

## COMMERCIAL AGREEMENTS: LEGAL RISKS FOR FOUNDERS IN THE UAE

Commercial agreements in the United Arab Emirates (“UAE”) are frequently negotiated under time constraints. Founders focus on closing the deal, quick delivery, and onboarding the supplier. The agreement is generally considered an administrative step, until liability arises.

In case of any disputes, the cause is simply not bad counterparties. It is predictable agreement design gaps: unclear termination mechanics, misaligned liability allocation, unenforceable or incoherent dispute clauses, and performance terms that cannot be measured or proven.

In the UAE, this is amplified by the reality that agreement performance is governed by an overarching duty of good faith, and agreements can carry implied obligations beyond what is explicitly mentioned.

### **1) Termination Clause**

Article 267 of the UAE Civil Code (Federal Law No. 5 of 1985), specifically states as follows:

*“If a contract is valid and binding, none of the contracting parties may revoke, modify or rescind it except by mutual consent, order of the court or a law provision.”*

The aforementioned article of the UAE Civil Code is commonly treated as the baseline rule on cancellation or termination of any agreement under UAE law by stating that a valid and binding agreement is not subject to unilateral rescission, except by mutual consent, an order of the competent court or tribunal, or where cancellation is permitted by law.

Many agreements include terms such as ‘termination for convenience’ or ‘termination for material breach’. However, the clause often fails to define the key parameters in requisite detail, such as, notice, cure periods, consequences, and financial exposure.

In practice, termination clauses fail less because the parties omitted a termination right and more because they did not specify the operational and financial mechanics that make termination workable. A properly drafted provision should address notice clause with precision - identifying the approved method(s) of service, the recipient(s) and authorised representatives, the deemed time of receipt, and the circumstances in which notice is treated as validly delivered. It should also articulate a definitive cure regime, including whether the relevant breach is capable of remedy, the circumstances in which performance may be suspended, adequately define ‘material breach’ in the context of the arrangement, and the period within which the defaulting party must cure the said breach before further rights may be exercised.

Equally, the clause should deal expressly with the consequences of termination. That typically includes obligations relating to handover and transition support, completion or transfer of work-in-progress, the return or orderly transfer of intellectual property, data and materials, and the treatment of repayments, offsets or credits. Finally, termination language should resolve the parties’ financial exposure in advance - clarifying which fees remain due and payable (including accrued charges and any committed minimums), what categories of loss or damages may be claimed, and which obligations survive termination (typically confidentiality, intellectual property, payment obligations accrued, limitations of liability, and dispute resolution). Without these details, termination event becomes driven by interpretation rather than the agreement, and the parties are left litigating process instead of solving the underlying commercial problem.

A founder red flag is a termination clause that simply states that either party may terminate ‘for material breach’ without defining the term, without a cure period, and without an exit protocol - because that is precisely the scenario in which disputes escalate from a commercial disagreement into a costly legal battle.

## **2) Liability Caps and No Liability Clause**

Many founders assume a liability cap is a universal shield. In the UAE, liability caps can be useful, but they must be drafted with an understanding of regulatory constraints and how courts interpret harmful acts.

Article 296 of the UAE Civil Code (Federal Law No. 5 of 1985), specifically states as follows:

*“Any condition purporting to provide exemption from responsibility for a harmful act shall be void”*

The UAE Civil Code under the aforementioned article provides that any clause purporting to exempt from liability for a harmful act is void. In practice, this means a blanket no liability clause, especially one that attempts to wipe away negligence-based exposure, can create enforceability risk.

Articles 390(1) of the UAE Civil Code (Federal Law No. 5 of 1985), specifically states as follows:

*“The contracting parties may fix in advance the amount of damages either in the contract or in a subsequent agreement, subject to the provisions of the law”*

Articles 390(2) of the UAE Civil Code (Federal Law No. 5 of 1985), specifically states as follows:

*“The judge may in all cases, upon the request of one of the parties, vary such agreement so as to make the damages equal to the loss, and any agreement to the contrary shall be void.”*

Article 390(2) operates as a judicial fairness provision to pre-agreed damages arrangements in the UAE based legal agreements. Even where the parties have stipulated a fixed sum, whether framed as liquidated damages, a penalty clause, or an agreed cap on compensation, the court may, upon the application of either party, vary that amount upward or downward so that it corresponds to the actual loss proven; and any clause that purports to exclude or restrict the court’s power to do so is void.

