



## Assigning Liability for the Grand Mosque Tragedy

Ahmed Baraka and Muhammad El-Haggan

During Hajj Season, one of the cranes used by Saudi Bin Laden Group (SBG) to expand the Grand Mosque of Mecca collapsed, leaving almost 100 dead and 400 injured. SCG is the second largest construction company in Saudi Arabia, and expanding the Mecca Grand Mosque was a prestigious project. After the crane collapse, SBG was immediately excluded from being awarded any new public construction contracts by an order issued from King Salman.

Although an engineer from SBG claimed that the accident was an act of God, the committee responsible for the investigation of the accident suggests otherwise. The committee stated that the crane fell because it was placed in a wrong position during a massive wind. The placement of the boom was not in a position for it to be safe when standing idle. Other professionals suggested that the crane fell backwards because of crane backward instability, which occurs when counterweights are not sufficient to balance the weight of the boom. Furthermore, Liebherr, the Swiss-based company that manufactured the crane involved in the accident, suggested that this specific type of crane (LR-11350 lattice boom crawler crane) should operate at a maximum wind speed of 33 km/h. On the day of the accident, the wind speed recorded over 60 km/h, close to double the recommended wind speed. Accordingly, the committee found SBG responsible, as it did not follow the proper safety instructions and procedures.

The Saudi press agency stated that King Salman ordered transferring all the investigations results to the investigation panel to continue investigating and prepare a final report to submit to the Judicial Authorities.

Although there was no criminal suspicion in the accident, King Salman ordered that SBG executives are not allowed to leave Saudi Arabia until the investigation is completed. The Ministry of Finance and Saudi authorities shall observe the current projects performed by SBG in order to make sure it is properly applying safety measures and precautions.

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## How Fraud Happens in Islamic Finance

Darine Goda

As Islamic finance grows in both size of assets and global reach, it faces new challenges. As seen before with the spread of different financial structures, increased growth leads to increased risk of fraud. What does fraud look like in Islamic finance? Knowing this, how can practitioners protect themselves?

Generally, fraud in Islamic finance happens through several means, and these means are not uniquely Islamic. Upon examining past fraud involving Islamic financial institutions, the most common causes of fraud are negligence of workers, lax security, low ethical standards, and last but not least, failure of supervising officers to prevent fraud. These challenges of corporate governance are shared with conventional financial institutions.

One notable example of how these factors came together was the Dubai Islamic Bank (DIB) fraud that was discovered in mid-2008. Seven expatriate businessmen stole US \$500,000,000 from DIB. These businessmen encouraged the negligence of DIB's compliance department with well-placed bribes as they drafted false documents connected to a series of bogus Shariah-compliant transactions. DIB's primarily Emirati upper management failed to monitor their employees, and the fraud continued for years.

In order to prevent fraud in Islamic finance, banks should strengthen their level of security to detect fraud earlier. Islamic banks need to use the same advanced monitoring techniques as conventional banks. This includes uses existing technology for real-time monitoring, and not waiting for routine auditing to discover fraud.<sup>1</sup> Additionally, there needs to be a way for whistleblowers to report fraud to upper management directly, such as through a hotline.

Ethical solutions are at least as important as technological solutions. Concepts of justice and morality may differ across countries, and any bank or organization may have different nationalities, so ethics training needs to be standardized across an institution. Upper management needs to lead by example in creating a culture of compliance with ethical standards.

When asked why he robbed banks, American criminal Willie Sutton replied, "Because that's where the money is." As Islamic finance grows in value, it will be exposed to more fraud because it is where people increasingly keep their money.

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<sup>1</sup> Albrecht, W. S., and Albrecht, C. C. (2002). Root out financial deception: Detect and eliminate fraud or suffer the consequences, *Journal of Accountancy*, April 2002, 30-34.

## **How to Enforce an Arbitration Award in Egypt**

Ahmed Keshik and Ahmed Khaled Rdwan

Winning an arbitration award in Egypt does not mean that the victor's work is complete. Art. 10-11 of Law 27 of 1994 allow natural and legal to choose to settle their disputes through arbitration instead of litigation. After one party wins an award through this process, Art. 55-58 of the same law set out the procedures the winning party needs to follow to enforce this award.

