Termination of Construction Contract under UAE Law

إنهاء عقد البناء في ظل قانون دولة الإمارات العربية المتحدة

by

AMEED TAHER SALOUS

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Abstract

The dissertation aims to examine the legal principles and practices applicable to terminate construction contracts in UAE.

This dissertation identified the causes of termination and showed the drastic effect of the termination on the contracting parties beginning from paying the cost of the performed works until paying the loss of profit or loss of opportunity. The UAE showed a significant level of protection on the performance of the contract refusing to accept the terminations as a prime remedy for the breach of contract and keeping it the last resort. Such protection was clear in the control of the court over the fate of the contract. However, many exceptions allow the automatic termination out of the court, such as force majeure events or by agreement of the parties.

The termination without causes still uncertain to be enforced by the courts; nevertheless, there are provisions of law that can be used as a vehicle to try to enforce it. Such a type of termination is necessary as there are economic advantages in applying it.

Many uncertainties and shortfalls are noticed in UAE law, from the degree of the breach that allows termination, the definition of the force majeure to the fate of the contractual damages upon the contract's termination. All are matters need to be treated better by the legislator.

الملخص

الهدف من الأطروحة هو فحص المبادئ والممارسات القانونية المطبقة لإنهاء عقود البناء في الإمارات العربية المتحدة.

حددت هذه الأطروحة أسباب الإنهاء وأظهرت أثره الكبيرعلى أطراف العقد بدءاً من دفع تكلفة الأعمال المنجزة حتى التعويض عن خسارة الربح أو ضياع الفرصة. كما أظهرت دولة الإمارات العربية المتحدة مستوى كبير من الحماية على أداء العقد؛ حيث رفضت قبول الإنهاء كعلاج رئيسي لخرق العقد وأبقته كملاذ أخير للحل. يتجلى أثرهذه الحماية بشكل واضح في سيطرة المحكمة على مصير العقد. مع ذلك كان هناك العديد من الاستثناءات التي تسمح بالإنهاء التلقائي دون الحاجة إلى حكم قضائي ، على سبيل المثال لا الحصراذا اتفق الاطراف على ذلك أو إذا كان هناك قوة قاهرة تمنع تنفيذ العقد. إلى الان ليس من الواضح مدى تقبل المحاكم لفكرة فسخ العقد دون سبب و عليه هناك الكثير من الشك حول إمكانية إنفاذه من قبل المحاكم. مع ذلك يحتوي القانون على أحكام قد يسمح التحجج بها لإنفاذ هكذا فسخ .

في ما يتعلق بإنهاء العقد هناك العديد من أوجه عدم اليقين وأوجه القصور في قانون دولة الإمارات العربية المتحدة، بدءاً من ضبابية درجة الانتهاك التي تسمح بالفسخ، غموض تعريف القوة القاهرة وانتهاءً بمصير الأضرار التعاقدية عند إنهاء العقد. هذا القصور بحاجة إلى معالجة أفضل من قبل المشرع.

Dedication

TO

MY MOTHER

“ALL I AM, I OWE TO MY MOTHER”

TO

MY FATHER

A MAN LIKE NO OTHER

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Table of Contents

Contents

Table of Cases

Table of Legislation

Chapter One

Introduction

Due to its long duration, the construction contract is described mostly as a hugely risky contract. New circumstances may emerge during such an extended period, imposing immense difficulties on the contracting parties, some of which may render the performance of the obligations cumbersome or even impossible. Such a scenario dictates the creation of a fair exit for the contracting parties.

This dissertation is made to assess "The Termination" as an available exit to escape from the contractual obligations and to examine the possibility to enforce it. To explore this, we need to evaluate first the performance principle in the UAE contract law and the degree of protection provided by the courts.

This dissertation will identify the causes that allow the parties to dissolve themselves from their promises and whether the termination, if made, is valid or not.

The focus will be on UAE law as a governing law; nevertheless, a framework is drawn to refer some articles to other civil laws such as Egyptian and French law[1]. The specific differences and similarities will guide us to understand what is acceptable under UAE law, in the sense that what has been dropped by UAE law may have a reasonable reason and some wisdom for not adopting it.

1.1 Research limitation

Understand the termination of the construction contract and how it works in UAE, thus identify the ill and shortfall of the provisions of law when dealing with such event and the possibility to enforce it.

Analyze and understand the termination of the construction contract and its application in the United Arab Emirates. Examining the applicable provisions of law that governs such act, thus to find:

[1] *as they are one of the primary sources of Emirati law*.

(i) The ill and shortfall of the provisions of law when dealing with such serious events.

(ii) The suitability of related provisions of law for the UAE competitive construction environment as well as the material ability to enforce it.

(iii) The impact of termination on the contracting parties.

Review the courts' decisions and their interpretation of the related provision of law, thus settling their contradictions.

1.2 Research problem

Termination is the last remedy for a breach of contract. Contract termination is a very burdensome remedy; it is the most harmful and damaging one. Parties all time are trying to avoid it. Nevertheless, during economic hardship and commercial crises, this remedy appears to be a good available tactic for the parties to escape from their promises.

However, in UAE, the termination right is not entirely clear and straightforward; it has many aspects and types. It can be enforced in particular circumstances, while it is forbidden in other situations. The parties rely on their contract's terms to exercise the right of termination and ignore the Governing Law. On the other side, if they refer to the UAE Law, they may get lost in what seems inconsistent or misinterpretations of contract law.

After a long experience in the field of construction, I noticed many misconceptions possessed either by the employer or the contractor. On top of that, there are many foreign conceptual theories and legislation imported from other laws, such as the common law, in which some parties wrongly found them applicable in UAE. These extraneous ideas have reached the point where they have become like facts for some parties, utilizing them as grounds of arguments even before the courts.

The most common one is the wrong belief that a contract can be terminated without referring to the governing law and considering it the only source of rights and duties. The confusion and misinterpretation of the termination clause are largely noticed in the UAE; this is maybe because of some contradictions between the standard contracts that are widely used in UAE and the local law.

Such contradiction will continue to exist as long as the standard contracts are utilized in this region; this necessitated a clear understanding of the termination in view of the UAE law and the validity of the termination clause whenever enforcement is required.

In this regard, many problematic questions related to the termination of building contracts responding to them can help the contracting parties assess their legal positions and thus elect the possible approach. I am attaching below the most crucial ones that can pave the way to understand the notion of the termination and its effect, hence finding the possible way to overcome its difficulties.

- What are the causes of termination available in the UAE? Can a construction contract be terminated in part? What are the financial and practical consequences of termination?
- What restrictions apply to the exercise of termination rights?
- Is termination an absolute right protected by the law, or can it be agreed otherwise?
- Can the employer exercise his power to terminate the contract for convenience, to give work to another contractor?
- What are the remedies available to the contractor in case of wrongful termination?
- Can the rules of force majeure be excluded or modified by agreement?
- Is it possible to consider that the contract, if it becomes uneconomical, constitutes force majeure?
- Is the termination notice required to give the contractor time to prepare him to rectify the performance? If the contract is silent, does this negate the need for notice?

These questions are essential to the dissertation finding as they help in restructuring and narrowing the research's area. The questions are crucial to organize the dissertation argument and so stay within its limits.

1.3 Objectives

This dissertation will give a clear understanding of the termination of the construction contract in UAE Law; thus, it can be a useful comprehensive guide for the contracting parties to comprehend the termination under UAE Law, henceforth understanding their position and diminishing the potential dispute. The parties can accordingly estimate their powers and limitations to identify the potential risks. Devise a clear concept of applying the contract's termination that can work for and not against the construction industry in UAE.