A defensible liability framework in UAE commercial agreements is seldom achieved through absolute exclusions. It is established through calibrated allocation of risk, typically implemented by a liability cap supported by clearly defined carve-outs. The cap should apply as the general rule across most claims, with limited exceptions for categories of conduct and exposure that are not ordinarily intended to benefit from limitation, most commonly fraud and wilful misconduct and, depending on the transaction’s risk profile, liabilities arising from intellectual property infringement or data security incidents. Drafted correctly, this structure ensures the cap functions as a genuine risk boundary and not merely as headline language that collapses under scrutiny.

A recurring drafting weakness arises where indemnity provisions are imported in broad form without alignment to UAE-law expectations relating to fault, causation, and proof of loss. Overbroad indemnities can either erode the cap in substance or create uncertainty as to how risk is to be allocated in dispute resolution. Indemnities are most effective when they are confined to clearly identified risks, allocated to the party best placed to prevent or control those risks, and supported by defined triggers, procedures, and limits that reflect the evidentiary burden likely to apply in enforcement.

The cap should also be commercially coherent and proportionate to the economic structure of the relationship. In SaaS arrangements, caps are commonly linked to fees paid over a defined look-back period, often the preceding twelve months, which aligns exposure with the value exchanged. In supply and services agreements, caps are frequently tied to the agreement value or to the limits of insurance maintained by the supplier where insurance is intended to operate as a primary risk mitigant. In higher-risk operating environments, differentiated caps may be appropriate, separating discrete categories of liability such as intellectual property risk, service credits, and general damages to reflect materially different risk magnitudes and control mechanisms.

A persistent indicator of poor risk allocation is the combination of sweeping exclusions of liability with a broad, unqualified indemnity. That configuration is internally inconsistent: it attempts to disclaim exposure while simultaneously creating an open-ended obligation to compensate the counterparty. In practice, it increases interpretive contestability and performs poorly when the relationship deteriorates and the parties seek to enforce their rights.

### **3) Governing Law and Jurisdiction**

A dispute resolution clause that reads ‘UAE law and Dubai courts’ (or, in some cases, ‘English law and UAE courts’) may be a good choice for local transactions but cross-border agreements often unravel when that drafting is not anchored to practical enforcement. Problems typically arise where the governing law and jurisdiction do not reflect the location(s) of the party’s meaningful assets, or where the clause fails to contemplate the practical route to recovery, namely, whether the outcome will be a court judgment or an arbitral award.

This is a principal reason why sophisticated UAE commercial arrangements frequently adopt arbitration. Arbitral awards, subject to applicable requirements, can be enforced through the international enforcement framework associated with the New York Convention, to which the UAE acceded by federal decree in 2006. In parallel, founders often underestimate how much value is lost when a dispute clause is theoretically sound but operationally unworkable. A clause is only as effective as its implementation: it should be drafted with clarity on process, language, the seat of arbitration, the administering institution and rules, and the availability of interim relief. When these mechanics are left ambiguous, the early stages of a dispute can devolve into litigation over procedure, delaying substantive resolution and increasing cost precisely when the business needs certainty.

Effective dispute resolution drafting begins with a deliberate choice between litigation and arbitration, determined primarily by where the counterparty’s enforceable assets are located and the categories of disputes the relationship is most likely to generate. Where arbitration is selected, the clause should be drafted with operational completeness: it should specify the seat, the administering institution and applicable rules, the language of the proceedings, the number of arbitrators, and the availability of interim or emergency relief. In the DIFC, for example, the arbitration framework sets out defined grounds on which recognition or enforcement may be refused, broadly aligned with the enforcement architecture associated with the New York Convention, which underscores the need for precision at the drafting stage.

Where court litigation is preferred, the same drafting discipline applies. The clause should state clearly whether jurisdiction is exclusive or non-exclusive, identify the competent court with certainty, and include service provisions that are realistic and workable for the counterparty’s place of incorporation and operating footprint. These mechanics materially affect procedural speed, the ability to obtain urgent relief, and the overall enforceability of outcomes.

A recurring drafting weakness is the selection of UAE governing law combined with a foreign court forum with limited connection to the parties or the transaction. While not invariably invalid, this configuration frequently increases procedural contestability and enforcement friction, and is often avoidable through better alignment of governing law, forum, and enforcement strategy.

