6

Interpretation and Gap Filling by the Courts

6.1 INTRODUCTION

This chapter examines an important, yet relatively obscure dimension in the life cycle of a contract. Whenever the parties, upon formation, disagree about the meaning of a particular term, they will turn to the courts for clarification. Consequently, the courts must determine but effectively interpret/construe the term in question in light of the contract as a whole. The CC sets out several interpretative tools that guide the courts in this process. These consist of literal interpretation, ascertainment of the parties' common intention or their shared subjective understanding, as well as maxims such as the *contra preferentem* rule. Contractual interpretation under the CC is predicated on rules and principles typically associated with the civil law tradition, but there do exist several differences that are peculiar to the CC.[1] A particular form of interpretation is also constituted by the exceptional gap-filling authority of the civil courts, despite the sanctity of party autonomy. The CC allows the courts in exceptional circumstances to intervene in the life cycle of the contract in order to either flesh out an assumed, but not expressed, intention of the parties, or in order to remedy an inappropriate imbalance or an overriding injustice.

6.2 CLARITY OF WORDING

The CC provides only two articles on contractual interpretation, namely 169 and 170. Despite their brevity, they are consistent with the body of practice on

[1] It is taken for granted that the courts must have jurisdiction to accept a request to interpret a contract. Where the same issue has become *res judicata* or is otherwise the subject matter of an arbitral award, the enforcement of which is sought in Qatar, the courts do not possess authority to interpret the underlying contract. Hence, the Court of Cassation's Judgment 33/2008, in *International Trading and Industrial Investment v DynCorp Aerospace Technology* must be seen as aberration that carries no precedential value.

interpretation that is common in both civil and common law jurisdictions. Article 169(1) CC implicitly distinguishes between contracts requiring interpretation from those that do not. A contract whose wording is clear, in that it leaves no doubts about what the parties intended to achieve or how to apportion rights and obligations, shall not be subject to construction by the courts. What is meant by construction in this context, is that the courts must not apply any principle or rule of construction to a contract whose wording is clear and unambiguous. The construction of clear and unambiguous terms dilutes the clarity of such terms and risks altering the parties' intention.[2]

As a result, when the courts are asked to determine the parties' obligation in a contract whose terms are clear and unambiguous, they must apply said terms literally. This should not be confused or conflated with the literal interpretation of contractual terms, which constitutes a method of interpretation.

6.3 LACK OF CLARITY

Not infrequently the parties fail, whether intentionally or inadvertently, to clarify the qualitative or quantitative elements of one or more contractual obligations. When this occurs and one of the parties so demands, the courts will resort to an interpretation of the relevant terms. If the parties perform their obligations, despite an objective lack of clarity, it is presumed that they internalised their understanding of said terms. The following sub-sections discuss several principles of interpretation put forth by the CC in the event that one of the parties requests a judicial construction of unclear terms. Where, however, the terms of a contract are clear, the courts are not permitted to 'interpret' it. They should rely on the relevant clear meaning.[3]

6.3.1 *Literal Construction*

Article 169(1) CC implies that where the terms of a contract are unclear, the intent of the parties may be construed by the courts. In this case, the courts may resort to a literal interpretation of the words used by the parties and ascribe to these words their ordinary meaning. The possibility of a literal construction is mentioned in paragraph 2 of article 169 CC, but not as an autonomous and self-contained method of interpretation. Rather, its application is conditional to other mandatory principles, namely good faith, the parties' common intention and public policy. These will be explored in the next sub-sections.

[2] The Court of Cassation in its Judgment 114/2009 emphasized the sanctity of party autonomy in consonance with the parties' agreement.

[3] Court of Cassation Judgment 8/2016.

As a result, a literal interpretation is only possible where there is no *prima facie* inconsistency with the three principles and assuming that the disputed terms are deemed by the courts unclear.[4] The CC does not provide any indication as to how a literal construction is to be conducted. The authors are not aware of any limitations to the general principles underpinning the literal construction of contracts, and hence, these are part of the CC. More specifically, a) unless otherwise indicated, words and phrases must be construed in accordance with their ordinary meaning; b) a party claiming the existence of a meaning other than the ordinary meaning of a word or phrase must provide evidence of such common meaning; and c) a literal interpretation must not lead to absurd or unjust outcomes.

