Dealing with subcontractor disputes

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Introduction

Over the next decade, the construction sector in Qatar will continue to witness a boom in major infrastructure projects – not only in preparation for the 2022 football World Cup (building stadiums and hotels), but also in other fields, such as the New Doha Port project and the Qatar railway project.

Due to the nature of these projects, many voluminous and complex construction contracts involving employers, project managers, contractors and subcontractors have already been concluded or will be concluded in the near future. A substantial increase in construction disputes involving primarily key public employers, project managers, foreign and local contractors and subcontractors can be expected over the next few years.

This update highlights some principles of Qatari law which may apply to these contracts.

Applicable law and jurisdiction

Almost all construction contracts concluded between public employers, project managers and local or foreign contractors are subject to Qatari law. These contracts usually provide for dispute resolution by the local courts or, more frequently in the case of large infrastructure projects, dispute resolution by mediation or international arbitration (e.g., arbitration under the Rules of Arbitration of the International Chamber of Commerce with seat in Doha, Qatar).

Subcontracting

A subcontract is a separate contract between a (general) contractor working under a construction contract for the employer and another contractor. The subcontractor has its own contractual relationship with the contractor and not with the employer. In theory, that contract can be subject to a different law and jurisdiction from the main contract between the employer and the contractor.

Large infrastructure construction contracts with public employers usually provide that a contractor cannot assign works to be performed under the main contract to a third party (subcontractor) without the prior written consent of and approval of the subcontractor by the employer. In these cases, the contractor is also obliged to ensure that the terms and conditions of the proposed contract with the subcontractor comply with and correspond to the terms and conditions of the main contract.

Contractual liability and limitations

Article 171 of the Civil Law provides that contracts are generally binding on the contractual parties only. Parties can agree on the provisions of their contract as long as such provisions are not prohibited by law or contrary to the public order or morals (Article 154 of the Civil Law).

A contractual party is liable for damages resulting from non-performance caused by its defaults and arising from its tortious acts or omissions (a wrongful act committed wilfully or negligence), unless that party demonstrates that it cannot be blamed for the damage suffered by the other party because the failure to perform or the delay in
performance was due to causes not attributable to it or that limited its liability, in case of contributory negligence (Article 256 of the Civil Law).

In its relationship with the employer, a contractor is therefore liable for the agreed performance of the main contract, which includes the work of subcontractor(s) (Article 701/2 of the Civil Law).

As a result, in the event of non-performance, an employer can initiate contractual action against the (general) contractor; it is generally prevented from initiating a direct contractual claim against the subcontractor. Exceptions are made in the case of the subcontractor's negligence (Article 199 of the Civil Law). In such case the employer may initiate a direct claim against the subcontractor, but must prove the existence of negligence by the subcontractor and the relationship between the acts or omissions of the subcontractor and the losses sustained as a result of the subcontractor's acts or omissions.

Disputes

In the event of default by a subcontractor, the employer must first seek compensation for damages from the (general) contractor.

Direct claims by the employer against the subcontractor are possible if a tort is committed by the subcontractor or there are direct contractual relationships between the employer and the subcontractor.

The applicable law and the forum depend on the subcontract or other specific contractual provisions that apply. As stated above, in contracts related to large Qatari infrastructure projects, the place of jurisdiction is likely to be Qatar.

Comment

Given the principle of freedom of contract set forth under Article 171(1) of the Civil Law, parties have a certain flexibility to establish an adequate liability regime through well-drafted provisions. For example, direct claims against subcontractors may be negotiated in cases where the employer requires the issuance of warranties or performance bonds in its favour.

Flexibility may be harder to negotiate in general contracts for larger infrastructure projects, where employers usually have more leverage than contractors.

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