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Construction Law 2024

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Kuwait: Law & Practice

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KUWAIT

Law and Practice

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With extensive experience in advising clients in the key Gulf Cooperation Council (GCC) states of Kuwait, Saudi Arabia, Qatar, the UAE, Egypt and Lebanon, the firm offers unique insights for companies seeking quality legal services. Data protection and privacy is an area of special attention for the firm, considering the expansion and revamping of applicable laws and regulations across the GCC.

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1. General

1.1 Governing Law

The principal laws governing the construction market in the State of Kuwait are:

- the Kuwait Civil Code, Law No 67 of 1980 (the “Kuwait Civil Code”);
- the Kuwait Commercial Code, Law No 68 of 1980 (the “Kuwait Commercial Code”);
- the Kuwait Public Tenders Law, Law No 49 of 2016, as amended by Law No 74 of 2019, and its executive regulations (the “Public Tenders Law”); and
- the Kuwait Public Private Partnerships Law, Law No 116 of 2014 (the “PPP Law”).

1.2 Standard Contracts

In Kuwait, standard contracts are commonly used (eg, FIDIC, NEC3) among contractors and employers to facilitate the drafting phase, and to ensure that all parties are following the standard practice for the region as well as globally, with the understanding that one of the parties is usually a foreign entity.

In the authors’ experience, contracts often originate from or are inspired by International Federation of Consulting Engineers (FIDIC) forms, and it is common practice for parties to adopt these forms of contract. Publicly known forms that are often used include the following:

- the Conditions of Contract for Construction (Red Book);
- the Conditions of Contract for Plant and Design-Build (Yellow Book); and
- the Conditions of Contract for EPC/Turnkey Projects (Silver Book).

As for other mega-projects and PPP works, a list of standard contract conditions is published

on the Central Agency for Public Tenders (CAPT) website, showing conditions that must be included in build-and-operate contracts, consultancy agreements, bids and tenders, subcontractors’ agreements and design contracts.

It is critical to note that, while standard contracts are commonly used, Kuwaiti law may differ in the interpretation and enforcement of standard contractual provisions.

2. Parties

2.1 The Employer

The companies and institutions typically involved as employers in construction projects are either wholly or partly state-owned entities or private entities such as commercial and leisure real estate developers, and project companies that are set up for a specific mega-project collaborating with the government (that holds a minority share in the project company).

Employers for construction projects in Kuwait typically include oil and gas, power and water companies.

An employer’s primary rights are:

- to receive the work from the contractor in accordance with the contract;
- to terminate the contract; and
- to recover damages suffered for delay in completion of the works.

Employers often have a right to select the contractor and/or subcontractors; however, most major projects require a fair and non-discriminatory bidding process to ensure equal opportunity, and thus the employers are required to select a bidder based on certain criteria.

Often, employers have a right to issue changes to the works, and contractors often become contractually obligated to proceed with such changes. In such cases, of course, contractors are entitled to a variation in their compensation and schedule to account for the changes made by the employer.

An employer's primary obligations are:

- to issue timely payment for works completed in accordance with the terms of the contract;
- to facilitate access to the site (including obtaining permits, clearances, gate passes, etc); and
- to perform the contract according to its terms, prevailing custom, principles of equity and Kuwaiti legal principles of good faith and honourable dealing.

2.2 The Contractor

The main contractors in Kuwait usually include a mix of local and foreign construction companies. Mega-projects, such as the Al Zor Refinery Project, the Umm Al Hayman Wastewater Project and the Clean Fuels Project, often include foreign partnerships, joint ventures and foreign consortiums.

However, foreign construction companies are expected to play a greater or more direct role within construction projects in Kuwait. This expectation follows recent amendments to Article 24 of the Kuwait Commercial Code and Article 31 of the Public Tenders Law. Under the previous legislation, foreign companies were not able to establish a branch in Kuwait or engage in business activities in Kuwait unless this was through a Kuwaiti agent. Also, in the absence of an exemption from the relevant authority, generally only Kuwaiti individuals or companies were able to submit bids for tenders or contracting.

Under the amended legislation, foreign companies may establish a branch in Kuwait and, through the same entity, engage in business activities in Kuwait without the prerequisite need for a local agent. Additionally, the amended legislation does not limit the submitting of bids for tenders or contracting to Kuwaiti individuals or companies. As a result, foreign entities may submit bids for tenders or contracting.

The effect of these amendments is that foreign construction companies do not need an exemption from the relevant authority to submit bids for tenders or contracting in respect of construction projects, nor do they need, as a precondition, a Kuwaiti partner or agent to submit a bid. With the unrestricted opportunity to bid for tenders or contracting against local entities, it is likely that foreign entities will participate in a greater selection of construction projects in Kuwait. This is in line with the objectives of the amendments, set out in Explanatory Memorandum for Law No 1 of 2024 Regarding Amending Article 24 of the Kuwait Commercial Code and Article 31 of the Public Tenders Law, which provide that authorities are no longer permitted to limit any offering to national or foreign companies. The intended effect is to open the market further by allowing greater and wider participation of foreign investment, which, in theory, should lead to better competition and choices within the market.

While the previous legislation, in like manner to the amended legislation, allowed foreign entities who submit bids for tenders or contracting to be exempt from complying with certain local partnership requirements, the effect of the amended legislation is that foreign entities do not need to submit bids for tenders or contracting in order to establish a branch in Kuwait wherein they can carry out their business activities. This allows foreign construction companies

to facilitate their construction-related business operations in a direct manner, whether in respect of activities under bids for tenders or contracting, or of other activities. Significantly, foreign construction companies may execute, or support their operations for, a contract through their own branch in Kuwait and without local partners such as agents. In relation to the application of the amendments, regulations to come may provide clarification in this respect and in respect of related considerations such as employee sponsorship.

