

Construction Contracts and Jordanian Law

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However, mandatory law may also be applicable. In Jordan, the parties' freedom to contract is a well recognised and enforced concept. However, this article considers the extent to which certain mandatory law provisions self apply into the contract.

We consider the most important provisions of mandatory law in the context of construction contracts and those matters that should be borne in mind when negotiating future construction contract with either Jordanian Law as the governing law and/or which are relating to projects in Jordan.

Contract Interest Rates:

Construction contracts always provide for the application of an interest rate in respect of delayed payments, and these are usually set at a high figure to act as a deterrent for any defaulting party.

Jordanian courts generally recognize and uphold parties' agreement regarding the imposition of an interest rate to accrue on payments in the event of a default in payment subject to article 167 of the Jordanian Civil Procedures Law No 24 of 1988, ("**CP Law**") which caps such interest rates at 9%.

Generally, an interest rate on defaulting payments which is higher than 9% will not be enforceable (unless the party is a Bank) and the Court will consider it contrary to 'Public Order and Morals', which may cause difficulties for any arbitration award which is trying to be enforced. This is discussed further below.

Liquidated Damages:

Liquidated damages (also referred to as liquidated and ascertained damages) are an amount of pre-determined damages which the parties designate and set in a contract for the injured party to collect as compensation upon a specific breach by the other party. In other words, liquidated damages are an agreed rate or amount which becomes payable by a party in the event of a breach by that party of the contract.

The rate should be a genuine pre-estimate and not a form of penalty to deter breach. There is no 'penalty' damages concept for contract damages under Jordanian Law. Courts generally award damages which reflect the extent of loss suffered by the injured party, on a compensation for actual damage suffered, rather than punitive basis.

Despite the use of liquidated damages clauses which seek to quantify the 'loss' incurred', under Jordanian Law. Courts generally award damages that reflect the extent of the actual loss suffered by the injured party rather than on a punitive basis.

Accordingly, when seeking to enforce a liquidated damages clause which provides for excessive penalties or fines, the same may not be enforced by Jordanian Courts. In brief, the Courts will consider such clauses as being contrary to 'Public Order and Morals'.

In addition article 364 of the Jordanian Civil Code No 43 of 1976 ("**Civil Code**"), gives a right to either

party to apply to the Court to decrease or increase contractually agreed damages, to be that damage actually incurred and proven.

Contractual liability determined by the Court only covers proven actual loss. Under Jordanian Law, contractual damages will not be due if the debtor is able to establish that the creditor did not suffer any damage, notwithstanding an agreement for penalties in case of default.

Importantly the amount of damages may be reduced if the debtor has established that the assessment was excessive. Where the debtor proves that part of the original obligation has been performed; any agreed damages may be found to be void.

Generally, when seeking to determine actual losses suffered, the Court may, in addition to examining the admitted evidence supporting such claims, seek the assistance of experts. As stated, contractual liability determined by the Court only covers evidenced actual loss [excluding any tortious liability].

3. Limitation of Liability:

Construction projects are often a web of interconnected contracts with different parties which may indirectly affect each other's ability to uphold their contractual obligations. To provide a higher degree of commercial and legal certainty, parties will generally seek to by limiting the scope of what each respective party can claim for by including a broad limitation of liability clause.

It is permissible under the Civil Code for parties to contractually agree to exclude or limit liability. However, parties' freedom to limit said liability does not extend to liability arising from acts of fraud or gross negligence, acts of tort, or any act or omission which fall under the scope of criminal law.

Further, the court, may award loss of profits damages where such damages are caused by a tortious act.

4. Warranty Period/ Decennial Liability

Under Article 788 of the Jordanian Civil Code, the architect/engineer who designed a structure and the contractor who built it, are jointly liable to the employer for any complete or partial collapse and for every defect which threatens the strength and safety of the structure, for a period of ten years from the date of taking over the works, ("**Decennial Liability**").

This mandatory and cannot be excluded by contract but the 10 year period can be longer if agreed.

Additionally, Decennial Liability applies even if the defect or collapse results from a defect inherent in the land itself, and even if the employer has given its consent to the defective construction.

There is a 1 year limitation period under Article 791 of the Civil Code for bringing a claim for damages, which runs from the date of the occurrence of the collapse or discovery of the defect or collapse.