1.4 Methodology

The dissertation will investigate the law principle using the doctrinal legal research methodology includes collecting and examining what law books, related acts, commentary, articles, and journals provide. The precedent of case law will also be utilized to examine the application of the law and review the effect of the termination in light of the courts' interpretation of the provisions of UAE Law; consequently, defining the efficiencies and deficiencies in the application of such provisions and the expected damages that the contracting parties may sustain.

1.5 Dissertation structure

This dissertation is divided into five chapters.

Chapter One is the introduction of the dissertation. The chapter describes the area of research, provides outlines methods and justification used in the dissertation, and finds a suitable framework for the research.

Chapter Two is titled "Causes of contract termination" it explores in-detail the causes of contract termination and explains how to end the contract's effectiveness. Define the differences between types of termination and know when each applies. Then clarify the general consequences of termination on the contracting parties.

Chapter Three is titled "Termination by court order," it analyses the principles of termination for breach of contract. Determine what constitutes a default/ contract breach and the grounds for a default termination. It explains the effect of such termination on the contracting parties. Examine the law of termination for breach of contract in UAE and the available remedies. Explore the permissibility to agree to terminate the contract automatically without the need for a court order.

Chapter Four is titled "Unilateral Termination," focuses on the parties' right to terminate the contract unilaterally according to a contractual clause and the limits of applying such right. The chapter also explores (1) the interrelationship between the contractual termination provisions and the UAE law and the possibility to enforce it. (2) The allowable grounds and the consequences of such termination on the contracting parties. (3) The applicability of loss of

profits as promised compensation. (4) The ability's limitations to terminate for convenience, and the possibility to enforce it, also explore the effect of good faith on it.

Chapter Five is titled "Termination by operation of law." it evaluates the general principles relating to force majeure and the unforeseen exceptional circumstances in UAE. It examines the difficulties that may arise when seeking to apply these principles; it also pays attention to the consequences and effect of the force majeure.

Chapter Six is the conclusion. It summarizes the concluded results of the five chapters and pointed out the stemmed recommendations.

Chapter Two

Overview of Construction Contract Termination

"Contracts are made to be performed."[2], such a principle is considered the cornerstone to legalize the contractual relations between individuals; it gives the contract similar power to the Judicial act. Article 1134 of the French Civil Code stipulates that *"Contracts which are lawfully concluded take the place of legislation for those who have made them. They can be modified or revoked only by the parties' mutual consent or on grounds which legislation authorizes"*[3]. So, in respect of the contractual relationship between the parties, the contract has the same legal effect of law; as a result, the contracting parties should apply the contract as if they were applying the law, and the courts must respect that.

In principle, it is not permissible for the parties to rescind the contract or amend it. To explain this, Sanhuri said, *"only in certain exceptional cases the creditor can fall back on the extinction of the contractual object, and consequently of the contract itself, so as not to perform its part of the bargain."* Thus, the party injured by the non-performance of the contract is not allowed to rescind it. It must either request performance or compensation.

This restriction stemmed mainly from Roman law, where the Romans strictly refused to accept the termination as a form of remedy for the failure to perform a valid contract.[4] The injured party was left with no choice but to demand the performance. Later a sort of evolution had occurred in the contract law where the Romans, in their sales contracts (*lex commissoria*), had accepted the recession as a remedy, hence most legal systems followed the same.[5]

The UAE Law rigorously applies such principle; nevertheless, it allows the contracting parties to dissolve themselves from the contractual obligations and discharge the contract only for one of the following causes:

(1) Discharge by performance.
(2) Discharge by mutual agreement.
(3) Discharge for breach.
(4) Discharge by the operation of law.

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[2]*Ewan McKendrick, Contract Law (11th edn, Macmillan Publishers Limited, 2015).p327*

[3] *Art. I 134 French Civil Code: 'Les Convemionslegalememformeestiennem lieu de loi 11. ceux qui les om faites ... et doivem eue executees de bonne foi'.*

[4]*Reinhard Zimmermann, The Law Of Obligations (1st edn, Juta 1990).p 738*

[5]*Heinz Kötz, European Contract Law (2nd edn, Oxford University Press 2017). Section 13*

2.1 Termination of construction contract

In principle, the UAE civil code is considered the primary source of construction law; the code includes a special section governing *Muqawala* (contract to make a thing or perform a task).[6] However, a construction contract as a nominated contract is still subject to both the special provisions of *Muqawala* and other general provisions applicable to all contracts.

By applying the above doctrine and looking at the provision of civil code, we found that the code in its general and specific articles posed the same causes for terminating a valid, binding contract.

The legislator codified such rule in Article 267, which reads:

"If a contract is validly binding, neither party to the contract shall withdraw therefrom nor amend it or terminate it except by agreement or by litigation, or in accordance with the provisions of the law."[7]

The "Termination" presupposes that there has been a perfectly valid binding contract dissolved after the contract was concluded and before its end; such a definition excludes the extinction of contract by performance as the dissolution here ensued after the contract has been totally performed.[8] Therefore I will partly exclude this topic (Discharge by performance) from this paper and just briefly explain it along with Discharge by Mutual Agreement in this chapter. And due to the importance and bifurcation of other topics, I devoted two separate chapters to the termination for breach and termination by operation of law.

2.2 Discharge by performance

Generally, only the accurate and complete performance of contractual duties can discharge the contract. If the contract is partially performed, then the contract will not expire naturally.[9]

A construction contract will be discharged by performance on the part of the contractor if he completes all the works plus the obligation of the maintenance period. When the employer pays all the cost against the performed works, he fulfils the other part of the bargain.[10] In other words, both the employer and the contractor have fulfilled their contractual obligations; consequently, the contract is considered fully performed. However, if hidden or undisclosed

[6] *Article 872 of the UAE Civil Transactions Code*

[7] *Article 267 of the UAE Civil Transactions Code, The same rule has been included in the Muqawala provisions article 893 and article 894, Such a rule is similar to article 1184 of the French civil code, which provides that if the injured party opted to terminate a contract for breach, he must apply for it in court.*

[8] *Abd El-Razzak El-Sanhuri, Masadn- al-haqq Volume 6 .p133*

[9] *John Uff, Construction Law (12th edn, Sweet & Maxwell 2017).p210*

[10] *John Uff, Construction Law (12th edn, Sweet & Maxwell 2017).p210*

defects are later revealed, the contract then is regarded not performed; the employer will reserve his right to file a claim for a breach during the limitation period.[11]

The vast majority of contracts are terminated by performance, so when both parties perform their obligations correctly, the contract is automatically discharged and so no longer binds the parties;[12]thus, no subsequent legal problems are anticipated to arise because the contract has extinct in a natural manner (the parties have fully complied with the terms of the contract).

2.3 Termination by mutual agreement (Iqala)

Because a construction contract is a voluntary agreement, the contracting parties can mutually concur to terminate it, wherein the parties to the contract can agree to withdraw themselves from their contractual obligations under the contract in the period between its conclusion and expiration.[13]

Article 268 of the UAE civil code provides that *"Contracting parties may, after the conclusion of a contract, dissolve it by mutual agreement,"* it is, therefore, permissible for the parties to agree to discharge the contract. Such a form of agreement is widely called (*Iqala).* Like any other agreement, *Iqala,* to be valid, required an offer and acceptance.[14] To emphasize that article 269 of the UAE civil code provides the following:

"Revocation shall be by offer and acceptance in the session (majlis), and by receiving (back the thing contracted for) on condition that the subject matter of the contract is in existence and in the possession of the contracting party at the time of the revocation, and if part of it has been lost the revocation shall be valid as to the remainder to the extent of the amount of the consideration attributable to it."