It is common for special purpose vehicles (SPVs) to be set up for large-scale projects to ensure effective risk management; however, the main contractors with the employer will often remain the parent entities. SPVs generally take the form of limited liability companies, but may also take the form of closed or public shareholding companies. SPVs in the construction industry are often created between a local contractor, an international contractor and (for example) a facilities management contractor. It is also common, especially with PPP projects, for employers to partake in the ownership of these SPVs.

For smaller projects, local companies are often assigned the contract.

A contractor's main rights are:

- to receive timely payment for works agreed and additional works approved by the employer, in some cases and as required under the circumstances; and
- to receive extensions of time in the event work is delayed due to a circumstance outside the control of the contractor (eg, force majeure, changes caused or requested by the employer).

A contractor's main obligation is to execute the work in accordance with the contract's requirements and specifications as required by applicable regulations, and to pay its subcontractors for their completed work in a timely manner.

The Kuwait Civil Code also sets obligations on the contractor, such as to remedy defects and to perform the work in accordance with the current usage and within a reasonable time limit as required by the nature of the work, with due consideration of usage in the trade.

The contractor is also obligated to inform its employer immediately about any defects caused or revealed in the course of the work in the materials provided by the employer, or where other elements have arisen which tend to impede performance of the work in appropriate conditions. If the employer provides the contractor with materials, the contractor becomes obligated to act as the safekeeper of those materials, including being obligated to:

- observe technical skills in using such materials;
- be able to account for them; and
- return any surplus material to the employer.

2.3 The Subcontractors

The main contractor will often subcontract parts of the work to specialist subcontractors and, in many cases, will be required to accept subcontractors that have been nominated by the employer. Subcontracting is permitted, provided it is allowed for in the main contract. Given the scale of the projects and the specialist works required, subcontracting is very common, particularly in relation to specialist fields such as:

- design/engineering, enabling and foundation works;

- mechanical, electrical and plumbing works;
- facade works; and
- any specialist systems required for the project.

Subcontractors have the same rights and obligations towards the contractor that the contractor has towards the employer. One key right afforded to subcontractors in Kuwait, in addition to those the contractor has in relation to the employer, is expressly provided for in the Civil Law: the right to obtain payment directly from the employer (from monies owed or due to be owed by the employer to the main contractor). In such cases, where the subcontractor is entitled to monies from the contractor, and the contractor has failed to make payment to the subcontractor, the subcontractor may claim such amounts directly from the employer.

2.4 The Financiers

Relevant institutions that typically act as financiers in a construction project include banks and financing institutions that are well known in Kuwait.

Public bodies are another structure that may be responsible for financing construction projects in Kuwait.

In 2014, the Kuwait Authority for Partnership Projects (KAPP) was established to oversee all PPP projects and to promote private sector participation in infrastructure development. The main aim of the KAPP was to establish a long-term development plan for the country and to attract private sector investors in key strategic industries such as energy, water, transportation and healthcare. In some cases, a governmental entity may take part in financing a construction project.

2.5 The Designer

In Kuwait, various types of companies and institutions may act as designers in a construction project, including architectural firms, engineering firms, design consultancies and (sometimes) specialised design divisions within construction companies.

In general, the rights and obligations of the designer under a construction contract in Kuwait include the following.

- Rights:
 - (a) the right to be paid for their services;
 - (b) the right to have their designs implemented faithfully;
 - (c) the right to intellectual property associated with their designs; and
 - (d) the right to professional indemnity insurance coverage.
- Obligations:
 - (a) the obligation to produce designs that meet the employer's requirements and standards;
 - (b) the obligation to adhere to regulatory requirements and building codes;
 - (c) the obligation to co-ordinate with other project stakeholders; and
 - (d) the obligation to provide accurate and timely design documentation.

In Kuwait, the relationship between the designer, the employer and the contractor involves close collaboration throughout the project's life cycle. The designer works closely with the employer to understand project requirements and objectives, translating them into design concepts and specifications. The contractor relies on the designer's plans and specifications to carry out the construction work accurately. Effective communication and co-ordination between all par-

ties is essential to ensure the successful delivery of the project.

3. Works

3.1 Scope

The scope of work in a construction contract is usually predetermined and agreed upon between the parties in the contract itself, or during the life of the project through additional addendums to the initial scope of work or through change orders.

The programme of requirements and specifications is often built up and assembled by the employer or the consultant in charge, before the project commences. The value-engineering options and specifications are also determined and fixed by the employer, agreed upon and presented to the contractor who will execute and perform them.

3.2 Variations

Procedures for variation orders and changes are usually determined in the contract, in order to allow the parties to the agreement – specifically the contractor – to apply for a change proposal and for the employer to be able to respond by either rejecting or approving this.

In the authors' experience, changes and variations issued by the employer, either by its own demand or by request of the contractor, typically fall within the contractual provision stating and allowing for this. Changes are usually gateways for entitlements to financial adjustments and time extensions. The authors have encountered cases involving claims for prolongation or time extension due to changes or variations that occurred to the provisional turnover schedule stipulated in the contract. In such circum-

stances, time extensions for the completion of the works would be implemented and claims for prolongation costs would take place.