The Civil Code does not define when defects should have been discovered, so 'discovery' in this context may be construed as actual discovery.

This time is in addition to the 10 year period so for instance, where the defect/collapse occurs on the eve of the 10 year period, the Employer. If so would still have 1 year following such an event to bring a claim. Accordingly, it may be said that the contractor and designer can still be liable for decennial liability of 11 years post-delivery.

The architects liability is limited by Article 789 of the Civil Code, where the architect/engineer has prepared the designs only and was not assigned to supervise the execution, to responsibility for the defects in the design, or which result from the design, rather than the defects which results from the method of execution of the design.

Similarly where a contractor who works on a construct only basis under the supervision of an architect or under the supervision of the employer (who has appointed himself in lieu of the architect/engineer), the contractor shall only be liable for defects in the execution and not for the defects in design.

5. Enforcement of Foreign Arbitral Awards:

Arbitration is often the default or go to means of dispute resolution in construction or infrastructure projects. Arbitration arguably grants more practicable benefits than litigation for projects of this nature, most important of which is time efficiency and speed.

For the purposes of foreign arbitration, foreign arbitral awards are granted the same treatment as foreign judicial awards. Jordan is a signatory to the 1958 New York Convention which was ratified in 1979. The enforcement of foreign awards in Jordan is governed by The Enforcement of Foreign Awards Law No.8 of 1952 ("**Enforcement Law**"), subject to fulfilling certain conditions.

In that regard, the Enforcement Law defines a 'foreign award' as *"any award issued by a court outside of the Hashemite Kingdom of Jordan (including Religious courts) relating to civil proceeding and which provides for the payment of monies or in-kind assets or liquidation of accounts and which includes decisions of arbitrators in arbitral proceedings if the award has become, by virtue of the laws of the country which issued the award, enforceable as an award issued by the courts in the aforementioned country"*.

The main condition for the enforcement of a foreign arbitral award in Jordan is the issuance of an exequatur order by virtue of a judicial decision in the country where arbitration was held. However the Jordanian courts may deny the enforcement of a foreign award granted under such exequatur in the following limited cases:

1. The court which issued the foreign award did not have jurisdiction to issue it:

In the sense that the court which issued the foreign award should have the competence to do so, including having both the geographic and specific jurisdiction to determine the case. Further, decisions issued by administrative bodies are not enforceable.

In accordance with Article 7 of the Enforcement Law, the award is not enforceable in Jordan in the following circumstances:

(a) if the defendant did not have his place of business, or was not resident in an area under the jurisdiction of the court; or

(b) if the defendant did not attend the court by his own choice, and has not acknowledged its jurisdiction.

2. The award should be final, binding and enforceable in the country which issued it:

For a decision to be considered final, binding and enforceable, it must not be open to challenge (on whatever grounds and for whatever reason) in the country which issued the decision. Please note that the burden of proof that the foreign award is not binding and enforceable lies with the defendant. If the defendant is able to prove the decision does not satisfy the above conditions, the award is not enforceable. Further, if the award is contested in the country which issued it, the claim to enforce the award before the Jordanian courts is stayed pending the outcome of that appeal or objection in that other jurisdiction.

3. The Defendant must be notified:

Provided that the issuing court had the jurisdiction to hear the case, Jordanian laws further provide conditions as regards notifying the defendant; Article 7 of the Enforcement Law provides that the Jordanian Court can refuse to enforce the award if the defendant was not served notice to attend the court which issued the said ruling, and he did not appear before the said court, despite the fact that he has his place of

business, or is resident in an area under the jurisdiction of the said court. What is crucial here is not whether or not he attended, but rather whether or not he was properly notified, and as such, could have attended the hearing.

4. Reciprocity:

In accordance with the principle of reciprocity of treatment, a Jordanian court may refuse to hear a claim to enforce a foreign award, if the award was issued in a country which does not allow the enforcement of Jordanian awards.

5. Legality:

The award must not have been obtained fraudulently.

6. Public Order and Morals:

The award should not go against the public order and morals of Jordan. This is a wide ambit, under which the Court retains discretion for the nullification of awards.

In light of the above, contractors and employers alike should take the necessary due diligence steps to ensure that their contract and the terms agreed to therein, do not contradict mandatory law, for the purposes of contractual certainty.