First, the arbitration panel must deliver to each party a copy of the award signed by the arbitrators within 30 days from the date of issuance of such award. The winning party must insert the award and a copy of it in the language in which it was issued and an Arabic translation of it confirmed from a certified authority if needed.

Second, for the losing party in arbitration, Art. 58/1 provides that an annulment suit must be filed within 90 days of the previous step. The annulment action will be accepted even if it the right to file it is waived by the party before rendering the award, so even a contractual annulment clause cannot protect the winning party from a subsequent annulment suit. If the court finds within 60 days that the annulment claim has significant grounds, it may suspend the execution of the award. If it decides to suspend the execution of the award it may order a monetary guarantee and to decide in the annulment lawsuit within 6 month from the date of issuance of such order.

Third, the president of the competent court will issue the execution order. The winning party must obtain this execution order from the competent court to execute the arbitral award instead of filing a suit requiring the execution. This order can only come after inserting the award and the passage of the time for an annulment suit to be filed.

One cannot dispute the execution order, but one can dispute a rejection of the execution order before the competent court within 30 days from the date of issuance of such rejection. Egyptian law provides an additional safeguard, in that it is required that before the issuance of the execution order that the judge checks whether the award does not include any matters that prevents the execution of the awards.

Receiving an arbitration award in Egypt is a milestone, but a winner should not celebrate quite yet. One who wins an arbitration award must ensure that they insert a copy of the award at an Egyptian court, that the losing side does not successfully annul the award, and that the court issues an execution order. Without following these procedures, an arbitration award in Egypt will not produce a full victory.

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## **New Kuwait Labor Law to ban passport confiscation**

Ahmed Baraka

Companies in Kuwait will no longer be allowed to withhold employees' passports under new labor laws being written, according to *Arabic Daily*. As a new humanitarian approach from the Kuwaiti Government regarding expats living in Kuwait and the injustice that may occur of the abuse of the sponsorship system, a draft resolution is expected to be submitted to the Minister of Social Affairs and Labor and Minister of Planning and Development Hind Al-Subaih this month.

The Sponsorship is a system used to monitor migrant laborers, working mostly in the construction and domestic sectors, in the Gulf region. The system requires all unskilled laborers to have an in-country sponsor, usually their employer, who is responsible for their visa and legal status. But, Sponsors have abused the Sponsorship system by taking away the passports of their workers and abuse them, with little chance of legal repercussions. The system has changed to be a rigid system. Now Kuwait is planning to issue new laws to decrease the control of the Sponsor over his employees or workers. The Public Authority for Manpower (PAM) in Kuwait has issued an administrative Decree No. 842/2015 which contains many regulations aimed to organize the process of the transfer of an employee from one employer or sponsor to another.

According to *Arabian Business*, under Kuwait's planned new law, employees still would be prohibited from leaving the Country without the approval of their sponsor and written travel permit from the newly established PAM. The authority, which was established to help better coordinate labor and expats issues, also is reportedly close to finalizing a new labor contract "unified contract" to come into force at the beginning of 2016.

The new contract will obligate the employer to provide the worker with an air ticket after the completion of the service period. This is in addition to the health insurance and end of service indemnity in accordance with the Labor Law of the Private Sector. The new contract also states that the worker will be eligible for paid 21-day leave to perform Hajj after completion of two years of continuous service, provided the worker is performing Hajj for the first time. The period of the contract will be open or limited as agreed between the employer and the worker. Moreover, if there is any clause in the contract which does not concur with the articles of labor law in the private sector and its decisions, will be null and void. All conflicts arising from the contract will be settled in court.

The advantages of repealing the Sponsorship system include hopefully reducing abuses against expats, and will result in more freedom of movement of the expat workers from one sponsor to another. This freedom should improve working conditions for expats.

The disadvantages of repealing the Sponsorship system include Sponsors who may spend huge amounts of money on training workers who leave after the end of the training period and go to another company. The new system may insufficiently protect employers' investments. Additionally, to keep these mobile workers, the employer to increase his employees' salaries, in order to make sure that they don't leave him.

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## Who is liable for idle equipment cost?

It is rare that a construction contract is suspended without a default from the contractor. However, there are several causes that might force an employer or the engineer to issue a suspension order for the works. For example, an employer might have no other option but to suspend the works due to financial difficulties. In this case, a contractor should not bear the cost impact of this type of risk.