3.3 Design

In colossal construction projects, the design responsibilities are often handled by a design consultant that is engaged by the employer.

3.4 Construction

The divisions of work would be mostly undertaken by two key players: the contractor/sub-contractor and the employer. The responsibility of the employer would typically include payment and financial obligations. The engineer or consultant would mainly be responsible for supervising the execution and performance works. Lastly, the contractor would be mostly or entirely responsible for the execution of the works.

3.5 Site

The accessibility of the site is usually the responsibility of the employer, who is responsible for granting the contractor access to the site within the time required by the programme of the works. The employer is also responsible for informing the contractor of the status of the site, including existing pollution and ground conditions.

Once the site is under the custody of the contractor, the contractor is responsible for the site. When in possession of the site, the contractor is normally responsible for the maintenance of the site, health and safety measures, and the levels of on-site noise and pollution.

With respect to archaeological finds, the party (whether the contractor/subcontractor or the employer) who makes the discovery is responsible for reporting it to the authorities and for informing the contractual parties to ensure that

all works are halted until an investigation has taken place.

3.6 Permits

In general, construction permits are acquired from the Kuwait Municipality, and this acquisition would mainly be the responsibility of the employer.

Further, once the permits have been obtained for the design of the works, the contractor is responsible for obtaining permits for the execution of the works.

3.7 Maintenance

According to the Kuwait Civil Code, amounts due to contractors and engineers who have been entrusted with the erection, reconstruction, repair or maintenance of buildings or other works have a privilege over such works to the extent of the increase resulting from such works and of the value of the immovables at the time of sale (Article 1081 of the Kuwait Civil Code).

The contractor is usually the party responsible for the maintenance of the works. Corrective works during the defect liability period are undertaken as per the division of works in the contract.

3.8 Other Functions

The employer is usually responsible for operation, finance and transfer functions. In certain cases, there may be exceptions for PPP projects or for build, own, operate or transfer contracts.

3.9 Tests

Typically, the process universally used for construction projects when implementing a test for completion of the works is enshrined in the contract, and is agreed upon between the parties prior to starting the works. However, it is

worth noting that many standard construction contracts are inspired from a FIDIC form, which, in the Red Book, provides that tests for completion be undertaken by the engineer in charge, the design consultant or the principal within 14 days from the date following notification.

3.10 Completion, Takeover and Delivery

Once the completion certificate is issued and the completion date arrives, the employer would be invited to take over the works from the contractor. The delivery date is considered as the date on which the takeover occurs, either implicitly or explicitly.

3.11 Defects and Defects Liability Period

There is a decennial liability provision under Articles 692 to 697 of the Kuwait Civil Code, placing joint liability on the contractor and the designer in charge if the subject of the construction project is deteriorated. Specifically, the architect/engineer and contractor are jointly liable for total or partial destruction or damage, and for any defect that threatens the strength and safety of a building or a fixed construction, for ten years from collapse or three years from discovery of defect.

Furthermore, the contract would often include a provision referring to the contractor's obligation to remedy the defects or to complete any remaining works within the scope of works stipulated in the contract.

Also relevant is the concept of *responsabilité décennale*, which originated in the French Civil Code (Article 1792-1) and evolved from a desire to protect building owners who could not ordinarily be expected to possess the technical expertise required to identify defects in design or construction at the point of delivery of a project, particularly where such defects were latent.

4. Price

4.1 Contract Price

Contract payments can generally be categorised into two types: fixed lump sum or remeasurement contracts.

In fixed lump sum contracts, and in accordance with Article 690 of the Kuwait Civil Code, the contractor does not have the right to demand a price increase. This remains the case even if modifications or additions are made to the construction plan, unless such changes are a result of the employer's fault or have been expressly authorised by the employer.

In a remeasurement contract, the value of the work is calculated based on an estimated pre-determined price schedule or Bill of Quantities (BOQ). The BOQ would usually include an extensive inventory outlining the materials, components and labour necessary for the successful execution of the construction project. In that regard, Article 689 of the Kuwait Civil Code stipulates that, if it becomes evident during the execution that it will be necessary to significantly exceed this estimate, the contractor is obliged to promptly inform the employer – and failure to promptly notify the employer would result in the contractor forfeiting the right to claim this increase.

The most frequently used approach for payment is usually tied to the certification of completed work by the contract administrator/project manager/PMC, which would be in accordance with applicable Kuwaiti law (specifically Article 677 of the Kuwait Civil Code). This certification, which is usually followed by an inspection of the finished work, occurs either periodically or at pre-determined milestones or stages as agreed upon beforehand. The value or percentage of the over-

all contract price is usually tied to the completion of the milestone(s) as pre-established within the agreement, and once such milestone(s) and subsequent inspection are completed, a contractor is expected to be paid in accordance with that determined percentage.

4.2 Indexation

In Kuwait, indexation of prices is commonly used in construction contracts to manage the risk of large price fluctuations, especially considering the potential impact of volatile market conditions and inflation.

The risk of large price fluctuations is typically divided between parties through contractual arrangements and mechanisms, such as the following.

Indexation Clauses

Contracts may include clauses that tie the contract price to a specified index, such as a consumer price index (CPI) or a construction cost index. This allows for automatic adjustments to the contract price based on changes in the selected index, thereby mitigating the risk of price fluctuations.

Price Escalation Provisions

Contracts may include provisions that outline how price escalation or adjustments will be calculated and applied in the event of significant changes in market conditions, such as fluctuations in material costs or currency exchange rates.

