary agreement.

However, Qatari law contains another significant exception to the concept of ‘privity of contract’ which goes beyond the traditional rights granted to third parties in civil law. Pursuant to Article 702 of the Qatar Civil Code, subcontractors, employees and labourers are entitled to claim payment directly from employers (bypassing the main contractor) where the amount claimed does not exceed the amount owed by the employer to the main contractor at the time the claim is filed.\(^\text{20}\)

Employers and contractors in Qatar must be aware of this potential liability. If there are subcontractors, upon notification of a claim, the employer and contractor should consider whether to withhold sums payable until such time a court judgment is issued or settlement is achieved for the claim, failing which they risk liability for a double payment. An attachment order can also be obtained preventing the employer or contractor from making any payments until a court judgment is issued or settlement is achieved.

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\(^\text{20}\) Article 702 of the Qatar Civil Code states:

1. The subcontractor and workers who work for the original contractor in the execution of the work shall have a right to claim against the employer for the work directly which does not exceed the amount for which he is in debt to the original contractor from the time when the legal action is brought, and the workers of the subcontractor shall have the same right against both the original contractor and the employer for the work.

2. The subcontractor and the aforementioned employees, when they impose a garnishee lien on the employer for the work or on the original contractor, shall have priority over the amounts payable to the original contractor or to the subcontractor at the time the lien is imposed, and the priority shall apply to each of them in proportion to his right. These amounts may be paid to them directly.

3. The rights of the subcontractor and workers prescribed in this article shall take precedence over the rights of any assignee of the contractor of his right and against the employer for the work.
The ability to make a claim pursuant to Article 702 and to obtain an attachment order preventing payment is a commonly used tactic in Qatar. Its impact on, among other things, the progress of works and cash flow is a serious matter which must be considered by project participants.

V. INTEREST

There is some divergence in the manner in which Qatar and the UAE deal with interest. Both Qatar and the UAE Civil Codes contain similar prohibitions against *riba* in the context of exchange rates and interest. Article 152 of the Qatar Civil Code states: ‘If the object of the obligation is the payment of a sum of money, the debtor is obligated to the amount specified in the contract without a change in its value having any effect, even if they have agreed to the contrary’. The UAE Civil Code contains a similar provision in Article 204. These provisions appear to ‘confirm the concept of *riba* within the ambit of the Code and recognises no exception which might otherwise be made due to modern inflationary circumstances’.

Similarly, both the Qatar and UAE Civil Codes contain anti-usury provisions in respect of lending. Article 714 of the UAE Civil Code states: ‘If the credit agreement provides for a benefit in excess of the essence of the contract otherwise than a guarantee of the rights of the lender, such provision shall be void but the contract shall be valid’. Article 568 of the Qatar Civil Code is effectively the same.

Likely as a result of concerns from the banking and financial community, the UAE Civil Code was amended by the UAE Federal Law No. 1/1987, which provided that commercial transactions would continue to be governed by the laws applicable thereto (which permitted the recovery of interest) until the introduction of the Commercial Transactions Code. The UAE Commercial Transactions Code, which was issued by the UAE Federal Law No. 18/1993, takes precedence over the UAE Civil Code in relation to commercial transactions and explicitly permits interest on delayed payment. In consequence, it is generally accepted that Article 714 of the UAE Civil Code does not apply to commercial transactions.

Whether a construction contract is a commercial transaction is not clearly defined in the UAE Federal Law No. 18/1993, unlike the Qatar Commercial Law No. 27/2006 (Qatar Commercial Code) which explicitly states in Article 4 that contracting activities are commercial. Nevertheless, the general position appears to be that if a transaction is personal or civil for one party and commercial for the other, it is governed by the laws.

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24 See H. Tamimi, ‘Interest under the UAE Law and as Applied by the Courts of Abu Dhabi’, *Arab Law Quarterly* 17, no.1 (2002), 50 for a useful summary of interest under the UAE law.