Abu Dhabi Court of Cassation used the same basis, where it defined *Iqala* as; an agreement between the parties to end a contract after its conclusion and before its ending.[15] Such rule is similar to article 1134 of the French civil code, which provides that

"Agreements lawfully entered into have the force of law for those who have made them. They may be revoked only by their mutual consent, or for causes allowed by law. They must be performed in good faith"[16]

[11] *ibid. Articles 880-883 of the UAE Civil Code set out decimal liability requirements for construction contracts*
[12] *Ewan McKendrick, Contract Law (11th edn, Macmillan Publishers Limited, 2015).p327*
[13] *Abd El-Razzak El-Sanhuri, Al-Wasit Fi Sharh Al-Qanun Al-Madani Volume 7 (1964).p235*
[14] *Article 270 of the UAE Civil Transactions Code*
[15] *Abu Dhabi Court of Cassation, case 176/2012 (52)*
[16] *Article 1134 of the French civil code.*

2.3.1 The Effect of *Iqala*

In principle (*Iqala)* is retrospectively operated. Meaning both contracting parties shall revert to the position they were in before the contract. According to Law if this is not possible compensation shall be awarded.[17]

The parties to the contract can also agree on how to settle any exchanged performance; if there is no agreement and a dispute arose, then the general rules of law, including the rule of unjustified enrichment and good faith, are applied.[18]

Termination by mutual agreement dissolved the contract automatically upon the parties' acceptance; hence, it does not require a court order, the court's role is limited to distinguish the existence or the absence of the parties' mutual acceptance if a dispute arose.[19]

The law sets forth the effect of *Iqala*, such as contract annulment for the contractors, and amounts to a new contract in the right of third parties.[20]

[17] *Article 274 of the UAE Civil Transactions Code*

[18] *Abd El-Razzak El-Sanhuri, Al-Wasit Fi Sharh Al-Qanun Al-Madani Volume 1 (1964). p240*

[19] *Abu Dhabi Court of Cassation, case 176/2012 (52)*

[20] *Article 269 of the UAE Civil Transactions Code*

Chapter Three

Termination for Breach

Termination for breach results from a defect in the contract performance, such type of termination has a prospective effect; therefore, sometimes described as "*de future"* termination.[21]

Termination of the contract for breach should be distinguished from *recession"*.[22] "Recession" differs from termination in that it operates retrospectively to nullify a contract that is affected by a defect at the time of its conclusion; the recession is so described as "*rescission ab initio."* The contract in such a manner is considered never exist; the parties consequently are treated as there is no contract between them; therefore, any exchanged performance should be reversed.[23] In the view of Sir Markesinis, the rationale of this drastic consequence is that "*the agreement between the parties was flawed, i.e., affected by a defect in the contracting process that the law recognizes as a vitiating factor."* [24]

In that sense, the recession as a remedy cannot be provided under the contract but can arise by operation of law.[25] However, this principle has its limits in construction contracts. The construction contract is different from other contracts in that the obligation upon the contractor's delivery is a material thing; for example, building a house. Hence, if any part was constituted, it would be illogical to return it to its origin. Thus, the only remedy available is the monetary compensation for the work performed.

Termination by court order (*faskh*) is a termination for a breach of the contractual duty. The main provision on termination of a contract for breach is Article 272, wherein if the other party failed to perform his contractual obligations, the injured party has the right to elect between insisting on performance or terminating the contract.[26]

Article 272 of the UAE civil law provides that

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[21] *Neil Andrews, Andrew Tettenborn and Graham Virgo, Contractual Duties (2nd edn, Thomson Reuters 2017).p4*

[22] *This phrase is sometimes translated as"Annulation of contract".seeAbd El-Razzak El-Sanhuri, Masadn- al-haqq Volume 6 .p133-134.*

[23] *Abd El-Razzak El-Sanhuri, Masadn- al-haqq Volume 6. p133-134*

[24] *Basil S Markesinis, Hannes Unberath and Angus Johnston, The German Law Of Contract (2nd edn, HART Publishing 2006).p 419*

[25] *Neil Andrews, Andrew Tettenborn and Graham Virgo, Contractual Duties (2nd edn, Thomson Reuters 2017).p5*

[26] *Article 272 of UAE Civil Transaction Code.*

"*In synallagmatic contracts, if either party fails to satisfy his obligations under the contract, the other contracting party may, after giving notice to the debtor, apply for the performance of the contract or its termination. 2. A judge may order the debtor to perform his obligations immediately, or he may give him a certain period to do so and may decide in favor of termination and compensation in all cases if it is justifiable."*

The previously mentioned article indicates that the court is not necessarily obligated to grant the cancellation request even if the implicit condition is determined for the termination party's interest.[27] The court may compel the debtor of immediate performance by awarding the debtor a specific time limit to do so and then dismissing the rescission motion if it becomes evident that the debtor is no longer late in carrying out his contractual obligation. The court may avoid issuing a rescission judgment if the contractual obligation is fulfilled whether before or after adjudicating the case and before the final decision is issued. Consequently, the delay in the fulfilment does not harm the plaintiff who moves for the cancellation.[28]

The above is by far the most important example of a parties' right to terminate a contract; however, to exercise such right, the following rules should be observed:

(1) The contract should be synallagmatic.
(2) There should be a breach.
(3) Termination for a breach is optional.
(4) There should be a notice
(5) Termination should be through a court order.

3.1 The contract should be synallagmatic

The contract should be synallagmatic (in common law jurisdictions, this is generally equivalent to bilateral contract) in which each contracting party is obliged to provide something to the other party.

The termination for breach is based on the notion of the interdependence of mutual obligations of performance. As the synallagmatic contracts (like construction contracts, for example) are the only contracts that give rise to such mutual obligations; thus, the termination as a remedy applies only to these contracts.[29] It will not be reasonable to apply termination for breach on the unilateral contracts such as deposit and gift that only the offeror makes an enforceable

[27] *Union Supreme court,Case no. 519/2011 -551(4)*
[28] *ibid*
[29] *Abd El-Razzak El-Sanhuri, Al-Wajiz Fi Sharh Al-Qanun Al-Madani Volume 1 (1964).p269*

promise; if he failed to perform it, there would be no interest for the offeror to demand termination. On the contrary, it will be more convenient for him to insist on performance. [30]

3.2 There should be a breach

The availability of breach is the prime requirement for the termination as a remedy for such a cause. Neither party to the contract can demand termination unless the other party fails to fulfill the obligation.[31] However, as explained by the Abu Dhabi Court of Cassation, such a principle is not applicable if the breach resulted from a foreign reason beyond the debtor control, such as a sudden accident or force majeure or a fault of a third party or the creditor himself.[32]

The trial court has the discretionary power to decide whether the fault amounts to a breach proffering the harmed party the right to terminate if the contract does not contain an explicit clause stating when the reasons for termination are met.

So the question is, in the absence of a termination clause, what is the degree of default that the courts may accept to allow the termination?