It is not uncommon for the Court of Cassation to employ a literal construction in order to arrive at the parties' common intention. In one case, the meaning of the word 'hazard' was debated. The Court went on to say that it was well settled that although the hazard linguistically means risk, and the majority of jurists identified it as associated with hidden consequences – and as additionally forbidden by the Shari'a – this was nonetheless the meaning intended in a contract whose main object was the taking of risks.[5]

6.3.2 *The Parties' Common Intention*

Article 172 CC is not particularly useful for the purposes of interpreting what the parties intended, but only for assessing whether the parties perform their obligations in good faith once the contract has come into operation. The interpretation of contracts by its very nature concerns the parties' subjective intention when drafting their contract, and this process predates their respective performance. As a result, it is important for the courts to assess the parties' true intention prior to the formation of the contract, at a time when they were putting words on paper, although this process does not fall within the sphere of contractual interpretation. Article 169(2) CC demands that construction must be predicated on the 'common intention' of the parties:

> … without restriction to the literal meaning of the words, taking into account the nature of the transaction as well as the honesty and confidence that should prevail between the parties in accordance with commercial custom.

In line with transnational practice, the parties' common intention is imputed by the courts and is generally demonstrated by reference to objective standards

[4] Court of Cassation Judgment 392/2015.
[5] Court of Cassation Judgment 87/2010.

under the particular circumstances of the parties. There is no indication that the situation is any different in the Qatari CC.[6] The parties' common intention may just as well be demonstrated by what the contract aims to achieve, in which case the individualistic pursuits of one of the parties, contrary to the expressed common pursuit, will not prevail over the common intention. Where the parties' common subjective intention is not susceptible to accurate verification (and it usually will not be), then such common intention will be inferred on the basis of the average person under the circumstances of the parties.[7] Article 169(2) CC makes the task a lot easier for the courts by adding another possible inference as to the parties' common intention, namely prevailing commercial custom.[8] The importance of this admonition here is that the courts are justified in inferring the parties' common intention from private instruments reflective of commercial custom relied upon, directly or indirectly by the parties, such as the UNIDROIT Principles of International Commercial Contracts or the FIDIC rules. In the absence of such admonition, reliance on commercial custom as an interpretative device would be arbitrary and subject to appeal and cassation. As already stated in the previous section, the courts' pursuit of the parties' common intention must not deviate from the apparent meaning of the terms of the contract and associated documents, without, however, being restricted to what is indicated by a specific phrase or words.[9]

Qatari courts all the way to the Court of Cassation employ standard language to emphasise the 'complete' authority of the trial court to interpret both the contract and related documents in order to ascertain the common intention of the parties.[10] As will become evident in a following sub-section relating to the permissibility of all probative evidence, the courts are under an obligation 'not to deviate from the apparent meaning of the terms of the contract or other written documents and should consider what a particular expression or phrase therein truly indicates. The courts must be guided by the nature of the transaction and the degree of trust expected, in accordance with the current custom in

[6] In its Judgment 86/2008, the Court of Cassation was asked to determine whether the parties to a contract providing for arbitration held the same intention following two addenda to their initial contract, one of which clearly opted for litigation. The Court of Cassation held that the lower court was entitled to infer the parties' intention in a manner that it is more fulfilling to their purpose, on the basis of tolerable grounds and without transcending the apparent meaning of words.

[7] Art 4.1(2) UNIDROIT PICC.

[8] This is common to all legal systems, e.g. s 346 of the German Commercial Code states that 'due consideration shall be given to prevailing commercial custom and usages concerning the meaning and effect of acts and omissions among merchants' and Art 1511(2) of the French CCP, which states that tribunals 'shall take into account trade usages'.

[9] Court of Cassation Judgment 5/2012.

