UAE Court judgments on construction works

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The Wasel & Wasel team have developed a guide on construction contracts and works from leading court judgment authorities from the UAE Federal Supreme Court, the Dubai Cassation Court, and the Abu Dhabi Cassation Court.

This is a quick reference guide to court judgments addressing matters such as liabilities of employers, contractors, subcontractors, and engineers, issues surrounding decennial liability, variation claims, lump sum, and re-measurable contracts, novation to subcontractors, and liquidated damages.

1. Defining construction contracts and subcontracting.

Federal Supreme Court – Civil and Commercial Judgments. Appeal No. 312 of judicial year 19 dated 01/12/1999:

The text in Article 872 of the Civil Transactions Law that ("contract for work is one by virtue of which one of the parties undertakes to do a piece of work in consideration of a remuneration which the other party undertakes to pay") indicates that the parties to the agreement in the construction contract are the employer and he is the one for whom the work is done.

And the contractor is the one who performs the work, but since the principle is that the construction is not one of the contracts that is based on the reliance on the personality of its parties, the legislator mentioned in the text of Article

890 that the contractor may entrust the implementation of all or part of the work to another contractor if it is not prevented by a condition in the main contract or if the nature of the work requires that the main contract perform it himself, and thus the main contractor – the original contractor – may entrust the implementation of all or part of the work to one or more sub-contractors – the second contractor – and the relationship of the first contractor with the second is regulated by the contract in which the first assigns the second to carry out the work specified for him, which is It is independent of the main contract between the employer and the main contractor, and the law does not require this to be in writing.

2. Construction contracts with supply.

Federal Supreme Court – Civil and Commercial Judgments. Appeal No. 473 of judicial year 26 dated 02/10/2005:

The effect of the text of Articles 872 and 873 of the Civil Transactions Law is that the construction contract is the contract under which one of the contracting parties undertakes to make something or performs work in return for a wage pledged by the other contracting party, and the contractor may be limited to a pledge to provide his work provided that the employer provides the material that the contractor uses or that the contractor may utilize in carrying out the works

And the contractor may pledge to provide the work and the material together, which is known as the “Istisna’a” contract, which is a construction contract on the work and not a sale of something in the future because the subject of the contractor’s obligation is to do a specific work – making the thing required of him.

Without the completion of this work, the contractor does not consider that he has fulfilled his obligation, and if the making of the thing entails that the employer owns it, this does not mean that the contract stipulated ownership from the beginning and that it is, therefore, a contract of sale because the latter's ownership of the thing made by the contractor is nothing but a necessary consequence of the contractor manufacturing for the employer.

3. Employer liability for supply.

Dubai Court of Cassation – Civil Judgments. Appeal No. 36 of 2004 dated 10/24/2004:

It is established in the judiciary of this court in accordance with the provisions of Articles 872, 873, 874, 875, and 878 of the Civil Transactions Law, that a construction contract is a contract whereby one of its parties undertakes to make something or perform a work in exchange for an allowance pledged by the other party.

And that it may also be a limited agreement in that the contractor undertakes to provide the work and that the employer shall provide the material the contractor uses or utilizes in carrying out his work, as long as the contract contains a statement of the material type, capacity, method of performance, duration of completion, and the corresponding allowance.

4. Contractor liability for supply.

Federal Supreme Court – Civil and Commercial Judgments. Appeal No. 410 of judicial year 26 dated 06/16/2008:

Whereas it was decided in the judiciary of this court in accordance with the provisions of Articles 872, 873, 874, 875, 878, 883 of the Civil Transactions Law that a construction contract is a contract whereby one of its parties undertakes to make something or perform a work in exchange for an allowance pledged by the other party, and that as the agreement in the contract may be limited to the contractor's undertaking to provide the work and for the employer to provide the material he uses or uses in carrying out his work, it may include a description of its place, a statement of its type, amount, method of performance, duration of completion, and the determination of the corresponding allowance.

And that in the event that it is stipulated in the contract that the contractor provide all or some of the work material, he shall be responsible for its quality in accordance with the terms of the contract if found, otherwise, according to current custom, provided that the contractor is a guarantor for the damage or loss that resulted from his action, whether through his transgression or negligence.

And the contractor's responsibility is not negated except by proving a foreign cause, and the warranty claim that is filed against the contractor shall not be heard after the lapse of three years from the discovery of the defect.

What is meant by discovering a defect in manufactured things is the real knowledge that surrounds and ascertains the occurrence of the damage, which is what the trial court extracts from the evidence.