25 UAE Federal Law No. 18/1993, Articles 77 and 88.
applicable to commercial transactions and that, therefore, a construction contract can be considered a commercial transaction.\(^{26}\)

Where this is the case, the UAE law provides that interest can be charged in accordance with the rate agreed between the parties and if there was no agreement, interest is calculated according to the current interest rate in the market at the time of dealing provided that in such event the rate does not exceed 12 per cent until final settlement of the debt.\(^{27}\) In addition, the law also provides that if the contract includes an agreement on the rate of interest and the debtor is late in making payment, delay interest shall be calculated on the basis of the agreed rate until full settlement of the debt occurs.\(^{28}\) Contractors in the UAE are therefore able to benefit from interest on delayed payments, including in relation to delayed payments in respect of a judgment or award.

As mentioned above, the Qatar Commercial Code states that contracting activities are commercial; however, the Qatar Commercial Code does not explicitly address interest. Banks and financial institutions instead rely on the Qatar Central Bank (QCB) Instructions to Banks, which are issued by the QCB pursuant to its authority under Qatar Law No. 13/2012 (QCB Law). The QCB Instructions to Banks permit commercial banks and financial institutions to charge interest.

With regard to construction contracts that are subject to Qatar law, there is some divergence as to whether the statutory position under the Qatar Civil Code prohibits interest except in relation to loans pursuant to Article 714. Qatar courts have upheld parties’ agreement on rates of interest for late payments in accordance with Articles 171 and 172 of the Qatar Civil Code, but this is not a consistent practice and can depend on the inclination of individual judges hearing the case.\(^{29}\) Whether interest is awarded in accordance with the parties’ agreement is also subject to the court’s overriding authority to nullify provisions it considers contrary to public order or morals.\(^{30}\) In the absence of an express provision in an agreement, no interest on delayed payments would be awarded. Where a court considers an agreed interest rate to be exorbitant there appears to be a risk that a Qatar court may find the provision unenforceable. This appears possible in the UAE as well.

The power of the court to award compensation for harm pursuant to the Qatar Civil Code, as per, for example, Article 256, is also worth noting in this context.\(^{31}\) The value of damages awarded is subject to the discretion of the court and does not arise

\(^{26}\) See Federal Supreme Court decisions No. 290/17 dated 28 November 1995 and No. 287/18 dated 31 March 1996.

\(^{27}\) See Article 77 of the UAE Federal Law No. 18 of 1993.

\(^{28}\) See Article 76 of the UAE Federal Law No. 18 of 1993.


\(^{30}\) See Article 151 of the Qatar Civil Code.

\(^{31}\) Article 256 of the Qatar Civil Code states: ‘If the debtor does not execute the obligation in kind, or delays in executing it, he is obliged to pay compensation for the detriment sustained by the creditor, unless he proves that failure to execute, or delay in execution, was for an external cause in which he played no part’.
from an entitlement to interest but instead from the principle that the delayed payment caused harm to the creditor. In such case, actual loss would have to be claimed in order to obtain relief. This route to claiming damages for delayed payments should not be ignored.

Interestingly, the Qatar Civil Code’s and Qatar Commercial Code’s prohibition and/or silence in respect of interest is in stark contrast to Law No. 16/1971 (Old Qatar Civil and Commercial Code), which was repealed by the aforementioned codes. The Old Qatar Civil and Commercial Code contains various references to the accrual and generation of interest, including the fixing of a ‘legal rate’ of interest at 5 per cent.32

VI. CONCLUSION

The similarities between the Qatar and UAE Civil Codes are abundant, but as seen above, there are some key differences that contractors and consultants should be aware of for the purposes of assessing risk, drafting contracts, subcontracts and performing works. For directors and lawyers who advise companies or clients in one or both jurisdictions, an understanding of the history and development of each legal system and civil/commercial codes will prove invaluable. It cannot be assumed that Qatar, the UAE, the GCC or any Arab state has a civil or commercial code that is the same as another, and by seeking to study the matter comparatively, one gains a deeper understanding of each jurisdiction.

32 See, for example, Articles 336, 340, 413, 414 and 452 of the Old Qatar Civil and Commercial Code.