In principle, there are no statutory guidelines regarding the type and gravity of the breach that can qualify the injured party to move for such termination.[33]However, by exploring the judicial precedents, I found six repeated examples that may draw a frame of rules that can work as a guide to assess the amount of a breach that the court may accept as a sufficient ground to grant the termination motion.[34]

First, termination may not be granted if the substantive part of the obligations is performed.[35] This is established in the *Barageel Emirates for Real Estate Company v The National International Holding* Company.[36] The case paper showed that the appellant (*Barageel Emirates)* obtained a completion certificate issued by the municipality that proves the building construction is completed and ready for handing over; therefore, the Abu Dhabi court of cassation upheld the original decision to reject the contract termination. The court explained that invoking the contract termination despite offering the substantive part of the contractual

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[30] *Adnan Amkhan, 'Termination For Breach In Arab Contract Law' (1995) Vol 10 Arab Law Quarterly.p21*

[31] *Basil S Markesinis, Hannes Unberath and Angus Johnston, The German Law Of Contract (2nd edn, Hart Publishing 2006).p420*

[32] *Abu Dhabi Court of Cassation, Case No. 177/2014 (109)*

[33] *Michael Grose, Construction Law In The United Arab Emirates And The Gulf (John Wiley & Sons, 2016). P181*

[34] *The following shall be considered a part of many that may be added, depends on the cases explored. More than 150 cases under the same subject were explored.*

[35] *Union Supreme Court, Case No. 235/2012 -277(23)*

[36] *Abu Dhabi Court of Cassation, Case No 240/2013 (268) dated 31 July 2013*

obligation is a defective act. Instead, it ordered a specific performance requesting the *Barageel Emirates* to deliver the subject of the contract (the building) once the *National Holding* pays the outstanding amount of the contract. The court awarded the necessary compensation to *National Holding* for the damages it sustained as it did not benefit from the units during the handover delay period.

However, if the construction contract requests or permits the performance in separate parts, then the creditor can terminate only this portion of the contract where the breach exists. In other terms, *"a partial non-performance could justify partial termination"*.[37] For example, Sub-clause 10.2 of Fidic Red Book allows dividing the works into parts. It stipulates that the employer is prohibited from using any part of the works until the work is completed and the engineer issue the Taking-over Certificate. If he did so (made a breach), then the part that he used (where he made the breach) shall be considered performed by the contractor, meaning the contractor is ceased to be liable for further performance to this particular part; hence, the responsibility shall be passed to the employer.[38]

Second, the breach should be substantive. A breach of an essential element of the contract is a substantive reason for revocation, for example, delivering the works in a defective manner or unfit for the intended purpose.[39] Perillo states that

"Where a party fails to perform a promise, it is important to determine if the breach is material. If the breach is material, and no cure is forthcoming, the aggrieved party may cancel the contract and may sue for total breach."[40]

Union Supreme Court in a construction contract case has provided examples of material breaches that allows the employer to invoke the termination of the contract[41]

- If the contractor is in breach of his obligation to complete the work.
- If he is in breach of the conditions and specifications agreed,
- If he departs from technical standards.
- If he displays a deficiency in technical competence.
- If he makes a wrong choice of materials to be used in work.
- If he falls below the standards of the reasonable man in performing his obligations.

[37] *Jan M. Smits, Contract Law A COMPARATIVE INTRODUCTION (Edward Elgar Publishing Limited 2014).p240..*
[38] *Sub-clause 10.2 of Fidic Red book 1999*
[39] *Union Supreme Court Case No. 88/1998 and Union Supreme Court No. 420/21*
[40] *Melvin Aron Eisenberg, Foundational Principles Of Contract Law (Oxford University Press 2018).p688*
[41] *Union Supreme Court, Case No. 644/Judicial Year 24 688.*

- If he delays in completing the work without cause.

The court explained that if any of these failures exist, then the contractor will be liable, and the employer (principal contractor in this particular legal case) will in such an event have the right either to require specific performance or to require that the contract be terminated.

Third, the court may order termination if there is a severe delay in performing the contract. The delay should be due to the contractor's fault and significantly affecting the other party's interests.[42]

Forth, the party demanding termination must be ready to perform his obligation.[43] If the creditor is not ready to perform or cannot perform his obligation, he loses his right to apply for termination. For example, if the contractor was liquidated and cannot deliver the building; consequently, he forfeits his right to terminate the contract under the pretext of the employer's non-payment. The Dubai Court of Cassation considered the creditor's ability to perform his obligation as a crucial requirement to invoke the termination.[44]

Fifth, the party requesting termination must not himself be in breach.[45] A plaintiff seeking termination due to the other party's failure to perform should not be in breach of his contractual obligation. It is unfair that the creditor breaches his obligation and consequently demands the termination for the other party's failure to deliver his side of the bargain.

However, if the contracting party released himself from his contractual obligations because of the non-performance of the other party, this is will be regarded as a suspension of performance and shall not be considered a termination.[46] Nevertheless, if the injured party opted to suspend his performance, he can later demand the termination after providing notice.[47] In short, the injured party has two choices either to suspend the work due to the other party's non-performance and wait for the counter-performance or to invoke the termination directly.

Sixth, the party requesting termination must be able to restore the status *quo ante*.[48] Some writers suggest that the parties' restoration to their original positions before the contract is made

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[42] *Union Supreme Court, Case No. 519/2011 -551(4) and Dubai Court of Cassation, Case No.30/2009. See also Union Supreme Court, Case No.644/Judicial Year 24 688.*

[43] *Michael Grose, Construction Law In The United Arab Emirates And The Gulf (John Wiley & Sons, 2016). P181*

[44] *Michael Grose, Construction Law In The United Arab Emirates And The Gulf (John Wiley & Sons, 2016). Foot notes P181*

[45] *ibid*

[46] *Union Supreme Court, Case No. 100/2008 (74)*

[47] *Abd El-Razzak El-Sanhuri, Masadn- al-haqq Volume 6. p137*

[48] *Michael Grose, Construction Law In The United Arab Emirates And The Gulf (John Wiley & Sons, 2016). P181 see also Abd El-Razzak El-Sanhuri, Al wajeez Volume1. p269*

should be possible.[49] Grose cited that the Federal Union Court overruled a request for termination of a transfer of shares due to the impossibility of restoration to the status *quo ante*.[50] However, due to the continuous nature of construction contracts, it is not easy to apply restitution and counter-restitution, so this rule does not apply to them; thus, the contract can only be terminated with future effect.

Despite the preceding, there are no fixed written standards by which the UAE courts can measure the severity of the breach.[51]The assessing of the breach has been left entirely to the discretion of the trial court. The following word by the Abu Dhabi Court of Cassation is an example thereof:

"It is established that the assessment of the sufficiency or insufficiency of the reasons for revocation and the annihilation or establishment of the negligence of the revocation requester is, as per the ruling of this court, among the factual matters that fall within the authority of the Subject Matter Court to assess the submitted evidence and documents, interpreting the wording of the contracts and concluding the truth therefrom."[52]

In its commentary, the UAE Ministry of Justice provided three prerequisites, the presence of which would allow the judge to order revocation.[53]

(1) The performance of the contract should remain possible.

    If the work is not possible to be performed anymore, then the only choice available for the Judge is to allow the termination and decide on the compensation.

(2) The motion of the creditor must specifically be for termination.

    The essence of contract is performance[54], so it is not permissible for the judge to rule against the injured party's wish if he elected the performance over the termination. Whereas if the termination is elected, the court has the power to adjudicate with revocation or decide otherwise,[55] i.e., obligate the debtor of immediate performance.

(3) The debtor should remain on his default.