5. Delay penalties.

Abu Dhabi Court of Cassation – Civil and Commercial Judgments – Appeal No. 1057 dated 08/02/2011:

As it was decided under Article 874 of the Civil Transactions Law, the location, the kind of work, its quantity, the way it should be performed, and the duration of work must be described, and the remuneration fixed.

And that according to Article 243 of the law, what is stipulated in the contract takes the place of the law for the contracting parties, and they are obligated to fulfill what is required of each of them.

And since that was the case, and the construction contract concluded between the two parties was devoid of a stipulation that the appellant was obligated to pay a penalty for the delay in handing over the building subject of the contract on the agreed-upon time.

And that the contract takes the place of the law for the contracting party, when the Court of Appeal decided to reject the delay penalty, it was because the construction contract did not stipulate the obligation of the contractor to pay delay penalties if the contractor delays in implementing its obligation to deliver on the agreed-upon time.

6. Contractor liability for work.

Dubai Court of Cassation – Civil Judgments. Appeal No. 156 of 2007 dated 11/09/2007:

It is decided in accordance with the provisions of Articles 875/1 and 878 of the Civil Transactions Law – that if the employer stipulates that the contractor submit all or some of the work material, he shall be responsible for its quality in accordance with the terms of the contract, if found, or otherwise according to current custom.

And the contractor shall guarantee what was generated by his work and any damage or loss thereof, whether that is a result of his transgression or negligence or not, and the warranty is void if that results from an accident that cannot be avoided.

7. Works defect liability.

Dubai Court of Cassation – Civil Judgments. Appeal No. 175 of 1997 dated 12/21/1997:

The classification of the cases mentioned in Articles 877 and 888 of the Civil Transactions Law states that if the workmanship is inconsistent with the agreed terms and specifications, the employer may request the termination of the contract if the repair of the work is not possible, but if it is possible, he may ask the contractor to repair the works within a reasonable period.

And if the term has expired and the repair has not been completed, the employer has the right to ask the judge to rescind the contract, and if the contract has not specified a wage for the work, the contractor must be given a similar wage with the value of the materials he provided that the work required.

8. Subcontractor liability before the contractor.

Federal Supreme Court – Civil and Commercial Judgments. Appeal No. 688 of judicial year 24 dated 05/31/2005:

It is established – pursuant to Articles 877 and 890/1 of the Civil Transactions Law – that the subcontractor is obligated to complete the work entrusted to him by the main contractor, and the work must be carried out in the manner agreed upon in

the subcontract and on the terms contained therein.

If there are no agreed terms It is obligatory to follow custom, especially the principles of industry, in accordance with the work done by the subcontractor, and he is also obligated to complete the work within the agreed period with accuracy and following the custom of the craft.

If the subcontractor breaches his obligation to complete the work, violates the agreed terms and specifications, deviates from the principles of the craft, shows a deficiency in his technical sufficiency, mis-selected the material he uses in the work, neglects the usual person's care in carrying out his commitment, or delays the completion of the work without reason, his liability is realized and the main contractor in this case has to either request the specific implementation or request termination.

The subcontractor shall carry out the work within the reasonable period that permits its completion according to the custom of the craft. If he breaches his commitment, violates the agreed terms and specifications, or deviates from the principles of the craft without reason, the subcontractor shall be liable before the main contractor.

9. Contractor, subcontractor and engineer decennial liability.

Abu Dhabi Court of Cassation – Civil and Commercial Judgments. Appeal No. 577 of 2011 dated 08/12/2011:

Whereas the text in Article 878 of the Civil Transactions Law stipulates that the contractor shall guarantee the damage or loss that resulted from his acts and works, whether it was his infringement or negligence or not, and the guarantee shall be void if this results from an accident from which cannot be

avoided.

Article 880 of the same law stipulates that if the object of the construction contract is the erection of buildings or other fixed constructions that the architect/engineer has designed, to be executed by the contractor, under his supervision, they shall be jointly liable, for a period of ten years or a longer agreed period, to indemnify the employer for total or partial destruction of these buildings or fixed constructions and for every defect endangering the solidity and security of the building.

This is unless the two contracting parties agreed that these constructions are meant to stay for less than ten years.

The law indicates that the contractor guarantees the damage or loss that results from his action and work, whether it was his transgression or negligence. Each of which is negatable by the contractor is the contractor can prove a foreign cause, and thus he does not negate the occurrence of the error, but rather negates the causal relationship between him and the damage.