[10] Court of Cassation Judgments 44/2010; 87/2010; 113/2012; 53/2012; 40/2013; 394/2015.

transactions'.[11] Where the courts in ascertaining the parties' common intention determine that the apparent meaning of contractual terms is different to the parties' common intention, they are bound to fully justify how the non-apparent meaning best reflects the parties' common intention.[12] Hence, the overall context of the parties' contractual relationship is central to the construction of the parties' common intention.[13] Under no circumstances should the courts exceed the explicit statement or words in the parties' contract.[14] The Court of Cassation has emphasised that the courts should not put too much emphasis on the meaning of a specific sentence, but on the overall meaning of all its sentences and conditions, guided by the nature of the transaction and the honesty and trust that should guide the parties in the fulfilment of their transaction.[15]

6.3.3 *Shared Subjective Understanding*

The parties' common intention is different from their understanding of a word or term. While there might be no doubt about their common intention as a whole, the parties may well differ about their understanding of a particular word or term. Although the CC does not specifically address this issue, it does clearly stipulate that the literal interpretation of words or terms does not supersede the parties' common understanding. Where a party intended a crucial word or term to possess a particular meaning and, at the time of conclusion of the contract, the other party could not have been unaware of the first party's intention, the first party's intention/understanding of that word or term prevails.[16] Where the second party's intention was different to that of the first party and the second party could not have been aware of the first party's intention, the contract lacks a common intention, and hence, it has not been properly formed.

6.3.4 *Interpretation of Imbalanced Contracts: The* Contra Preferentum *Maxim*

Contractual fairness requires appropriate construction/interpretation by the courts in order to counter the deficiencies associated with the incorporation problem and the use of standard terms. Qatari law has adopted most

[11] Court of Cassation Judgment 219/2011.
[12] Court of Cassation Judgments 23/2012; 323/2014; 18/2015.
[13] See Court of Cassation Judgment 126/2013, where it was held that the courts must be led by what is stated in the contract as a whole and the circumstances of its issuance; see also Court of Cassation Judgments 120/2014; 80/2015 and; 437/2018.
[14] Court of Cassation Judgments 82/2011 and 84/2011.
[15] Court of Cassation Judgment 219/2012.
[16] See Art 4.1 UNIDROIT PICC.

construction principles developed in the common and civil law traditions. Article 107 CC goes on to establish the so-called *contra preferentum* rule, according to which an ambiguous term in an adhesion contract shall always be construed in favour of the adhering party. It is, therefore, in the interest of the stronger party to clarify the content of its standard terms, in accordance with the analysis in the previous section. This allows for fairer contracting.

Article 170(1) CC takes the mantle even further by providing that if doubt arises as to the wording or meaning of words or phrases in the contract, these shall be construed in favour of the obligor. Where, however, the contract contains a clause discharging a party from liability, such provision shall be construed narrowly.[17] Paragraph 2 of article 170 CC must be read alongside article 160 CC and applicable consumer legislation.

Article 80(1) CC makes the point that where the parties have agreed that their affairs shall be governed by standard terms and conditions these shall apply only when sufficient notice has been served on the adhering party. Paragraph 2 of article 80 CC goes on to say that where such provisions of which no notice has been taken are essential, the contract shall be invalid. If the provisions are auxiliary, the judge shall resolve any dispute arising therefrom in accordance with the nature of the transaction, current usage, and rules of justice.

6.4 EVIDENCE FOR CONTRACTUAL INTERPRETATION

There is no discussion on this issue in the CC or the CCP. The key question here is what kind of evidence the courts may rely on in deciphering the parties' common intention. Is this a documents-only process or are witnesses also permitted to testify? Moreover, should all documents be permitted or only those that are official and those private documents that satisfy formality requirements? Finally, should evidence arising from the parties' negotiations phase be considered admissible, given that such a phase is outside the scope of good faith?[18]

Article 216 CCP distinguishes between official exhibits and conventional documents, both of which must satisfy several formalities. Articles 217 and 218 CCP specify that official exhibits may be used as evidence without any limitations, and this is also possible with respect to photocopies of official exhibits. With respect to conventional documents, article 220 CCP makes it clear that if found to have been signed by a party and their authenticity is not in doubt they possess unlimited evidentiary value. The only exception

[17] Art 170(2) CC.
[18] Art 172(1) CC.

concerns ledgers kept by businessmen. These may not be used as evidence against non-businessmen.[19] As regards witness-based evidence, articles 260 to 262 CCP generally permit such evidence in commercial disputes, as well as non-commercial disputes of a high value.