#### **4) Service Level Agreements (“SLAs”) and Performance**

A significant proportion of commercial disputes arise not from the absence of performance obligations, but from performance language that reads well and yet cannot be substantiated. Phrases such as reasonable efforts, best efforts, deliver promptly, support within a reasonable time, or maintain high uptime may appear commercially sensible, but they are inherently elastic and difficult to evidentially anchor. When service quality deteriorates or delivery outcomes fall short, the customer often discovers that it cannot demonstrate breach with sufficient clarity because the agreement does not establish measurable thresholds, a verifiable source of data, or an escalation pathway that translates operational failure into legal consequences.

Performance drafting is most effective when it is treated as operational design rather than generic legal wording. The agreement should specify the relevant metric, the method by which it is measured, and the authoritative source of truth. Uptime, for example, should be linked to an identified monitoring tool or agreed reporting mechanism; response times should be measured from a defined event within a specified ticketing system; delivery or fulfilment SLAs should identify the starting timestamp, the endpoint, and any excluded events such as force majeure, customer-caused delays, or agreed service windows. The clause should then attach remedies that are proportionate and enforceable, such as service credits, step-in rights, re-performance obligations, and escalation thresholds that trigger termination rights where failures are persistent or material.

A recurring weakness is SLA drafting that contains obligations without a measurement method, without a reporting requirement, and without a remedy, leaving the parties with statements of aspiration rather than enforceable performance standards.

#### **5) Implied Obligations and Good Faith**

Assumptions that contractual obligations are limited strictly to what is expressly written can be problematic in UAE-law governed agreements. The UAE Civil Code, that is, the Federal Law No. (5) of 1985 on Civil Transactions, recognises that agreements must be performed in good faith and that obligations may arise not only from the agreement’s express terms, but also from law, custom, and the nature of the transaction. In practice, this can expand the dispute perimeter. A party may contend that duties of cooperation, disclosure, or coordination were implicit in the relationship, particularly where performance depends on information sharing, approvals, or joint operational execution. In parallel, the exercise of contractual rights may be scrutinised where the manner of exercise is alleged to be inconsistent with good faith, which can become a fact-intensive point of contention in dispute resolution.

Risk is reduced when the agreement makes the operating model explicit. Agreements should allocate operational responsibilities with specificity, including handoffs, approval processes, decision timelines, and dependencies. They should also include governance mechanics suitable for the relationship, such as scheduled operational or steering meetings, named escalation contacts, clear escalation timeframes, and deemed approval constructs where delay would otherwise stall delivery. Ambiguity should be systematically removed from areas where future performance disputes are most likely to hinge on competing narratives rather than objective records. A common weakness is the documentation of high-dependency arrangements, including technology integrations, logistics services, exclusivity structures, or

revenue-share models, without a defined governance framework and without express cooperation obligations, leaving core performance expectations to be reconstructed after the relationship deteriorates.

### **Founder's 10-Minute Agreement Risk Checklist**

If you only do one thing, run this checklist on every material commercial agreement:

- i. **Termination Mechanics:** Notice, cure, exit obligations, commercial unwind.
- ii. **Liability Allocation:** Clear cap, consistent carve-outs, no conflicting exclusions.
- iii. **Indemnities:** Control-based scope, defined triggers, procedure, limits, mitigation.
- iv. **Dispute Framework:** Aligned governing law and forum, enforceable where assets sit.
- v. **Performance Terms:** Measurable SLAs, defined methodology, reporting, remedies.
- vi. **Payment Clarity:** Invoicing, acceptance, timing, set-off, late-payment consequences.
- vii. **Change Control:** Formal variation process for scope, price, timelines, approvals.
- viii. **Intellectual Property and Data:** Ownership, licences, security obligations, return or deletion on exit.
- ix. **Entity and Authority:** Correct contracting party, verified signatory authority, guarantees if required.
- x. **Exit Test:** Ability to terminate within six months without operational disruption or unmanaged exposure.

### **Conclusion**

Well-drafted commercial agreements function as risk allocation instruments as they anticipate predictable failures, allocate decision rights, and protect cashflow, delivery continuity, and conserve reputation and good will of the party.

Remediating any contractual gaps at the drafting stage is materially more cost-effective than attempting to reconstruct rights and obligations in dispute, particularly in high-dependency arrangements such as services, technology implementation, supply chain, and strategic partnerships.

Where helpful, an agreement can be reviewed on a confidential basis with commercial terms redacted, identifying the principal risk exposures commonly missed in founder-led negotiations and proposing tighter clause language aligned with prevailing UAE legal practices.

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