    This condition allows the defaulting party to prevent the termination by fulfilling his part of the obligation before or after the court adjudication upon the case and before the issuance of the irrevocable judgment.[56]

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[49] *Michael Grose, Construction Law in The United Arab Emirates And The Gulf (John Wiley & Sons, 2016). P181*
[50] *ibid see the foot notes*
[51] *ibid p181*
[52] *Abu Dhabi Court of Cassation, Case No.177/2014 (109) see also Dubai Court of Cassation Case No. 130/2006*
[53] *UAE Ministry of Justice Commentary, p. 251*
[54] *Solène Rowan,* Remedies for Breach Of Contract *(1st edn, Oxford University Press Inc 2012). p82*
[55] *UAE Ministry of Justice Commentary, p. 250*
[56] *Union Supreme Court Case No. 519/2011 -551(4) dated 31 January 2012see also Abd El-Razzak El-Sanhuri, Al wajeez Volume 1. p271*

3.3 Termination for a breach is optional

For the case in which one of the two parties failed to fulfill his contractual obligation, the other party has the right to demand performance if the performance remains possible or to request the contract to be revoked. The request for either remedy can be submitted at any time of the legal proceedings if it is still at the court of subject matter and before the final judgment, this is always without prejudice to the plaintiff's right to compensation for any loss resulting from the concerned breach.[57]

No conditions restrict this right of election, nor subject to any requirements of objectivity or reasonableness. The injured party's motives for exercising this right are not in any way questionable. The UAE Ministry of Justice Commentary explained that if the plaintiff opts for the performance of the obligation, the court is compelled to accept the request and permitted to give compensation on top of that if appropriate. Hence, if he opts for termination, the court is not obliged inevitably to grant the termination motion, but rather it may grant the debtor a time to cure and order compensation when necessary.[58] In respect of the termination, the final word over the contract rests in the court's hands.

3.4 There should be notice

It is settled in Article 272 of the U.A.E. Civil Transactions Law that if one of the parties sought to terminate a contract, he must put the defaulting party on notice before the claim is made. The Dubai court of cassation used the notice as a distinguishing factor to differentiate between termination and suspension; the court explicitly affirmed that the termination of a contract requires a notice while the suspension does not.[59]

In UAE law, there is no particular form for the notice;[60] however, to prove the communication, it is strongly recommended to make the notice in writing. Since there was no specific form, the court found a way to reduce the notice requisite; it considered the commencement of the court proceeding itself as valid notice. Abu Dhabi Court of Cassation provided that

[57] *Adnan Amkhan, 'Termination For Breach In Arab Contract Law' (1995) Vol 10 Arab Law Quarterly.p23*
[58] *UAE Ministry of Justice Commentary, p.250*
[59] *Union Supreme Court, Case No. 100/2008 (74) dated 2 June 2008*
[60] *Michael Grose, Construction Law In The United Arab Emirates And The Gulf (John Wiley & Sons, 2016). P182*

"Article 272 of the Civil Code provides that notice must be given to the obligor before a claim is made for the enforcement or rescission of the contract. Under the precedents of this court, a statement of claim is regarded as a notice."[61]

The above is in accordance with French civil law as there is no prior notice is required if the termination is demanded through legal proceedings; obviously, this is not applicable if the contract contains a termination clause to the contrary.[62]

Nevertheless, it would be more practical to serve the notice before filing the termination, as the early notice could provide the claimant advantage in the following:

(1) It may speed up the court's response.
(2) If the claim succeeds, the court likely will award termination plus compensation.
(3) If the termination claim is filed without notice and the debtor fulfilled his obligation before the judgment, in such a case, the plaintiff will not be granted the lawsuit expenses.[63]

It is worth noting that if the debtor expresses his refusal to fulfil his contractual obligation or if the performance becomes impossible or no longer valuable due to the debtor's acts, the notice requirement becomes, therefore, unnecessary.[64]

In some laws, the notification is not restricted only to notify the other party with the intention to rescind the contract but also extended to the breaching act, in other words, the breaching act should be brought to the attention of the defaulting party. For example, the Syrian court of cassation ruled that the absence of such notice will be regarded as there was no breach and viewed the plaintiff as he has tolerated the default and consequently has not sustained any loss.[65] Regardless of the different nature of the aforementioned law, its rationale position compels the party seeking the termination to take further precautions by including the reasons for the termination upon serving the notice.

Notwithstanding the form of the notice (either written or not), the notice remains a crucial procedural matter that aims to place the defaulting party in a legal breach position.[66]

In some standard construction contracts, the termination clauses imposing the serving of notice as a prerequisite for invoking the termination. Thus, it will not be enforced unless the

[61] *Abu Dhabi Court of Cassation, 610/Judicial Year 3*
[62] *John Cartwright, Stefan Vogenauer and Simon Whittaker, Reforming The French Law Of Obligations (Hart 2009)p171.*
[63] *Abd El-Razzak El-Sanhuri, Masader- al-haqq(Arabic)Volume 6 .p140*
[64] *ibid*
[65] *Adnan Amkhan, 'Termination For Breach In Arab Contract Law' (1995) Vol 10 Arab Law Quarterly.p22*
[66] *ibid*

terminating party complies strictly with the notice obligation. In Fidic Contracts, the employer should give the defaulted contractor a notice to correct his performance; the notice should clearly describe the default circumstances. Furthermore, if the contractor failed to correct his performance within the given period, another notice (termination notice) should be served to terminate the contract.[67]

In AIA's contract, both *"the contractor"* and *"the owner"* are demanded to provide seven days' written notice before terminating the contract.[68] The Fidic red book adopted the same principle demanding both parties to provide a fourteen-days' notice before the termination if they elected to exercise such a right. Sub-clause 15.2 and 15.2, respectively, provided that:

"The Employer shall be entitled to terminate the Contract […] In any of these events or circumstances, the Employer may, upon giving 14 days' notice to the Contractor, terminate the Contract and expel the Contractor from the Site."[69]

"The Contractor shall be entitled to terminate the Contract […] In any of these events or circumstances, the Contractor may, upon giving 14 days' notice to the Employer, terminate the Contract."[70]

Nevertheless, for bankruptcy and bribery, there is no requirement for a period of notice (neither 14 days' termination notice nor notice to correct); the employer hence can terminate the contract immediately by merely serving a termination notice.[71]

However, there is an argument whether the fourteen days' notice has an automatic effect of terminating the contract or not, in the sense that if the 14 days' notice passed, the contract would be terminated immediately and no further requirements from the terminating party. Some academic writers suggest that the election to exercise the termination right as granted by the words of sub-clause 15.2 *"the Employer **may**, upon giving 14 days' notice to the Contractor, terminate the Contract"* [emphasis added] indicates that the termination is not automatic and thus involves a two-step process. The first one requests the employer to provide fourteen days' notice to the contractor, and after fourteen days, the employer must serve the contractor another notice to terminate the contract.[72]

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[67] *FIDIC 1999 Conditions, Sub - Clause 15.1*

[68] *AIA-A201-2007- General Conditions of the Contract for Construction sub-clause 14.1.3 and sub-clause 14.2.2*

[69] *FIDIC 1999 Conditions, - Clause 15.2*

[70] *FIDIC 1999 Conditions, Sub - Clause 16.2*

[71] *Ibid, Sub - Clause 15.2*

[72] *Ellis Baker and others, FIDIC Contracts: Law And Practice (5th edn, Informa Law from Routledge 2009).p449*

Finally, it is worth knowing that the regular correspondence and non-conformance reports are not regarded as adequate notice to notify the contractor that his non-performance is invoking the termination.[73]

3.4.1 Waiving the right of notice

In this regard, many jurisdictions allow the courts to drop such procedures in case the recipient (the party to whom the notifications are meant to be sent) is by his conduct is considered to have waived his rights to carry out such required procedures. For example, if one party acknowledges that the other party's right has arisen, even if the required notification has not been fulfilled.[74]

The right of notice is more important in the UAE. However, the courts most likely endorse any contractual procedures agreed upon; hence, if the agreement requires prior written notice, the parties must respect that, and if the parties accepted expressly to dispense with it, then such waiver will be valid.[75]

Therefore, it is highly recommended that both parties, either as sender or recipient, to pay attention to the notices.

3.4.2 Opportunity to cure

Termination clauses may also demand a cure period during which the defaulting party can correct his performance and so avoid the termination.[76] The notice and the cure period work together to uphold the parties' contractual relationships and preserve the contracts, even if temporarily.