Exceptionally, litigants may request that the other party take a so-called decisive oath, in accordance with article 314 CCP. The court may compel a party to take this oath, even if it is intended to prove a fact to the contrary of a written contract, even in respect of a formal document, except for formal documents whose authenticity may not be challenged.[20]

As a result, and in line with civil law principles, the Qatari CCP does not ascribe to the so-called parol evidence rule, whereby evidence that is extrinsic to the contract, such as draft contracts, statements and emails exchanged during the negotiation of the contract, travaux or witness statements are inadmissible.[21] The CCP implicitly allows all such evidence in order to allow the judge to ascertain the parties' common intention and excludes nothing that has probative value, subject to the requirements demanded of each evidence as discussed.[22] This is clear in the language and practice of the Court of Cassation, through which it has supported the authority of trial courts to examine and interpret all relevant evidence pertaining to contracts, so long 'as judgments are reasoned and based on reasonable grounds'.[23] The existence of an employment relationship (which by extension evinces an employment contract) has been viewed as a question of fact by the Court of Cassation,[24] and the same is true with the renewal of a lease.[25] As a result, all evidence with a probative value is admissible.[26] This may include the appointment of an expert, which is at the discretion of the courts.[27] The Court has made it clear that probative value is tantamount to the 'truth'.[28] In several instances, the Court of Cassation has ordered that the parties provide

[19] Art 223 CCP. See also Arts 226 and 227 CCP for two particular exceptions.
[20] Court of Cassation Judgments 3/2010 and 97/2011.
[21] See Art 4.3 UNIDROIT PICC, which refers to a list of five extrinsic factors as relevant circumstances in interpretating a contract. This is consistent with the Qatari CC, save for the fact that extrinsic factors are expressly permitted in the PICC but not the CC.
[22] It is established that photocopies of originals, whether written documents or photographs have no probative effect except to the extent they lead to the signed originals, if any. See Court of Cassation Judgment 9/2010.
[23] Court of Cassation Judgments 161/2010; 45/2011; 74/2011; 22/2012 and 113/2012.
[24] Court of Cassation Judgment 89/2011.
[25] Court of Cassation Judgments 33/2012 and 158/2012.
[26] Court of Cassation Judgment 89/2011.
[27] Court of Cassation Judgments 93/2012 and 191/2012.
[28] Court of Cassation Judgments 90/2011; 154/2012; Court of Cassation Judgment 22/2013; 369/2014; 139/2014 and 258/2016.

oral evidence in court where the material presented, including their contract, did not provide sufficient clarity.[29] This rationale is aided by specialist legislation. Article 38 of Labor Law No. 14 of 2004 indicates that if the contract was not in writing, the employee may prove the work relationship by all means of proof.[30] No doubt, such instances are exceptional, and the general rule remains whereby it is not permissible to disprove a written document except by another written document.[31]

6.5 GAP FILLING

The relationship between gap filling and contractual interpretation is obvious. In interpreting a contract, the courts are not allowed to infer facts which neither the parties nor the law intend or imply.[32] By extension, the courts do not possess power to alter the parties' requests.[33] However, just because the parties failed to cater for each and every issue that could arise in their relationship does not and should not mean that the contract becomes inoperable. The borderline between inference/construction and substituting the parties' intention (gap filling) is not always clear. The Court of Cassation has aptly demarcated the two by stipulating that the courts may not create contracts for the parties but possesses full power for interpreting and construing agreements in order to infer the common intention of the parties, as this appears from the facts and circumstances. 'The interpretation of the contract [and supporting documentation] may not go beyond the obvious meanings implied by their wordings'.[34] The Court of Cassation has expressly employed the term 'adaptation', albeit subject to the considerations mentioned throughout this chapter.[35]

The common law does not view ad hoc gap filling as a means of contractual interpretation, but as supplementing terms missing from the contract, which the parties clearly assumed. Common law courts refer to these as *terms implied in fact*. Just like other civil codes, the Qatari CC does not contain general provisions on gap filling. However, the foundational principle whereby party autonomy is supreme makes it clear that gap filling is exceptional, subject also to the interpretative tools set out in the previous sections of this chapter.