Risk-Sharing Agreements

Parties may negotiate risk-sharing agreements where both parties agree to share the impact of price fluctuations up to a certain threshold, beyond which one party may bear a larger portion of the risk.

Fixed-Price Contracts Versus Cost-Reimbursement Contracts

The choice between fixed-price contracts and cost-reimbursement contracts can also influence how the risk of price fluctuations is allocated. Fixed-price contracts shift more risk to the contractor; while cost-reimbursement contracts may provide greater flexibility but can expose the employer to more risk.

Overall, the specific allocation of risk for price fluctuations in construction contracts in Kuwait depends on the negotiation and agreement between the parties, with indexation of prices being a common strategy for managing this risk.

4.3 Payment

It is important to note that, in the absence of applicable legal provisions governing due dates of payments, the specific measures and provisions regarding late or non-payment can vary depending on the terms and conditions of the individual construction contract. Parties may negotiate and customise these provisions to suit their particular project requirements.

In government contracts involving large and complex projects, advance payments to the contractor are usually utilised. These payments provide financial support to the contractor to cover initial project costs such as mobilisation, procurement of materials and hiring of labour. Advance payments serve as a form of assurance to the contractor that funds are available to start the project – this is especially the case for foreign contractors.

Throughout completion of the project, the contractor is usually paid through interim payments, as the contract usually defines the percentage of work completion required to trigger an interim payment. These payments allow the contractor

to cover ongoing expenses and ensure a steady cash flow throughout the project.

Delayed payments may occur due to various reasons, such as administrative delays, financial constraints or disputes between parties. In such cases, contractual provisions may specify a grace period or a timeframe within which payments should be made. If payment is not made within the specified timeframe, this may trigger consequences such as interest accrual or the right to suspend work.

That said, Article 110 of the Kuwait Commercial Code stipulates that, if an employer is obligated within a contract to provide payment within an agreed timeframe, they are obligated to provide the contractor with compensation for delay in payment. This compensation takes the form of legal interest, which is fixed at an annual rate of 7% from the due date of the payment. Late payments may also be dealt with by providing the employer with legal notices compelling payment within a specified date, and these may be issued by the contractor or by the competent local courts.

4.4 Invoicing

The specific invoicing method used may vary depending on the terms and conditions of the construction contract. The chosen method should be clearly defined in the contract to ensure transparency and to facilitate smooth payment processes.

Invoicing methods (agreed upon between the parties) may include a delivery of invoices in physical form, usually as hard copies. However, certain contracts may utilise electronic systems, such as ACONEX or Focus, to simplify the document-exchange process, including for the submission of invoices.

5. Time

5.1 Planning and Programme

Planning in construction-related activities and projects would likely involve the planning of the validity of the permits, the accessibility of the site, etc. Categories of permitted construction-related activities and their corresponding licensing requirements depend on the type of project, the height of the building and any internal directives that may be applied by the ministry in charge.

Furthermore, planning would occur in the period before commencing work. Foreign entities seeking to work on construction projects in Kuwait must have a foreign investment licence from the Ministry of Commerce and Industry and a commercial presence in Kuwait. All consultants and contractors must also obtain a classification/licence from the Ministry to carry out the works in Kuwait.

The planning process before or during the construction works also involves various permits, including:

- permits for civil works;
- environmental permits;
- permits related to the roads or key transport routes that will be used by the contractor or subcontractors throughout the project; and
- all other relevant governmental permits.

Upon completion of the works, the contractor would need to request a completion certificate from the employer.

5.2 Delays

In the event of a delay, the obligations of the parties are usually enshrined in the provisions of the contract, stipulating the procedure that

should be followed internally between the contractor and the employer to reach a settlement or to resolve the delay issue.

Further, the contract usually provides that the contractor should notify the employer upon the occurrence or the prediction of a potential delay. The notice should include the amounts that were incurred and the expected costs and time.

Under the Kuwait Civil Code, the primary circumstances where delays are excusable are:

- where the counterparty fails to perform its obligations;
- where the delay is caused by a third party outside the control of the responsible contracting party;
- where an unforeseeable extraordinary circumstance renders the performance of the obligation oppressive, if not impossible; and
- where the delay is caused by a force majeure event.

In Kuwaiti construction practice, there may be excusable and non-excusable delays. When concurrent delays occur, the contractual stipulation would most probably govern the situation.

5.3 Remedies in the Event of Delays

Generally, in Kuwait, the employer would be entitled to remedies in the event of delays if the delays are due to a cause immediately related to a breach by the contractor. The Kuwait Civil Code Article 293 provides that “in the case of impossibility or delay of performance in rem of an obligation, the debtor must compensate the damage resulting therefrom to the creditor, save where the debtor establishes that non-performance or delay of performance was due to a cause beyond his control”.

5.4 Extension of Time

The extension of time would be awarded based on the procedure provided in the contract. In the authors' experience, the extension-of-time request would be submitted by the contractor to the employer, and the employer would need to answer and respond to such notice within a certain period, usually 30 days or 45 days.

The extension-of-time root cause could be changed by law, change orders or variations in general that would considerably affect the provisional turnover dates, the force majeure event or an event that severely impacted the timeline of the project.

Kuwaiti courts would likely dismiss claims that the extension-of-time claim should be raised in a certain period. Even when time limits stipulated in the contract are not respected, the courts have requested common reasons for an extension of time, including:

- adverse weather;
- variations to the works by the employer; or
- difficulties encountered on-site.

