

# Exclusive remedies clauses: UAE law and the Common Law

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Exclusive remedies clauses frequently arise in construction contracts in the UAE and often prove to be a hotly contested issue. This article is therefore to consider exclusive remedies clauses from a UAE law perspective and, by comparison, briefly sets out the common law position (from where the concept is derived).

## **The potential impact of an exclusive remedies clause**

A typical exclusive remedies clause in a construction contract may read as follows:

“The Employer and the Contractor agree that their respective rights, obligations and liabilities as provided for in the Contract shall be exhaustive of the rights, obligations and liabilities of each of them to the other arising out of, under or in connection with the Contract or the Works. Accordingly, except as expressly provided for in the Contract, neither party shall be obligated or liable to the other in respect of damages or losses suffered by the other which arise out of, under or in connection with the Contract or the Works, whether by reason or in consequence of any breach of contract or of statutory duty or tortious or negligent act or omission.”

Although it is customary for construction contracts to provide that specific remedies apply in certain circumstances (most notably in respect of liquidated damages in the event of delay and/or failure to satisfy certain performance criteria), a contractor is invariably required to discharge a multitude of other fundamental obligations and it is unusual for the contract to specify the remedy for a breach of each obligation.

Accordingly, the effect of a widely drafted exclusive remedies clause can, on the face of it, be dramatic as the contractor may be absolved from liability in the event of breach unless an express remedy is referred to in the contract that applies to the breach in question. Depending on the drafting, this could potentially lead to the employer being required to remedy big ticket items such as structural defects, at its own cost and expense.

Additionally, an employer could be deprived of compensation even if the contract specifies a particular and exclusive remedy for a particular breach if the remedy in question is unenforceable (perhaps on account of unclear drafting).

## **Position under UAE Law**

While Article 258 of the UAE Civil Code provides that contractual provisions should be “given their true meaning” and the principle of freedom of contract generally prevails, Article 31 of the UAE Civil Code provides that this is only the position if a clause does not conflict with a mandatory provision of law.

As such and although much will turn on the relevant drafting, the following provisions place serious doubt over the enforceability of an exclusive remedy clause under UAE law:

- Article 246(2), which states that “the contract shall not be restricted to an obligation upon the contracting party to do that which is contained in it, but shall also embrace that which is appurtenant to it by virtue of the law, custom and the nature of the transaction”, thus suggesting all principles of law apply to contracts and cannot be excluded.
- Article 309.2, which states that “the judge may in all cases, upon the application of either of the parties, vary such agreement so as to make the compensation equal to the loss, and any agreement to the contrary shall be void.” The protection afforded by this article could therefore be invoked if an exclusive remedies clause deprives a party of compensation.
- Article 878, which states that “the contractor shall be liable for any loss or damage resulting from his act or work whether arising through his wrongful act or default or not but he shall not be liable if it arises out of an event which could not have been prevented”. As above, the inclusion of an exclusive remedies clause is contrary to this principle.
- Article 106(2)(c), which states that “the exercise of a right shall be unlawful if the interests desired are disproportionate to the harm that will be suffered by the other”. This is potentially relevant to an exclusive remedies clause as prohibiting the employer from obtaining redress in respect of, say, a defective design is clearly prejudicial to the employer’s interests.

It could also be argued that the use of an exclusive remedies clause to evade liability which would otherwise arise may result in unjust enrichment. This is contrary to Articles 318 and 319 of the Civil Code.

### **Position under Common Law**

The situation regarding the enforceability of exclusive remedies clauses is different under the common law as the usual rules of interpretation apply to exclusive remedies clauses, meaning that the clause will be construed in accordance with its natural and ordinary meaning. As such, provided that an exclusive remedies clause is unambiguously drafted and validly incorporated into the contract, several judgments have confirmed that exclusive remedies clauses are, in principle, enforceable in common law jurisdictions and may therefore extinguish rights that would otherwise be available to the injured party.

The main exceptions to this rule arise if:

- a court considers the exclusion to be unreasonable in which case the clause will be deemed void. However, an exclusive remedies clause will be generally upheld if both contracting parties are commercial entities of relatively comparable bargaining strength and, for this reason, this ground is rarely successfully invoked in practice; and
- the drafting of the exclusive remedies clause is ambiguous. In this situation, the clause will be construed against the party seeking to rely on it (and there are examples of courts being inventive in their approach to circumvent the effect of exclusive remedies as well as caps on liability).

### **Conclusion**

Notwithstanding the questions regarding the enforceability of exclusive remedies clauses in the UAE, we recommend that employers in the UAE always resist their inclusion on the off-chance that such a clause is held to be legitimate and to avoid unnecessary uncertainty. Similarly, contractors should find alternative ways to limit their contractual liability as they may be dangerously exposed if an exclusive remedies clause the contractor is seeking to rely upon is struck out.