According to Abdel Razak Al Sanhoury's interpretation of the Egyptian Civil Code (ECC), enabling the contractor to perform its contractual obligations is one of the fundamental liabilities of the employer under a construction contract. Accordingly, an employer would be in breach of the contract in case a suspension order is issued without the default of the contractor.

Idle equipment is a major result of a suspension order by the employer or the engineer, and this idle equipment almost always causes additional costs in construction contracts. In case the suspension order was not for reasons related to the contractor, then the employer is liable for compensation to the contractor for such idle equipment costs. Under ECC, the employer is liable for compensation to the contractor against the actually incurred losses (*Art. 221*).

Calculation of Idle equipment costs could differ depending on whether the contractor owns such equipment or is renting them for the execution of the contract. If the equipment is rented, then the idle equipment costs would be the cost of rent of the piece of equipment along the period of suspension. If the equipment is owned by the contractor, then the idle costs would be a combination of several factors and are usually uneasy to prove. In the case *B. Sunley & Co. Ltd v. Cunard White Star Ltd [1940] 2 All ER 97 (England)*, it was held that when equipment is owned by the contractor, the idle costs include depreciation, interest on money invested, costs of maintenance and expenditure of related wages. It is not necessary that all components of idle costs are applicable under Egyptian law, in case the equipment was owned by the contractor, especially when related to interest. In both cases, the contractor will be entitled to the idle costs subject to the submission of sufficient evidence for the incurred costs. In addition, the contractor is obligated to mitigate the incurred losses during the suspension period, in an attempt to decrease such losses and hence, their impact on the employer.

In summary, a suspension order by the employer for reasons not within the contractor's control is a breach of the contract. This provides entitlement to the contractor for compensation against incurred losses. Subject to sufficient evidence, the contractor is entitled to the idle equipment costs during the suspension period.

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## The Limits of Federalism for Ras Al Khaimah

Phil Zager

Although the United Arab Emirates (UAE) is composed of seven emirates, the first sentence of the UAE Constitution, dated December 2, 1971, declares the unity of six emirates. The missing emirate, Ras Al Khaimah (RAK), did not join the UAE until February 10, 1972. In many federal systems, the date of entry is unimportant for how an individual entity relates to the federation. For example, United States law treats Hawaii (admitted to the United States in 1959) the same as it treats New York (admitted in 1788). For RAK, its later entry is indicative of its relationship with the UAE federal government. This article discusses the UAE's federal legal system, how RAK does not quite fit into this scheme, and what this could mean for your business.

Like several other Arab countries, the UAE's legal system is built on a combination of Civil Law and Islamic Law or "Shariah," so its laws are primarily found in detailed codes. The UAE's codes are generally based on Egyptian codes, which are based on French codes. There are three different court systems in the UAE, one for civil matters, one for criminal matters, and one for Shariah matters. The Shariah courts primarily cover family law, divorce, and inheritance among Muslims, but Shariah principles are used when there are gaps in codified law.<sup>2</sup> In the UAE, there is no formal system of precedent, but judgments delivered by higher courts are usually applied by lower courts.

Like in the United States, there are generally parallel court structures both federally and for each emirate, with the Abu Dhabi Supreme Court as the final court of appeal. However, Emirati federal supremacy is incomplete because RAK and Dubai are not part of the federal judicial system. Unlike the other five emirates, Dubai and RAK have their own judicial systems, which are not subject to the review by the federal Supreme Court.

Dubai and RAK follow federal law, so a would-be corporate fraudster could not escape liability under the stricter new UAE Commercial Companies Law. However, because of the unique position of RAK in the UAE's federal judicial scheme, RAK judges are unlikely to rely on precedent from other emirates or the UAE itself. Finally, investors need to know that disputes in RAK cannot be resolved through intervention of the Abu Dhabi Supreme Court.

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<sup>2</sup> Dr. Ahmed Aly Khedr, *UPDATE: Overview of the United Arab Emirates Legal System*, GLOBALEX, March 2014.