[29] See Court of Cassation Judgment 10/2011. This was viewed by the Court as a valid exception to the principle of material evidence only as articulated in Arts 261 and 262 CCP; see equally Court of Cassation Judgment 47/2011.
[30] See Court of Cassation Judgment 98/2014.
[31] Court of Cassation Judgment 115/2012.
[32] Court of Cassation Judgments 335/2016 and 92/2016.
[33] Court of Cassation Judgment 55/2012.
[34] Court of Cassation Judgment 63/2008.
[35] See eg Court of Cassation Judgments 16/2013 and 115/2015.

6.5.1 *Terms Implied by Fact*

The CC does specifically refer to terms implied, yet not expressed, in the parties' contract. Even so, implied factual terms are beyond doubt encompassed within the gap filling authority of the Qatari courts. Unlike the common law tradition, terms implied by fact are a matter of interpretation in the civil law tradition and by extension the Qatari civil law. Article 169(2) CC, which we have already examined, allows the courts to fill gaps in the parties' mutual obligations by reference to the 'nature of the transaction', the 'honesty and confidence that should prevail', as well as 'commercial custom'. Hence, where the contract refers to standard terms or private rules, such as those under FIDIC, the courts will construe the entire body of such terms and rules as being part of the contract, unless the parties specifically excluded some rules, or if the nature of the transaction otherwise demands. In exceptional cases, the law requires that certain stipulations be evidenced only in writing. This is the case with an agreement to arbitrate under article 7(3) of the 2017 Arbitration Law or guarantees under article 809 CC.

That terms implied in fact are a matter of interpretation should assist in distinguishing this function of article 169(2) CC from article 150 CC, which does not set out a rule of construction. Article 150 CC stipulates that where the object of a contractual obligation is a material thing it shall be identified with precision in terms of its type/kind, quality, and quantity. Where it is identified by its type, 'it shall be sufficient to include in the contract such provision as may be required to identify the quantity of such thing. Where there is no agreement on the degree of quality and such quality cannot be ascertained by use or by any other circumstances, the obligee must supply an article of average quality.'

6.5.2 *Terms Implied by Law*

Mandatory provisions that apply to all contracts – otherwise known as *terms implied in law* in common law jurisdictions – are binding on parties to all contracts and cannot be waived by mutual consent. Many of these concern public policy and good faith, and in general, their purpose is to prevent injustice; others serve the public interest.[36] The courts may amend the parties' obligations in such circumstances in order to remedy any imbalance or counter injustice. Article 106 CC, for example, stipulates that if a contract

[36] For example, Law No. 30 of 2002 on Environment Protection (Environment Law) obliges the project owner to take all necessary precautions and measures to prevent air or water pollution. This includes the submission of environmental impact assessments (EIAs).

is made by adhesion and contains arbitrary conditions, the judge may at the request of the adhering party amend such conditions so as to expunge them fully, even if the adhering party proves to have known thereof as prescribed by justice. Similarly, article 140 CC makes the point that 'where a person exploits another person out of need, obvious frivolity, visible vulnerability, or sudden heat of passion, or his moral influence over the other person causes that other person to conclude a contract in his own or a third party's favour, and such contract contains an excessive imbalance between the obligations he must perform and the material or moral benefits he shall obtain from the contract, the judge may, at the request of the affected party, reduce his obligations, or increase the obligations of the other party, or void the contract'. In equal vein, article 141 CC stipulates that the courts may annul or reduce the amount of contracts of gift where the donor is exploited, taking into consideration due process and fairness.