The Fidic 1999 demands the employer, in case of the contractor's non-performance, to serve a notice to correct requesting the defaulting contractor to remedy his failure within a specified reasonable time.[77] If the contract does not stipulate a notice period, the court may still find it

[73] *AIA A201-2007 Article 14.1.3. and Article 14.2.2*

[74] *Ellis Baker and others, FIDIC Contracts: Law And Practice (5th edn, Informa Law from Routledge 2009).p306*

[75] *Article 271 of UAE Civil Transactions Code*

[76] *It is imperative to note that some standard contracts restrict the cure period to one party only, commonly giving to the contractor only. see AIA and FIDIC contracts.*

[77] *FIDIC 1999 Conditions, Sub - Clause 15.1*

necessary and grants the contractor the opportunity to cure his default. Article 877 of UAE law recognize the same concept; where it provides that

"*in private muqawala contracts, the contractor must complete the work in accordance with the conditions of the contract. If it appears that he is carrying out what he has undertaken to do in a defective manner or in a manner in breach of the agreed conditions, the employer may require that the contract be terminated immediately if it is impossible to make good the work, but if it is possible to make good the work it shall be permissible for the employer to require the contractor to abide by the conditions of the contract and to repair the work within a reasonable period. If such period expires without the reparation being performed, the employer may apply to the judge for the cancellation of the contract or for leave to himself to engage another contractor to complete the work at the expense of the first contractor."*[78]

The Law in this article defines the chief obligations between the employer and the contractor, the failure of the contractor to fulfil his duties will not absolutely lead to termination. The law keeps the opportunity open for the employer to give the contractor a second chance to rectify his performance; any failure to rectify it allows the employer either to entrust the work to another contractor at the expense of the original contractor or to invoke the termination.

Even though the law here distinguishes between the possibility of rectifying the breach and the impossibility of rectification, the cure period logically is not required in the event of impossibility. The court generally finds that notice needless if the breach is impossible to be corrected. For example, the contract completion date has elapsed and the time is of the essence, or the contractor has left the project. However, in both situations, it is still mandatory for the employer to apply to the court if he opted the termination. The contract cannot be rescinded automatically, even if the cure period expired without the rectification being done.

The cure period is consistent with Article 272. The law obliges the injured party to notify the other party of his intention to terminate the contract; the notice herein aims to offer the defaulting party the opportunity to correct his performance. We can infer the same from the court's approach to regard the legal motion as a notice for the defaulting party to avoid the termination by performing the work before the judgment, in other words granting the defendant a cure period between the initiation of the motion and the court's decision. In his description, Rowan considers the cure period as an *"intermediate solution that allows greater flexibility than a straight choice between rejecting or ordering termination."*[79]

In the event of granting the opportunity to cure, it is expected from the court to consider the interests of the injured party and consider any losses that he may suffer as a result of the cure

[78] *Article 877of UAE Civil Transaction Code.*

[79] *Solène Rowan, Remedies For Breach Of Contract (1st edn, Oxford University Press Inc 2012). p91*

period. The court should also examine the good faith principle; if the defaulting party acts in bad faith, the court's protection should be removed; thus, the cure opportunity will not be granted.[80]

What if the cure period is already stipulated in the contract? Does it give the defaulting party two opportunities to avoid the termination, one before filing a case and the second after the motion? In such a case, the courts will more likely consider the defaulting party has been given the opportunity to cure his performance; the court accordingly will refuse to award him a specific performance to cure, consequently, enforce the termination if demanded. However, if the work is performed during the legal proceeding, the court may also accept the performance and award monetary compensation as a remedy.

Therefore, it is recommended for the injured party if he elected the termination to prove that the cure period has already expired, so he became eligible to demand the termination plus compensation.

3.4.3 Response to the notice

Notice response is critical as an inadequate response by the defaulting party may lead to losing the cure performance opportunity, thus, expedite the termination. For example, disregarding the notice if it is intentional or not may be regarded as a reluctance from the contractor to perform. The advice to the contractor is to respond with details on how to correct the performance.

3.5 Termination should be by a court order

"As the value of cancellation lies in the immediate relief it offers from any ongoing contractual obligation, a requirement that a court order must first be obtained would significantly diminish the potency of this remedy."[81]

UAE courts have a significant role in deciding the fate of the contract. The words of Articles 267 and 892 give the Judge the discretion either to kill the contract or to save it by granting the defaulting party a period to cure the breach.[82]The injured party cannot by his own accord absolve himself from his contractual obligations due to the other party's breach.

[80] *ibid*

[81] *Michael Grose, Construction Law In The United Arab Emirates And The Gulf (John Wiley & Sons, 2016).p.182*

[82] *Article 267 and Article 892 of the UAE Civil Transaction Code*

Some academic writers say that the rationale for judicial intervention is to help the court uphold the contract and so gives the defaulting party a second chance to fulfill his obligation rather than cause him serious harm. [83] However, this is subject to the defaulting party's act in good faith.[84] Such justification may be acceptable if we consider that the injured party will be compensated for any loss resulted from the cure period if granted.

On the other hand, I can argue that the judicial intervention in such a manner can add more harm to the injured party; because it may add to more damages to the ones that he already sustained, for example more delay. The compensation may not recover all types of losses; for example, it is difficult to compensate for the adverse effects of uncertainty, the damaged relationship between the two parties, and other similar losses.

3.5.1 Termination of the contract without a court order

The common law has a more flexible approach with regards to the control of the court over the fate of the contract. In principle, English law offers the injured party the option to terminate the contract and claim damages or affirm the contract and claim compensation. [85] Such right of election is unrestricted, if the injured party elects to terminate the contract, the only requirement is to communicate his decision to the defaulting party; this does not necessitate the injured party to specify the reasons or the legal basis on which the contract is discharged.[86] However, in practice, the injured party may be bound by the rule that he must take reasonable measures to mitigate his loss.[87]

The other party may file legal action if he finds that the termination was wrongly made. At this point, the injured party needs to show the lawful basis for his decision to terminate the contract. The courts consequently will look at the merits and either uphold the termination or award the compensation.[88]

To sum it, the UK's termination process does not require any judicial interference; the injured party can exercise his right to terminate the contract straight off with no need for a court order. The court has no power to change the termination itself, nor has the jurisdiction to grant the

[83] *Abd El-Razzak El-Sanhuri, Al-Wasit Fi Sharh Al-Qanun Al-Madani Volume 1 (1964).*
[84] *Abd El-Razzak El-Sanhuri, Al-Wasit Fi Sharh Al-Qanun Al-Madani Volume 1 (1964).*
[85] *Ewan McKendrick, Contract Law (11th edn, Macmillan Publishers Limited, 2015).p334*
[86] *Solène Rowan, Remedies For Breach Of Contract (1st edn, Oxford University Press Inc 2012).p78*
[87] *Ewan McKendrick, Contract Law (11th edn, Macmillan Publishers Limited, 2015).p334*
[88] *Solène Rowan, Remedies For Breach Of Contract (1st edn, Oxford University Press Inc 2012).p78*

defaulting party a period to cure. The court may involve merely in the consequences of the termination; for example, it may award compensation if the termination is wrongfully made.[89]

The rationale for the absence of court intervention is that it responds to the desire to expedite the termination of a failed contract; thus, the injured party can easily and quickly absolve himself from the contract's ties. Accordingly, he will avoid inefficiency that may make him suffer further delay and cost, the immediate termination will allow him to distribute his resources to another project without waiting for a court order even if the dispute arises.[90]

Mc Kendrick has commented on such a liberal approach, as follows:

"*English law [. . .] places considerable emphasis on the importance of termination as a remedy in the event of a breach [. . .] At the risk of some over-statement, it can be said that the philosophy of English law is that when one encounters a problem which has been caused by a breach of contract committed by the other party to the contract, the law should make it easy for the innocent party to walk away from the transaction to enter into a fresh transaction elsewhere"*[91]

This apparently is in conflict with the position of the UAE law, where its main objective is to maintain the parties' contractual relationships; that is why the right to terminate a breached contract is much more fettered. But can we apply such an approach (i.e., the English Law approach) in UAE? In principle, importing a foreign law and attempting to implement it in UAE is logically not possible. However, it is widely accepted that if there is an explicit agreement to implement such law, this agreement can prevail if it does not conflict with the UAE public order or violates one of the mandatory provisions of the UAE law. This will be explained at length in section 3.5.3.