5.5 Force Majeure

In some contracts, such as FIDIC standard form contracts, there is an option that allows claiming for a circumstance considered as force majeure. The Kuwaiti legislators have described force majeure and emergency situations as a cause external to the contract. In particular, Articles 214 and 215 of the Kuwait Civil Code provide that a force majeure circumstance is a context where the performance of the contractual obligation is impossible due to an external reason beyond the control of the performing party, and there the contract shall be automatically revoked.

Furthermore, Article 437 of the Kuwait Civil Code specifies that the force majeure event should not be predictable.

As inspired by the French Civil Code, the Kuwaiti legislature establishes that the force majeure circumstance could be traced using a series of criteria or a series of elements, including the following:

- unforeseeability – the event must not have been within the limits of the foreseeability or predictability of a person or of a reasonably diligent individual *ab initio*;
- unavoidable – the circumstance should not have been avoidable or capable of being prevented with duty of care or mitigation;
- impossibility – meaning, in the same vein as the above two factors, that the circumstance giving rise to the force majeure renders the contractual obligations “impossible” to accomplish or execute; and
- the force majeure circumstance is external, meaning that it is out of the hands of either party to the contract.

According to Article 295 of the Kuwait Civil Code, “it is permissible to agree that the obligor will bear liability for *cas fortuit* and force majeure”.

5.6 Unforeseen Circumstances

Issues regarding unforeseen circumstances are governed by the terms of the construction contract and the Kuwait Civil Code. So long as the contractual provisions do not contravene express provisions in the law, they will be upheld.

Various provisions of the Kuwait Civil Code apply to unforeseen circumstances. For example, if, prior to delivery or takeover, the work has perished or sustained damage due to a force majeure event, the contractor may not claim

the agreed consideration or reimbursement of their expenses, unless the employer had at the time of the perishing or damage breached its obligation of taking over the work. Likewise, in such case the employer will not be able to claim the value of the materials provided, unless the contractor was, at the time of the perishing or damage, in default of their obligation to deliver the work and has not established that the thing would have sustained damage had they made timely delivery.

While the Kuwait Civil Code generally prohibits the costs (of the contractor) for completing works from affecting the extent of the contractor's obligations, in the event of an unforeseen extraordinary circumstance which renders the performance of the obligation arising therefrom oppressive (if not impossible) and which would result in a heavy loss to the contractor, a tribunal may reduce the obligation of the contractor, or increase the price to be paid by the employer for the same obligation. Thus, there are circumstances where the employer may have to pay more for the same amount of work, if an unforeseen extraordinary circumstance occurs – such as new tariffs on raw materials resulting in an extraordinary increase of the cost to the contractor.

For events such as force majeure which may be unforeseen, and barring a provision to contrary, harm resulting therefrom excuses the party who would otherwise be liable for such harm caused. For example, if a war broke out and destroyed the contractor's work in progress, thereby causing the contractor to be delayed and the employer to suffer harm as a result, the contractor would not be liable for the employer's harm because their failure to perform the work was the result of a force majeure event.

Finally, as regards recoverable damages arising from a breach of contract, the Kuwait Civil Code provides that the breaching party is liable only for the harm which normally could have been foreseen at the time of entering into the contract, save where the breaching party committed fraud or gross negligence.

5.7 Disruption

Depending on the cause of the disruption to the works, the contractor may be entitled to an extension of time to perform the obligation, as provided for in the Civil Code. However, contracts usually provide for the circumstances in which a contractor may be entitled to this.

While the concept of disruption is not directly addressed, the Kuwait Civil Code excuses performance of an obligation under the following circumstances:

- unforeseeable extraordinary circumstances;
- events of force majeure; or
- barring a provision to the contrary, when the cause of the delay is due to something beyond the control of the contractor, such as *cas fortuit* or an act by the employer or some other third party (see 5.6 **Unforeseen Circumstances**).

The concept of disruption is not expressly recognised under provisions of the Kuwait Civil Code. Experts broadly acknowledge that construction disruption claims are uncommon in Kuwait. A distinction should be made between the disruption concept and the concept of delays. Here there is little overlap, as in Kuwaiti practice and following Kuwaiti precedents there are not many cases focusing on claims that arise due to lack of productivity or inefficiency in the execution of the project.

In such cases, a basic claim for damages must be established. This means that a breach on the part of the employer should be taken into consideration or proven in some way for the court or the arbitral tribunal to establish the disrupting event that caused the damage affecting the contractor. As is the case in most damages claims, the damage must be established and there must be a link between the cause and the damage.

6. Liability

6.1 Exclusion of Liability

The Kuwait Civil Code lists certain liabilities that are mandatory, such as any liability classified as a crime (eg, fraud) gross negligence or involving death of one of the employees.

In accordance with Article 227 of the Kuwait Civil Code, anyone who has committed a wrongful act that caused harm to others is obliged to compensate them, whether the harm is direct (*mubashir*) or consequential (*mutasabib*), even where the actor is not a discrete person.

6.2 Wilful Misconduct and Gross Negligence

The concepts of gross negligence and wilful misconduct exist under Kuwaiti civil law. The Kuwaiti legislature refers to gross negligence as a breach of the contractual relationship and the duty of care, and to wilful misconduct as a breach of the duty of good faith.

The concepts are covered by the legislation governing contracts, usually the Kuwait Civil Code and Kuwait Commercial Code. One point worth mentioning is that the Kuwaiti legislature does not make a distinction between gross negligence and ordinary negligence – see Salama Ahmad, *Notices in Obligation Theory (First Edi-*

tion, Ain Shams Library), page 266, where the Egypt Supreme Court stated that the doctor was required to exercise prudent care which is consistent with medical principle, and so would be liable for professional negligence and ordinary negligence (Egypt Supreme Court, No 461 of Year 36, 21 December 1971, page 1062).