In a subsequent sub-section dealing with public policy, it will become evident that the existence of a public policy rule overrides the parties' common intention and such rule is always part of their contract. Examples include the violation of the rule conferring 51% ownership to Qatari nationals in commerce conducted in Qatar,[37] as well as peremptory laws regulating labour relations.[38]

In another chapter, we go on to examine the authority of the courts to intervene in the parties' contractual obligations where said obligations have become onerous for one of the parties.[39] Article 171(2) CC suggests that the courts have authority to 'reduce the excessive obligation to a reasonable level'. Similarly, in order to avoid rescission of a contract the courts may 'determine a period of grace within which the obligor shall perform his obligation'. Finally, where the parties have agreed that a contract may be rescinded without a court order, such agreement 'may not limit the authority of the judge to terminate the contract, unless the wording of the contract expressly indicates that this is the parties' mutual intention'. In 2013 the Court of Cassation issued an important judgment, which has some relevance to this sub-section. There, the Court emphasised that 'it is not permissible for a judge to rescind or amend a valid contract on the ground that the revocation or modification is required by the rules of justice. Justice completes the will of the contracting parties, but does not abrogate it'.[40]

[37] Court of Cassation Judgment 11/2015.
[38] Court of Appeal Judgment 268/2018.
[39] See Chapter 12.
[40] Court of Cassation Judgments 122/2013 and 109/2015.

6.5.2.1 Good Faith

We shall encounter good faith in Chapter 7 as a mandatory statutory mechanism that applies to all contracts. In this chapter, we shall examine good faith as a principle of interpretation. We have explained that article 172(1) CC points out that good faith concerns the performance of contractual obligations.[41] What this excludes from the scope of article 172(1) CC is the application of good faith in the phases of *negotiation* and *formation* of the contract. Article 172(2) CC expands the good faith requirement by stating that obligations arising from a contract encompass, in addition to what the parties have agreed, whatever 'is required by law, customary practice and justice' in accordance with the nature of the obligations in the contract. This no doubt covers industry practices, such as commercial custom,[42] as well as fair dealing in accordance with the law and accepted public policy. Article 169(2) CC renders good faith an interpretative method above literal construction ('honesty and confidence that should prevail between the parties') and side by side with the parties' common intention.

It is not possible to apply good faith as an interpretative tool to the pre-contractual phase, albeit the courts construe the parties' performance on the basis of good faith. In Chapter 7, we explain those limited circumstances where the parties are free to waive good faith.

6.5.2.2 Public Policy, Custom and the *Sharia*

Contractual terms in violation of public policy render the contract void.[43] At the same time, although it seems obvious, Qatari courts must construe a contract in conformity with the public policy or public order of Qatar. The mandatory nature of public policy is, therefore, implied by the law in the parties' contract.[44] As a result, the parties are not allowed to waive public policy requirements. The Court of Cassation has defined public order as follows: 'a set of basic principles that foster the political system, social consensus, economic rules, and moral values on which society is based, and through which the public interest is achieved'.[45] Qatari courts often

[41] This, of course, is hardly unusual and most legal systems apply the same principle. See Art 242 BGB.

[42] The Court of Cassation has consistently held that interest rates shall be upheld in accordance with prevailing business custom. See Judgments 66/2014; 40/2013 and Judgment 208/2014.

[43] Arts 151 and 154(1) CC.

[44] The Court of Cassation in its Judgement 62/2006 emphasized that the agreement must not conflict with public order or ethics; equally Court of Cassation Judgment 63/2008.

[45] Court of Cassation Judgment 141/2015.

refer to conduct or principles that reflect public policy, from which the parties may not deviate. These include labour rights, particularly the restricted right to termination by the employer;[46] commercial activities in violation of the requirement that a Qatari partner hold at least 51% of shares;[47] exercising a profession without proper license and registration;[48] rental value and eviction from leased properties[49] and not bypassing the proper jurisdiction of Qatari courts.[50]

On the other hand, the courts are bound to construe a contract in accordance with the *Sharia* where the particular subject matter is not regulated by statute.[51] The parties may not exclude the *Sharia* where their contract is governed by Qatari law, and the latter lacks a statutory provision regulating a particular issue under the contract.[52] This is not an easy venture nor is it free from contention. Article 1(2) CC provides a hierarchy, with statute at the apex, followed by the *Sharia* ('if any'), customary practices and finally 'rules of justice'.[53] While it seems that the two provisions serve distinct purposes, namely that article 1(2) CC merely attempts to posit the *Sharia* as a secondary source of law, whereas article 169(2) CC refers to commercial custom as an interpretative tool, article 1(2) CC is effectively transformed into an interpretative tool where a statutory provision is deemed to be lacking.[54]

The *Sharia*, no doubt, becomes a primary source of law in interpreting a dispute where Islamic law is the governing law of the parties' contract, or where the subject matter of the dispute concerns a contractual type predicated

[46] Court of Cassation Judgments 44/2010 and 73/2010.