Also, the contractor is the one who is entrusted with the construction of the facilities. The one who demands the guarantee in the construction contract is the employer in this contract. He is the one who suffers damage as a result of the demolition of the building or as a result of the appearance of a defect in the installations that threatens their safety, but the employer is not a creditor of the guarantee if he was an original contractor who contracted with a subcontractor.

The subcontractor is not bound by the warranty towards the main contractor or towards the employer in this case except to the extent required by the general rules, and the

subcontractor’s commitment to the warranty ends as soon as the main contractor takes over the works he has done while enabling him to examine them and disclose what they contain in defects. Hence the subcontractor he is not bound by the warranty if a defect appears within ten years.

The responsibility of the contractor or engineer to pay the compensation is contractual before the employer and may not be used as evidence by others who do not have a contractual relationship with either of them.

Dubai Court of Cassation – Civil Judgments. Appeal No. 6 of 2004 on 20/06/2004:

The text in Articles 880 and 883 of the Civil Transactions Law indicates that the guarantee of the contractor and the engineer who supervised the implementation of the construction is limited to what may be inflicted on it in terms of total or partial demolition or any defects that may appear in it that threaten the durability and safety of the building, and this guarantee does not extend to every defect discovered in the building, unless this defect threatens the durability and safety of the building that has been constructed. Or from the date on which a defect was discovered in the building, whenever this defect threatens its durability and safety.

10. Liability of the architect/engineer.

Federal Supreme Court – Civil and Commercial Judgments. Appeal No. 416 of judicial year 27 dated 31/10/2006

Articles 880 and 881 of the Civil Transactions Law stipulate that the rules of responsibility for the damage of the building in whole or in part and its safety include the architect/engineer and the contractor alike, unless the

architect/engineer’s work is limited to setting the design, so he is only responsible for the defects that resulted from it.

Hence, the warranty of the architect/ engineer is based on a contract concluded between him and the employer that entails his responsibility for design errors or implementation defects, and it is a contractual responsibility established by the text of the law for each construction contract, whether it is stipulated in the contract or not, and that the obligation of the architect/engineer or contractor is a commitment to a result that the construction of the building is sound and solid for a period specified by the Civil Transactions Law, that is ten years after its delivery.

And since the breach of this obligation is based on just proving that the result was not achieved without the need to prove defects.

And that the guarantee to the implementation of construction works is actionable if the presence of the defect appears in the building within ten years from the time of delivery even if the effects of the defect have not been proven and are in dispute, or the actual damage takes place after the expiry of this period.

And that that the guarantee to the implementation of construction works is actionable even if the delivery of the building is acceptable in its apparent condition, or that the defect or demolition resulted from a defect in the land itself, or the employer’s consent to construct the defective buildings or facilities does not exempt the architect engineer and contractor from the warranty.

And that if it becomes clear that the demolition or defect resulted from the fault of each of the architect/engineer or

contractor in causing the damage – taking into account the degree of gravity of this error – and that is if each of them committed a mistake independent of the mistake made by the other, or if the two have committed a common mistake, the responsibility shall be divided between the architect engineer and the contractor if it is proven that the damage arose from the fault of the architect engineer and the contractor in not verifying the safety of the building.

11. Maintenance retention.

Federal Supreme Court – Civil and Commercial Judgments. Appeal No. 201 of judicial year 20 dated 07/03/2000:

It is stipulated in Article 885 of the Civil Transactions Law of 1985 that the employer is obligated to pay the allowance when the contracts are handed over to him, unless the agreement or custom stipulates otherwise.

Also, the maintenance guarantee of 5% of the contract value and for a period of one year from the date of the final receipt, which is customary for construction contracts to stipulate, is provided by the contractor to the employer in order to immediately receive all his remaining entitlements and the purpose of which is to enable the employer to carry out maintenance work if the contractor fails to perform such maintenance, which would be carried out and at the expense of the contractor.

12. Lump sum and re-measurable contracts.

Dubai Court of Cassation – Civil Judgments. Appeal No. 370 of 2005 on 12/05/2005:

What is stipulated in the first paragraph of Article 886 and the first paragraph of Article 887 of the Civil Transactions Law is that if the construction contract is concluded on the basis of an agreed-upon design in return for a lump sum, the contractor may not demand any increase in the sum.

However, if the contract is concluded on a re-measurement basis, then the contractor may request fees for the extra works on the basis of the agreed units.

The basis for the distinction between the construction contract by design or by lump sum and the re-measurement construction contract by analogy is that the first contract (lump sum) in which the wage is set at a total known amount in advance that does not increase or decrease, and that the contract is based on an agreed design, while the second contract (re-measurement) requires that the remuneration is on the basis of am agreed unit.