As such, an important example stated in case precedents is the gross negligence of a doctor. This could be implemented in the case of gross negligence of a contractor or subcontractor in a construction project – ie, when a subcontractor commits an error on the construction site due to its gross negligence or due to not adhering to quantum or scientific calculations, if related to a power plant or a water-waste project.

In one case in the Kuwaiti courts, it was held that the doctor must follow the proper diagnostic procedure and undertake the common medical examination. It was also held that the doctor's fault must be obviously proved, and it must be shown that he performed unprofessionally, whether he was unknowing or negligent, contrary to basic and scientific principles of medical treatment (see Kuwaiti Supreme Court Case No 66, 69/2003 dated 27 October 2003; and Kuwaiti Supreme Court Case No 519/2010 dated 20 April 2011).

For the calculation of damages, the measure of relief may differ where the damage resulted from the breaching party committing fraud or gross negligence (see also 5.6 Unforeseen Circumstances).

6.3 Limitation of Liability

The Kuwait Civil Code permits parties to predetermine the measure of relief available to them in the event of a breach of contract resulting in damages suffered (see 5.6 Unforeseen Circum-

stances). However, an agreement will be rendered null if it exonerates a party from liability for an unlawful act *before* the occurrence thereof. In other words, waivers of liability for future acts that contradict express provisions of Kuwaiti law are generally unenforceable.

7. Risk, Insurance and Securities

7.1 Indemnities

In Kuwaiti construction contracts, indemnities are frequently used to manage risk and assign responsibilities among the parties involved. The particular areas for which indemnification may be provided can vary based on the project's nature and the negotiated terms of the contract.

Common subjects for indemnification provisions include the following.

Design or Construction Defects

The contractor may indemnify the employer against any costs, expenses or damages resulting from defects in the design or construction of the project. This includes omissions, errors or failures to meet contractual specifications or industry standards, in accordance with Articles 663 and 665 of the Kuwait Civil Code.

Third-Party Claims

One party may agree to indemnify the other party against any actions, claims, demands or lawsuits brought by third parties related to the construction project. These are especially typical in instances where the performance of the contractor's obligations is delegated or utilises the work of third parties, and where the contractor assumes the responsibility of the third parties' actions and accordingly indemnifies the employer in accordance with Article 204 of the Kuwait Civil Code.

Intellectual Property Infringement

If the project involves the use of intellectual property, one party may indemnify the other party against any claims or damages arising from infringement of intellectual property rights, particularly pertaining to any unauthorised use of background and developed intellectual property.

Environmental/Regulatory Compliance

The contractor may indemnify the employer for any costs, fines or liabilities associated with non-compliance with environmental laws, regulations or permits during the course of the construction project.

Delay Claims

The contractor may indemnify the employer against any costs or damages resulting from delays and other disruptions caused by the contractor's actions or failures to perform according to the contract, in accordance with Article 293 of the Kuwait Civil Code.

7.2 Guarantees

In construction projects in Kuwait, the provision of guarantees can vary, and the subject is often governed by mandatory or regulatory laws, depending on the regulatory sector which the project involves. The following are some typical guarantees used in construction projects in Kuwait.

Performance Guarantees/Bonds

Issued by a bank, these guarantees ensure that the contractor will fulfil their contractual obligations, complete the project as specified and adhere to any expected industry quality standards. If the contractor fails to meet these obligations, the employer can make a claim against the bonds to recover losses.

Retention Guarantees

Also known as security deposits, these may be provided by the contractor to ensure their compliance with maintenance obligations or other imposed obligations after the completion of the project. These guarantees allow the employer to retain a certain percentage of the contractual value until the contractor fulfils their agreed-upon post-completion obligations.

Warranty Guarantees

These are typically provided by the contractor and/or the employer to ensure the quality and performance of the completed work or the equipment used and procured by either party. These guarantees protect the employer or the contractor from defects that may arise during the specified warranty period. If issues occur within the warranty period, the employer/contractor can claim against the guarantee for necessary repairs.

Payment Guarantees

These include payment bonds or guarantees issued by a bank or other financial institution, used by the employer as a form of ensuring that subcontractors, vendors/suppliers and other parties involved in the project will be paid for their services and materials.

Statutory Guarantees

Article 688 of the Kuwait Civil Code provides certain protections and guarantees that if, for any reason, the contract for work is terminated by an employer before completion, the contractor is entitled to compensation. This compensation includes:

- reimbursement for all expenses incurred;
- payment for the value of the work already executed; and

- the profit the contractor would have earned had the work been finished.

7.3 Insurance

Please refer to 7.1 Indemnities.

Other specific types of insurance policies provide coverage for certain aspects of the construction project. The following are some common types of insurance policies taken out in construction contracts in Kuwait.

Contractors' All-Risks Insurance (CAR)

This is a frequently secured insurance policy for contractors, offering protection against physical loss or damage to the construction project. It typically encompasses risks such as fire, theft, vandalism, natural disasters and accidental damage that may occur during the construction phase.

Professional Indemnity Insurance

This is often obtained by design professionals, including architects and engineers. It serves as a safeguard against claims that may arise from errors, omissions or professional negligence in the design or consulting services that the professionals provide.

