

The Middle East, Construction and the Law

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As well as increased activity in the private sector, governments across the region are recognising an urgent need for updated social and economic infrastructure in sectors including health, housing, transport, water/wastewater, hospitality and tourism and energy.

Against this backdrop, this article briefly considers some of the key legal characteristics of the Middle East construction market.

Apart from a few exceptions (such as Saudi Arabia and Oman), Middle Eastern legal systems are founded upon principles of civil law (primarily derived from Egyptian law which, in turn, was heavily influenced by the French legal system) and are therefore codified. In the UAE, for example, the UAE Civil Code has a specific chapter entitled “Muqawala”, which contains provisions governing the relationships between the participants in a construction project.

Projects across the Middle East are procured on a variety of bases, including lump sum turnkey, construction management and management contracting variants, EPCM and traditional direct contracting. FIDIC forms of contract (the standard developed by the International Federation of Consulting Engineers) are commonly used as the base project documents but are usually heavily amended to favour the Employer. Additionally, as there are a large number of common law trained lawyers practising in the Middle East, contracts are significantly influenced by common law principles. This creates difficulties as, unless used so widely as to constitute local custom or practice, certain common law principles do not fit neatly under local law and may be unworkable or ultimately, unenforceable.

A good example of this is liquidated damages. In common law jurisdictions, parties are free to commercially agree rates of liquidated damages and the courts will enforce whatever is agreed provided that it is loosely a genuine pre-estimate of the loss suffered. However, in most Middle East jurisdictions, parties may petition the court to either increase or decrease the agreed liquidated damages so as to accurately reflect the true extent of any loss or harm suffered.

The concept of “good faith” is a key area of difference. Although “good faith” has doubtful legal meaning in a common law setting, it is an important codified principle in Middle Eastern civil codes and courts have the power (which they frequently use) to prohibit conduct they consider falls short of the standards imposed by this far-reaching principle of law.

An equivalent remedy to damages in tort for economic loss is generally available while serious complications can arise if a contract is terminated other than by mutual consent, by court order or at law. This has obvious implications for some customary clauses like termination for convenience. There are, of course, many other features of the law in Middle Eastern countries that have an important bearing on matters of contract and law to parties involved in construction projects that we have not touched on this short note.

Differences in concept and approach may come as a surprise to those unfamiliar with the nuances of the Middle East. When things go wrong, how are disputes resolved? Arbitration is the most common form of dispute resolution in contracts involving international parties (Saudi Arabia is a notable exception to this for a number of reasons) and, as well as arbitration pursuant to international rules of arbitration, there are a number of well respected local arbitral bodies including the Dubai International Arbitration Centre and

the DIFC/LCIA Arbitration Centre. In the absence of an arbitration clause, the default position is that disputes are resolved by local courts, where proceedings are conducted in Arabic, in a civil law setting. There is no system of precedent, although decisions of the highest court typically have persuasive authority.

Alternative dispute resolution is in its relative infancy in the Middle East, with methods such as mediation rarely used. There are reasons for this, including a lack of confidence in the application of the concept of “without prejudice”, which is obviously enshrined in common law countries. Methods tend to be generally more conservative than those employed in the common law world.

It is imperative that stakeholders obtain expert local law advice prior to entering into contracts in the Middle East. Naturally, parties should do the same at the earliest possible stage if an existing contractual relationship is turning, or has turned, sour.

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