13. Main contractor variation claims.

Dubai Court of Cassation – Civil Judgments. Appeal No. 68 of 2010 dated 13/04/2010:

The meaning of what is stipulated in Articles 872, 886 and 887 of the Civil Transactions Law – and what has been established by the judiciary of this court – is that the construction contract is a contract whereby one of its parties undertakes to make something or perform a work in exchange for a compensation pledged by the other party.

And that if a contract is concluded based on an agreed design in return for a lump sum, the contractor may not demand any increase in the sum – and if there is an amendment or addition in the design with the consent of the employer, the current

agreement with the contractor regarding this modification or addition shall be taken into account.

And if the contract does not specify sums for additional works, then the contractor is entitled to the same sums with the value of the materials that the contractor provided for the work.

14. Subcontractor variation claims.

Abu Dhabi Court of Cassation – Civil and Commercial Judgments. Appeal No. 573 of 2008 dated 18/12/2008:

Since the text in Article 887 of the Civil Transactions Law states that "1-When a contract is concluded on a lump sum basis according to an agreed plan, the contractor has no claim to an increase in price required for the execution of the plan. 2-If a modification or addition is made to the plan, with the consent of the master, the current agreement with the contractor, as regards such a modification or addition, shall be observed."

Which means that if a construction contract is concluded in which the wage is determined in total on the basis of an agreed upon design that does not increase or decrease, and in which the work is specified in a complete, clear and final manner that includes the required works detailed accurately, the gross total wage agreed upon by the two parties in the construction contract is not subject to modification, neither by increase nor by decrease, provided that the construction contract is concluded between the original employer and the contractor.

But if it is concluded between an original/main contractor and a sub-contractor, the provision of the aforementioned Article

887 does not apply between them, but rather the general rules apply, and the sub-contractor can make a modification in the design after the approval of the original contractor, even with an implicit, unwritten approval, and without the need to agree with him on the extra fee in In return for this amendment, and it is due to him with the extra wage according to the importance of the change and the expenses of the work, and this is due to the fact that Article 887 of the Civil Transactions Law was intended to protect the employer, who is usually a non-technical person with little experience.

As the purpose of the text (Article 887) is not applicable in the relationship between the original contractor and the subcontractor, as they are equal in technical knowledge and experience. It is sufficient in the relationship between them that the general rules apply. This is in accordance with Article 890 of the aforementioned law, where the subcontract is a consensual contract, and the law did not stipulate a specific form for this contract. And that the contract is not considered complete and binding simply by writing down its texts in writing, even if it is signed. Rather, evidence must be established of the convergence of the contracting parties' will on the establishment and enforcement of the obligation.

15. Architect/engineer claims for incomplete work.

Abu Dhabi Court of Cassation – Civil and Commercial Judgments. Appeal No. 245 of 2012 dated 01/10/2013:

As it was established that since the text in Article 889 of the Civil Transactions Law states that: "1-If there were no agreement as to the remuneration of the architect, who made the plans for the building and supervised their execution, he shall be entitled to the remuneration payable for similar work, in accordance with the current custom. 2- If an

occurrence impedes the completion of the work's execution, according to the design he has prepared, he shall deserve the wage according to what he has performed."

Which means that according to the second paragraph of this article, the engineer shall not have the right to his full wage if the work was not completed according to the design that he made, even if it was not by his fault.

But if the work that was not done according to the design he put in due to a mistake on his part, such as the design being defective or not in conformity with the instructions of the employer, or the engineer's delay in submitting it, then he is not entitled to any of his wages.

16. Liability of subcontractor vis the employer.

Federal Supreme Court – Civil and Commercial Judgments. Appeal No. 273 of judicial year 19 on 30/05/1999:

It is established by law that the subcontractor does not have the right to demand from the employer any of what the main contractor is entitled to unless the main contractor assigns him to the employer, but the responsibility of the main contractor remains in place before the employer pursuant to Articles 890 and 891 of the Civil Transactions Law.

Federal Supreme Court – Civil and Commercial Judgments. Appeal No. 457 of judicial year 24 dated 04/26/2005:

The meaning of the text of Articles 891 and 892 of the Civil Transactions Law is that the responsibility of the main contractor remains before the employer who has no direct contractual relationship between him and the sub-contractor,

such as the one that exists between him and the main contractor.

Also, the contract concluded between the main contractor and the subcontractor defines the rights and obligations of each towards the other and the employer cannot argue otherwise unless the main contract stipulates otherwise.