Employers' Liability Insurance

This is commonly obtained by employers to protect themselves against legal liabilities in the case of workplace accidents, injuries or occupational diseases experienced by employees working on the construction project. This insurance provides compensation to employees affected by such incidents, and covers the associated legal expenses.

Delay in Start-Up (DSU) Insurance

This offers coverage for financial losses that the employer or the contractor may face due to

project start delays resulting from design errors, material supply disruptions or unforeseen circumstances.

7.4 Insolvency

In Kuwait, the specific contractual provisions regarding the consequences of insolvency in a construction contract may include the following.

Termination Rights

Construction contracts typically include provisions that allow the non-insolvent party to terminate the contract in the event of the other party's insolvency.

Step-In Rights

Some construction contracts may include provisions allowing the employer or another party to step in and take over the responsibilities of the insolvent party. This provision enables the project to continue despite insolvency.

Performance Bonds

Performance bonds or guarantees may provide financial security to the employer if the contractor becomes insolvent or fails to fulfil their contractual obligations. In the event of insolvency, the employer may have the right to make a claim against the performance bond to recover losses or secure an alternative means of completing the project.

Assignment of Claims

The contract may include provisions allowing the non-insolvent party to assign any claims or amounts owed by the insolvent party to a third party. This can help protect the non-insolvent party's interests and mitigate the financial impact of insolvency (in accordance with Article 680 of the Kuwait Civil Code).

7.5 Risk Sharing

Risk sharing is not regulated within the law per se; however, as in many other jurisdictions, the sharing of responsibility for certain risks is a common practice in Kuwaiti construction contracts. Generally, the distribution of risk between employers and contractors is influenced by the economic and market conditions prevailing during contractual negotiations. That said, some common risks often shared in construction contracts include the following.

Design Risk

Parties may allocate responsibility for design-related risks such as errors, omissions or inadequacies in the design documentation, which the employer typically bears when providing (eg, in FEED documentation) that the contractor bases their work and costs estimation for completing the project thereon.

Force Majeure Events

Construction contracts often contain provisions addressing force majeure events, and these provisions typically allocate the risk of such events between the parties, specifying which party will bear the additional costs or delays caused thereby. Article 233 of the Kuwait Civil Code limits liability for damages caused by force majeure events; however, Article 295 provides that parties may agree in advance to accept and/or limit liability for damages caused by force majeure events.

Delay and Liquidated Damages

Contracts commonly include provisions primarily placed on the contractor regarding delays extending beyond the agreed-upon timeframe. They may specify the precise calculation method and amount of liquidated damages that the party responsible for the delay must pay.

Site Conditions

Construction contracts typically address the risk of encountering unforeseen site conditions that may affect construction, with provisions usually placed on the employer for providing suitable site conditions.

8. Contract Administration and Claims

8.1 Personnel

Standard construction contracts commonly include provisions related to personnel, as can be observed in various contract templates such as the 1999 FIDIC Red Book. These provisions typically require contractors to:

- ensure that wages paid to their personnel are at least in line with industry standards;
- establish on-site medical staff, first aid facilities, a sick bay and ambulance services as available at all times; and
- implement necessary measures for welfare and hygiene to prevent epidemics.

The Labour Law

In addition, Kuwaiti Law No 6 of 2010 on Labour in the Private Sector (the “Labour Law”) contains dedicated provisions for construction workers, as follows.

Working hours

Articles 64 and 65 of the Labour Law stipulate that workers are prohibited from working for more than 48 hours per week or eight hours per day, except in specific cases as mentioned in the law. During the Holy Month of Ramadan, the working hours per week are reduced to 36.

Overtime

Article 67 of the Labour Law stipulates that overtime work should not exceed two hours per day, 180 hours per year, three days per week and 90 days per year. Workers have the right to provide evidence of being assigned extra work, or to receive overtime pay, which should be 25% higher than their regular pay for the same period.

Public holidays

Article 68 of the Labour Law stipulates that, if the work circumstances require the worker to work on any officially recognised public holiday, the worker has the right to receive double the regular remuneration for that day and should also be provided with another day off as compensation.

8.2 Subcontracting

In accordance with Articles 681 and 682 of the Kuwait Civil Code, possibilities exist under Kuwaiti jurisdiction in relation to subcontractors.

A contractor has the option of delegating the execution of all or part of the work to a subcontractor, unless the contract explicitly prohibits this or the nature of the work requires the contractor’s expertise. The involvement of a subcontractor does not absolve the principal contractor from their obligations towards the client or from their liability for the actions of the subcontractor.

In addition, when carrying out a contract, both the subcontractor and the workers employed by the principal contractor have the right to directly pursue legal action against the employer. However, their claims are limited to the extent of the amounts owed by the employer to the principal contractor at the time the legal action is filed. Similarly, the workers of the subcontractor may also take legal action against both the principal contractor and the employer, but only up to the amounts owed to them.

8.3 Intellectual Property

In Kuwait, intellectual property provisions in construction contracts typically address the ownership, use and protection of intellectual property rights related to the project, specifically the use of any background or developed intellectual property. These provisions specify the ownership of intellectual property and may grant licences or permissions for its use, including any measures to protect the intellectual property from unauthorised use or disclosure.

Construction contracts may also outline obligations for parties to take necessary steps in safeguarding intellectual property rights, and may include confidentiality agreements and non-disclosure clauses. Indemnification clauses are commonly included to protect against intellectual property infringement claims, and the transfer of intellectual property rights upon project completion is often addressed, including the transfer of ownership or usage rights to the employer or relevant parties.