The UAE conservative approach can be noticed in the significant involvement of the courts in deciding the fate of the contract and whether the defaulting party deserves a period to cure his breach or not.

This is largely consistent with the position of the French Law, where

"the promisor must apply to the court for an order discharging the contract. This means that unlike in England, a contract can, in principle, only be brought to an end through the court process. The injured promisee cannot, of his own accord, treat the promisor's breach as discharging him from his contractual obligations."[92]

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[89] *ibid. p79*

[90] *Solène Rowan, Remedies For Breach Of Contract (1st edn, Oxford University Press Inc 2012). p90*

[91] *Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith, DEFENCES IN CONTRACT (1st edn, HART Publishing 2017).p183*

[92] *Solène Rowan, Remedies For Breach Of Contract (1st edn, Oxford University Press Inc 2012).*

Under such similarity, the justification of the courts' involvement can also be applied in the UAE case. The French Law academic writers provide the following explanations for the courts' involvement;[93] I will point out only the most applicable one to the UAE case:

(1) Absolving the parties from their contractual obligations without a court order would be manifestly in contrast with the contract's binding force.

(2) When the promise applies for the termination, the courts will ensure that the termination was made based on legitimate, justifiable grounds and not on an arbitrary basis.

(3) *"contracts are made to be performed"*[94], such a principle is in harmony with the wide discretion of the court over the fate of the contract. In other words, the court should protect the performance of the contract. Some opinions are even more radical when dealing with this matter; they call for the full performance of the contract regardless of the cost or the adverse circumstances encountered.

(4) There is a lack of trust among the lawyers in the self-help remedy (unilateral termination of the contract without a court order), as they believe in the principle that *"justice cannot be done privately."*

(5) The discretion power of the court over the termination process is interpreted as a protection for the interest of the promisor who may find himself out of the contract either with no justifiable reason or in an expedited process that prevents him from any opportunity to correct his breach and benefit from the contract. The court will examine if he is really unable to perform his obligations or he just refuses to do so. This examination will help reach a fair balance decision, especially that the consequences of the termination can be devastating.

3.5.2 Other approaches

There are two widely opposing approaches, i.e., the Civil Law approach (like UAE and France) and the common law approach (like the UK). Each has its opposite rationale; the good deeds of the first are the other's bad and vice versa. But is there any possibility to reach a middle ground?

[93] *ibid*

[94] *Ewan McKendrick, Contract Law (11th edn, Macmillan Publishers Limited, 2015).p327*

Some international instruments like "UNIDROIT Principles" try to take the essential positive elements from each approach and cast them in a new form. It preserved the gain of the English approach in encouraging contractual certainty. It also mitigates the losses by keeping the advantages of the Civil law approach, namely protecting the contracting parties' interests, and preserving the contractual relationship.[95] For example, according to the UNIDROIT Principles, the court has no discretion to grant a cure period; this to avoid delaying the injured promisee from exercising his right to terminate the contract. In the absence of legitimate refusal by the promisee, the defaulting promisor will be given the right to cure his breach, but bound to make it promptly. Consequently, contracts with a time of essence provisions shall be excluded therefrom. The contract can only be terminated if the time to cure is expired without success in remedying the breach.[96]

Recently, in France, another suggestion, *"Catala proposals,"* has been proposed. This proposal is meant to reduce the dominant role of the court over the contract termination. Corresponding to this project the injured promisee will be given a choice either to go with Judicial termination or to terminate the contract by his act (without a court order),[97] the latter is subject to the following procedural requirements act as prerequisites to bring the termination into effect:

(1) The defaulting promisor should be served with a notice requesting him to cure his breach within a reasonable time.
(2) If he persists in his breach or fails to cure it within a reasonable given period, further notice must be provided notifying him that the contract is terminated, the notice should mention the basis on which the termination was made.[98]

What about UAE, is there any other approach or exceptions in this regard?

3.5.3 Exceptions to the judicial nature of the termination

The uncertainty, cost, and delay are overriding features affecting the injured party who seeks the contract's termination through the court. Perhaps this is why the UAE legislature created a limited exception to exempt the injured party from recourse to the courts when requesting termination. The exception has been offered in Article 271 where it provides that

[95] *Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith, DEFENCES IN CONTRACT (1st edn, HART Publishing 2017). p184*
[96] *ibid*
[97] *ibid. p180*
[98] *John Cartwright, Stefan Vogenauer and Simon Whittaker, Reforming The French Law Of Obligations (Hart 2009). P193*

"It may be agreed that a contract is considered automatically terminated without having to seek a judicial order upon failure to fulfill the obligations arising from it; however, such an agreement shall not exempt the parties thereto from giving notice of said termination unless both contracting parties agree expressly on exemption therefrom."[99]

According to the above context, the UAE court may recognize the out-of-court termination if the following are available:

(1) A breach.
(2) A mutual agreement to terminate the contract without a judicial order.
(3) A notice of termination, except if the parties to the contract expressly agreed to dispense with it.

It is widely suggested that article 271 can be applied to *Muqawala* contracts if the out-of-court termination is expressly included in the agreement's provisions. More specifically, if the agreement explicitly provides that the contract termination can be made automatically by any of the parties without the requirement of a court order.[100] However, it is still arguable that Article 271 is in disagreement with the provisions of *Muqawala*, particularly article 892, which explicitly demands a court order as a prerequisite to attain the termination.[101]

In this connection, the wording of Article 267, which falls under the same general provisions of the civil transaction law is equivalent to article 892 (Under Muqawala), where it provides that

"If the contract is valid and binding, it shall not be permissible for either of the contracting parties to resile from it, nor to vary or rescind it, save by mutual consent or an order of the court, or under a provision of the law."[102]

By citing the wording above, and the notion that the discrepancy between articles under the same category is not logical, we can conclude that termination by court order is not a mandatory requirement. It is not mandatory in the sense that it does not contravene public order or required court supervision, it is permitted so to agree otherwise. Grose explained that

"Mandatory provisions are, in general, aimed at protecting parties from the harsher consequences of the exercise by them of their right to enter into binding contractual arrangements, in effect designating certain issues as being of sufficient importance that the parties do not have unfettered power to govern these without court supervision," he continued

[99] *Article 271 of UAE Civil Transactions Code*
[100] *Omar Al-Hyari, 'Applicability Of The 2017 FIDIC Red Book In Civil Law Jurisdictions' (2020) 36 Arab Law Quarterly.p.10*
[101] *ibid*
[102] *Article 267 of UAE Civil Transaction Code*

"However, in the context of construction contracts, the courts do not seem inclined, in practice, to extend the reach of mandatory provisions."[103]

I assume that Article 271 with its permissible language supplements article 267 rather than contradicting it; the same is applied to article 892, especially that there is no article under the special provisions of *Muqawala* denying article 271,[104] thus the *lex specialis* doctrine is not applicable. I concur with the opinion that terminating a construction contract without the need for a court order is permissible under UAE law.