16. Assignment of works by the employer to the subcontractor.

Federal Supreme Court – Civil and Commercial Judgments. Appeal No. 108 of judicial year 22 dated 23/01/2002:

Even if the stipulation of Articles 890 and 891 of the Civil Transactions Law is that there is no direct relationship between the employer and the subcontractor or the second contractor, and that the first main contractor is responsible before the employer, and the subcontractor may not demand anything from the employer that the contractor is entitled to unless the latter assigns him to the employer.

If this assignment is not proven, the subcontractor may not claim any of his rights arising from the subcontract from the employer, except that, according to the general rules of contractual liability, the contractor’s responsibility arising from the construction contract is contractual responsibility, and hence it can be agreed to amend the provisions of that responsibility or what is contrary to it.

Therefore, it is permissible for the contractor to require the employer that the subcontractor be solely responsible in the face of the employer.

It is also permissible, after the subcontract is concluded,

that the employer accept the subcontractor to replace the main contractor in the performance of the work subject of the contract and therefore in all rights and obligations of the contract, and hence this becomes a waiver of the main contract, and this waiver is governed by what the two parties agreed upon, namely the employer and the subcontractor, from the date of that agreement, and the period prior to that remains governed by the subcontract and the general rules of the construction contracts.

Therefore, if the original contractor stops performing his obligations to the subcontractor, and the latter stops carrying out the work, except if the employer asks the subcontractor to continue implementing the contract in return for paying him the compensation due for these works, in this way the subcontract turns into a waiver of the main contract in accordance with the aforementioned rules, and thus there is a direct relationship between the employer and the subcontractor, and both are responsible in facing the other for the rights or obligations that arise from the implementation of the contract or the completion of its implementation after the realization of that waiver.

Which means that the rights of the subcontractor in the period prior to the realization of a claim are directed to the main contractor in his capacity as a debtor, if proven.

It is based on this that it is not permissible to obligate the original contractor to the rights of the subcontractor for the periods before and after the assignment.

17. Force majeure in construction contracts.

Federal Supreme Court – Civil and Commercial Judgments. Appeal No. 213 of judicial year 23 dated 08/06/2003:

The text in Article 894 of the Civil Transactions Law states that: “If the contractor has started the execution of the work and then became unable to accomplish it, for a reason beyond his control, he shall be entitled to value of the completed work, in addition to the expenses disbursed for its execution to the extent of the benefit that the employer derives from such work.”

This means that if the contractor is unable to complete the works that he started to implement for a compelling reason in which he has no hand in, then the contract is nullified and the positions of the parties are contractually dissolved, and the employer must pay the contractor the value of what has been accomplished of those works, and what was spent to implement what was not completed, and that is to the extent of the benefit the employer accrues from these works and expenses.

18. Liquidated damages.

Federal Supreme Court – Civil and Commercial Judgments. Appeal No. 370 of judicial year 20 on 02/05/2000:

The text in Article 390 of the Civil Transactions Law states that (1) the contracting parties may specify the compensation amount by stipulating it in the contract or in a subsequent agreement, taking into account the provisions of the law, (2) the judge may, in all cases, at the request of one of the parties, amend such an agreement, in order to make the amount assessed equal to the prejudice. Any agreement to the contrary is void.

It indicates that the stipulation in the contract on the penalty clause makes the damage actual in the estimation of the contracting parties and does not require the creditor to

prove it, rather the debtor has to prove that no damage has occurred.

Unless the debtor proves that the agreed estimate is exaggerated, in which case the judge may reduce it in proportion to the damage suffered by the creditor.

Federal Supreme Court – Civil and Commercial Judgments. Appeal No. 103 of judicial year 24 dated 21/03/2004:

The implication of the text of Article 390 of the Civil Transactions Law – and according to what was done by the judiciary of this court – is that it is not sufficient to entitle the delay penalties and the agreed compensation – just the presence of the element of error on the part of the debtor with the obligation, but also requires the availability of the element of damage on the side of the creditor.

If the debtor proves the absence of the damage, the delay penalty is forfeited, and the judge may reduce the delay penalty specified in private contracting contracts if it is proven that it is exaggerated, and that the value of the damage is less than the amount of the agreed penalty, because it is determined that the compensation is estimated by the amount of the damage, and since the damage includes what the person affected has suffered as a loss, and what he missed in terms of gain, the trial court is obliged to include in its ruling a statement of the components of the damage that is included in the calculations of that penalty.

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