It is also common for designers to provide collateral warranties to third parties (such as funders, purchasers and key tenants) where these warranties serve as a legal agreement between the designer and the third party, providing the third party with certain rights and protections in relation to the design of the project.

9. Remedies and Damages

9.1 Remedies

Please refer to **5.3 Remedies in the Event of Delays**.

The Kuwait Civil Code provides for parties involved in construction contracts to have a range of remedies at their disposal in the case

of a breach. Most commonly, damages can be sought to recover financial losses resulting from a breach, and specific performance may be pursued, whereby the non-breaching party requests that the breaching party fulfil their original contractual obligations.

Additionally, termination of the contract is an option in the event of a material breach, allowing the innocent party to cease their performance under the contract and possibly entitling them to seek damages for any losses suffered due to the breach. Another potential remedy is rectification, which involves requesting that the breaching party correct any defects in or non-conformance with the construction work, to align it with the agreed-upon contractual requirements.

9.2 Restricting Remedies

In Kuwait, it is not uncommon for parties to contractually limit the remedies available in construction contracts. Such limitations are generally permitted provided they are not in violation of any mandatory provisions of Kuwaiti law, and are freely negotiated and agreed upon by the parties.

However, certain statutory limitations on damages are included within the Kuwait Civil Code. Article 303 states that, if it can be proven that the “aggrieved” party did not suffer any damage, the agreed-upon damages shall not be payable. In addition, the court has the authority to reduce the amount of damages if it can be proven that the stipulated damages within the contract were greatly exaggerated or if the obligation has been partially fulfilled. Any agreement that contradicts these provisions is considered void.

In addition, according to Article 304, if the actual harm suffered exceeds the agreed-upon damages, the aggrieved party cannot claim an

increased amount unless they can provide evidence of fraud or serious misconduct.

9.3 Sole Remedy Clauses

In Kuwait, contractual sole remedy clauses are frequently used in construction contracts to limit the available remedies for a party in the case of a breach. While they are generally enforceable, there are instances where their enforceability may be challenged in Kuwaiti courts. Factors that may affect such enforcement include:

- unconscionability;
- fraud or misrepresentation;
- non-compliance with mandatory provisions; and
- the clear and unambiguous nature of the clause.

Enforcement of a contractual sole remedy clause is often subject to the interpretation of the competent court. If a sole remedy clause is found to be unconscionable, excessively unfair or contrary to public policy, a court may refuse to enforce it. Similarly, if a party can demonstrate that the other party fraudulently induced them into agreeing to the clause or made material misrepresentations, the clause may be deemed void.

9.4 Excluded Damages

In Kuwaiti construction contracts, the exclusion or limitation of liability for certain types of damages is a common practice. The specific forms of damages typically excluded can vary based on the terms negotiated between the parties. However, there are several common types of damages that are often excluded or limited in such contracts.

For example, consequential damages, which are indirect or special damages resulting from the

breach, are commonly excluded or limited, as they do not exist and therefore are not enforceable under applicable Kuwaiti law.

In addition, punitive damages, which aim to punish the breaching party for their misconduct, are generally excluded. Such damages extend beyond compensating for actual losses and are not usually permitted under Kuwaiti law; by excluding punitive damages, the focus remains on compensating the injured party rather than on seeking punishment.

9.5 Retention and Suspension Rights

Generally, for foreign entities contracting with local entities in Kuwait, the paying entity is required to withhold 5% from each payment or the total contract value until the recipient provides a valid tax retention release letter (RRL) issued by the Ministry of Finance (MOF). The RRL is granted by the MOF when it is convinced that the taxpayer has fulfilled their tax obligations in Kuwait or qualifies for tax exemption.

9.6 Termination

The Kuwait Civil Code provides for possibilities where a construction contract may be terminated, as follows:

- a contract for work terminates when the specified period for maintenance or additional work expires (Article 684);
- the contract terminates if the performance of the work becomes impossible due to reasons beyond the control of either party (Article 685);
- the death of the contractor automatically terminates the contract if the contractor's personal qualifications or skills were considered in the contract (Article 687); and
- the employer has the right to terminate the contract at any time before completion,

provided they compensate the contractor for expenses, the value of work completed and the expected profit upon completion (Article 688).

10. Dispute Resolution

10.1 Regular Dispute Resolution

Commercial circuit courts are usually regarded as the most competent courts in Kuwait to adjudicate on construction dispute matters.

In the majority of claims related to construction disputes, the trial judge would likely refer the case to an expert from the Ministry of Justice to investigate technical matters of the claim, as the expert would possess the necessary technical expertise and knowledge to assist the judge in reaching a well-informed judgment. The expert is often assigned broad responsibilities, including:

- determining rights and obligations;
- assessing breaches of obligations;
- evaluating defences; and
- determining the extent of damages suffered, if any.

However, the legal aspects of the dispute remain within the judge's deliberation.

10.2 Alternative Dispute Resolution

Kuwait has long recognised the significance of arbitration and has sought to incorporate it into its legal framework, particularly due to the growing importance of arbitration and the expansion of international and local business activities in Kuwait (see Kuwaiti Law No 11/1995 on Judicial Arbitration with Respect to Civil and Commercial Matters, which was enacted to address the evolving needs in this area).

Said law aimed to provide comprehensive coverage of arbitration requirements, authorising the establishment of the Kuwait Commercial Arbitration Centre (KCAC) in 1999 with the primary goal of promoting arbitration as a means of resolving commercial disputes, and which was established to facilitate a flexible and efficient arbitration procedure in Kuwait.

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