[47] Court of Cassation Judgments 74/2010 and 102/2010; see also Court of Cassation Judgment 73/2016 on a similar employment issue.

[48] Court of Cassation Judgment 226/2011.

[49] Court of Cassation Judgments 19/2011 and 32/2015.

[50] Court of Cassation Judgment 62/2011.

[51] Art 1(2) CC; see Court of Cassation Judgment 323/2014.

[52] In practice, it seems that several issues in the CC are regulated by the *Sharia* and CC in tandem, especially where it is deemed that the *Sharia* is more elaborate. The Court of Cassation in Judgment 21/2008 accepted the applicability of the *Sharia* concerning the acquisition of property by prescription, despite the existence of a relevant provision in the CC (Art 404). While ultimately the Court did not agree with the lower court's interpretation of Islamic law, neither the Court nor the parties expressed any concern about the use of *Sharia* despite the existence of express provisions in the CC. Hence, it is evident that the courts will apply the *Sharia* not only where the CC is silent on a particular issue, but also where the *Sharia* is more elaborate.

[53] See Court of Cassation Judgment 122/2013 on the limitations of justice as a rule that is trumped by the mutual intention of the parties; see equally Court of Cassation Judgment 26/2015.

[54] The best approach in the event where the *Sharia* becomes applicable is to apply only its contractual dimension. See I Bantekas, J Ercanbrack, U Oseni, I Ullah, *Islamic Contract Law* (OUP 2023).

on Islamic law.[55] The consistent practice in the GCC is that in interpreting such contracts, the courts are not to accept the parties' stipulations that the contract is in conformity with the *Sharia*; rather, the courts have authority to undertake an objective analysis of said conformity.[56]

Article 169(2) CC allows the courts to infer the parties' common intention by reference to commercial custom.[57] The Court of Appeal has relied on custom on several occasions and hardly sees it as peripheral. In one case, it relied on the report of an expert to declare the existence of a customary rule whereby airlines have the right to prevent a passenger from travelling permanently or temporarily in certain cases. This was considered as having a customary value despite the fact that the practice in question was subject to variation and instability.[58] The Court of Cassation has not relied on the *Sharia* in any significant degree, at least in the construction of contractual relationships. Conversely, it has relied extensively on custom, even if the same subject matter is somehow regulated by the *Sharia*. The reason for this preference lies clearly in the fact that recourse to the *Sharia* in some cases would serve to invalidate the contract (e.g. delay interest), but not if business custom is applied.

[55] The Court of Cassation, although it rarely refers to the *Sharia* in contractual disputes, sometimes does refer to it as the origin of a rule. See Judgment 94/2013.

[56] See Dubai Cassation Court Judgment 898–927/2019, which concluded that for a *murabaha* contract to be *Sharia*-compliant, it has to satisfy the criteria of the Maliki school and that a certificate of compliance from an Islamic bank or financial institution is insufficient.

[57] The Court of Cassation does not shy away from identifying business custom through standard phraseology. Eg in Court of Cassation Judgment 148/2010, it held that the bank's exposure to the lender is significant and hence compensation for late payments (delay interest) is justified by reference to banking custom, whereby it is 'common knowledge' that proof is not required; equally Court of Cassation Judgment 220/2011; to the same effect see also Court of Cassation Judgment 40/2013. The Court of Cassation in Judgment 107/2013, stated that where a special commercial/trade law is silent 'commercial custom shall be applied, with the special custom or local custom being given precedence over the general custom'. If there is no commercial custom, the provisions of the civil law shall apply. This was also reiterated in Court of Cassation Judgment 66/2014; see equally Court of Cassation Judgments 371/2014 and 208/2014.

[58] Court of Appeal Judgment 526/2018.