## **Does the Soliman Basha Tomb belong to Syria or Turkey?**

Ahmed Radwan

Soliman Basha Tomb is a historical tomb located in Syria, but Turkey maintains sovereignty over it according to a 1921 treaty between Syria and Turkey. Turkey declared that it will take all measures to protect this historical tomb, including moving the tomb from one place to another within Syria. On 22 February, Turkish troops invaded Syria to protect Turkish soldiers there and to move the tomb to another place. Under international law is this an act of aggression or not?

Turkey claims that this is not an act of aggression because, according to Article 9 of the treaty, the tomb of Suleiman Shah, the grandfather of the founder of the Ottoman Empire shall remain the property of Turkey. This grants Turkey sovereignty and the right to appoint guardians to protect it and hoist the Turkish flag there. Moreover, Northern Syria, where the tomb is located, is not under the control of the Syrian government but under the control of ISIS. The Turkish government announced that it would move the tomb from its place to another to protect it from violence from ISIS.

Syria says that what Turkey did is an act of aggression because the 1921 treaty provides Turkish sovereignty over a certain piece of land. This means that Turkey does not have the right to move the tomb from its place to another place within Syria because Syria still has sovereignty. The Turkish announcement to the Syrian government is not enough, since the Syrian government did not approve of this breach of Syrian sovereignty. Moreover, there was no imminent attack on the tomb so the Turkish venture into Syria was unnecessary.

In my opinion Turkey breached Syrian sovereignty, which is considered a breach of article 2 (4) of the UN Charter respecting the sovereignty, territorial integrity and political independence of other States. According to that article states are prohibited from using force except in cases of self-defense in accordance with article 51 of the UN charter. To use the right of self-defense the attack must be imminent as anticipatory self-defense is prohibited. This means that Turkey does not have the right to use force since there is no imminent attack. I prefer the Syrian arguments, although Turkey does have sovereignty over the certain piece of land where the tomb is located. But this does not allow Turkey to move the tomb to another place within Syria without Syrian government permission.

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## The Surprising Reach of FATCA

Eslam Magdy and Muhammad Abdullah

The Foreign Account Tax Compliance Act (FATCA) became law in the United States in March 2010, and its application began on July 1, 2014. As detailed below, FATCA outsources enforcement of US tax law to financial institutions around the world, extending American taxation to new areas. It does so by targeting tax non-compliance by U.S. taxpayers with foreign accounts. U.S. taxpayers are required to report information about certain foreign financial accounts and offshore assets to the U.S. Internal Revenue Service (IRS) and Treasury Department. Under FATCA, foreign financial institutions (FFIs) are required to report information about financial accounts held by U.S. taxpayers and about foreign entities in which U.S. taxpayers hold a substantial ownership interest.

An FFI that does not comply with its reporting obligations is subject to U.S. tax withholding of 30% on certain types of payments. In order to avoid this withholding, an FFI is generally required to collect information about its account holders to determine whether it has any “U.S. accounts” and then to report that information.

FFIs include, but are not limited to depository banks, mutual funds, equity investment funds and most insurance companies. A U.S. account is a financial account maintained by an FFI that is held by certain U.S. persons, including U.S. citizens, those born in America, or those with permanent residence in America through a green card. This includes the over 200,000 Saudi citizens with green cards. U.S. persons also generally include foreign entities that are more than 10% owned by U.S. owners. However, a person does not become a “U.S. person” for this purpose solely as a result of receiving U.S.-source income. An FFI is required to conduct due diligence with respect to its accounts to determine whether it has any “U.S. accounts.” Generally, non-U.S. persons must provide a certification to the FFI to establish foreign status.

The FFI must then report the information on U.S. accounts in one of two ways. Certain countries, including Saudi Arabia, Bahrain, Qatar, Kuwait, and the UAE have entered into or are planning to enter into “intergovernmental agreements” with the IRS. In those countries, the FFIs are to report directly to their own governments, which are then required to provide the information to the IRS. The Egyptian government has not signed an agreement with the US government. However, with the announcement last month that Banque Misr is FATCA-compliant, all of the top-ten Egyptian banks have agreements with the IRS. These banks may be required to withhold 30% on certain payments to account holders if such payees do not provide the requested information. FFIs may also be required to close recalcitrant accounts.

Whether through governmental or bank action, FATCA is expanding throughout the Middle East.

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