However, this does not mean that the agreement to terminate a contract spontaneously will strip the debtor from his right to litigate if a dispute arises. The function of the court in such an event is limited to examine the debtor's claim without interfering in the creditor's choice. If the allegations are proven correct, the court may decide to preserve the contract, but if they were wrong, the court must uphold the termination. In other words, the court in such a scenario has no jurisdiction to decide between the termination and performance.[105]

In short, termination without interference from the court is authorized by bespoke drafting. However, as a caveat, this type of termination may have significant implications for the terminating party if it turns out that the termination was wrongful. If the terminated party decided to object before the court, citing the invalidity of the termination, the court would assess the validity; if it appeared that the termination was wrongfully made (for example, the terminating party misinterpreted the right of termination or the method of its implementation), thus the terminating party himself would be in a breach and so be obliged to pay damages.

Just very recently, the Government of Dubai settled the controversy when it enacted a new law, "*Law No. (12) of 2020 for Contracts and warehouse management of the Government of Dubai,*" where it permits in certain circumstances to terminate the Dubai government contracts without a court order.

According to Article "61 A" of this law, upon the governmental committee recommendation the director of the governmental entity may terminate the contract without resorting to the court in any of the following cases:

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[103] *Michael Grose, Construction Law In The United Arab Emirates And The Gulf (John Wiley & Sons, 2016).p.45-46*

[104] *Article 128 of the UAE civil TrabsactionCopde provides that " (1) The general provisions contained in this Part shall apply to nominate and innominate contracts. (2) With regard to rules applying to certain contracts only, the special provisions governing the same shall be laid down in this Law or in other laws."*

[105] *UAE Ministry of Justice Commentary, p.251*

1. In the event of any deceit or manipulation by the supplier or the event of his conviction of the crime of bribery.

2. The supplier's bankruptcy, insolvency, or liquidation, rendering him incapable of performing the contract.

3. The death of the supplier. In such an event, the government agency may either terminate the contract or return the insurance to the heirs or, upon their request the government agency may keep the insurance and permits the heirs to proceed with the performance subject to follow the provisions of the contract.

4. The supplier is unable to perform the contract.

5. Any other cases stipulated in the contract.

If the contract is terminated due to any of these cases, the insurance then will be called, and the work will be performed at the cost of the supplier plus the entitlement for any other compensation for damages.[106] However, as mentioned above, the supplier will not lose his right to litigate. So if he believes that the cases relied on by the government did not occur, and the court found his claim valid, it would order the government to pay the necessary damages.

3.6 Consequences of termination for breach

One of the general principles of UAE law is that the main effect of a valid termination is that the contract is retrospectively rescinded, the parties to the contract consequently are absolved from their contractual obligations, thus should be restored to the status *quo ante* before the contract was made.[107]

With its continuing nature, the construction contract is considered a long-term contract distinguished by the fact that mutual performances occur over a long period of time; thus, the retrospective effect becomes not practical or even impossible.[108] For example, it is hard to build a house and then ask the builder to return the performance. It is not practical to knock the house down.

[106]*Law No. (12) of 2020 for Contracts and warehouse management of the Government of Dubai*

[107]*See article 274 of the UAE Civil Transactions Coed. See also Union Supreme court, case No. 420/Judicial Year 21 dated 29 April 2001*

[108]*Michael Grose, Construction Law In The United Arab Emirates And The Gulf (John Wiley & Sons,2016).p.188*

In such circumstances, the law allows the party to claim the value of the performance.[109] The court settled the same in its judgment where it explained that

"*A muqawala contract is a continuing contract, and a rescission of it will not have any effect on works already delivered. The judgment in favor of the contractor for payment of the monies due in respect of those works amounted to an implementation of the muqawala contract and was not an effect of the rescission".*[110]

That means the contractual obligation has been performed by way of monetary compensation. The compensation will be for any expenses incurred until the moment of termination. However, the injured party is also entitled to consequential damages/sustained losses due to the termination act, such as loss of profits or loss of opportunity.[111] In other words, the aim of awarding the cost of performed works plus the damages is to put the injured party in the position as though the contract had been completed.

Such principles have a different effect on the contracting parties in terms of their characteristics and role (If he is a contractor or an employer. If he is the terminating party or the terminated one), this will be further detailed in Section 4.1.1.1 and 4.1.2.1.

However, as a general rule, compensation and damages resulting from a breach of an incomplete or defective construction contract are calculated as follows:

(1) The accrued rights. Such costs can be incurred at different levels and for several reasons, such as:[112]

- The cost of any completed works.
- The cost of any plant and material ordered for the construction.
- Demobilization cost.
- Repatriation cost.
- Inventory costs.
- Cost for removal of temporary works.
- Subcontractor settlement costs.
- Settlement proposal preparation costs.

[109] *Article 274 of the UAE Civil Coed.*

[110] *Abu Dhabi Court of Cassation, Case No. 293/Judicial Year 3 dated 27 May 2009*

[111] *Dubai Court of Cassation, Case NO. 51/2007*

[112] *Axel-Volkmar Jaeger and Götz-Sebastian Hök, FIDIC - A Guide For Practitioners (Springer Berlin Heidelberg 2010).*

(2) The cost to complete the construction, as well as the cost to correct any defective work.

(3) Consequential damages, such as loss of revenue or anticipated profit or loss of opportunity.

After calculating these costs, any pending progress payment should be paid to the contractor, and any balance monetary values that have been retained should be repaid, such as retention, and advance payment. Also, insurances like performance security should be returned.

In principle, it can be summarized that, under a termination for breach, the employer is not liable to pay the cost of undelivered work, but he is liable to pay the contractor the value of performed work less any payments on account been previously made. So, in all cases, the accrued rights at the moment of termination are preserved, plus the damages such as loss of profits.

In construction contracts, it is common to agree on a fixed amount of paid damages (liquidated damages) to the injured party in case of a breach. However, such an agreement will not affect by any means the right of the injured party to invoke the termination if he elects to do so. But if the termination is granted, liquidated damages will be considered ineffective, as the related clause is terminated with the rest of the contract.[113]

Thus, in the event of termination and applying the liquidated damages, the contractor may recourse to the court to dispute the entitlement of the employer for such liquidated damages on the ground that the relevant clause has been rescinded with the termination of the contract. Alternatively, he may request the court to decrease the amount of liquidated damages based on Article 390, which gives the court the power to amend the damages. Article 390, part 2, provides that *"In all cases, the judge may, at the request of either party, amend said agreement, making the estimation equal to the damage, and every agreement to the contrary shall be invalid."*[114] However, in such a case, the contractor should prove that the liquidated damages were excessive; otherwise, the court will uphold the liquidated damages without variation.[115]

[113] *Adnan Amkhan, 'Termination For Breach In Arab Contract Law' (1995) Vol 10 Arab Law Quarterly.p.28 see also Michael Grose, Construction Law In The United Arab Emirates And The Gulf (John Wiley & Sons,2016).p.188*

[114] *Article 390 of UAE Civil Transaction Code*

[115] *Union Supreme court, Case No. 370/Judicial Year 20 dated 2 May 2000*

This is consistent with the well-established principle that the compensation shall be assessed according to the amount of damage, such damage can be material such as the loss incurred and loss of profits, and it can be moral.[116]

There is a presumption that the due damages upon the termination for breach should be calculated based on the liability in tort and not on the contractual liability because such termination renders the contractual damages ineffective as they are expired with the rest of the terminated contract.[117] John Uff said, "Once a contract is discharged, neither party can rely on its terms but can only enforce whatever rights may arise from the discharge."[118]

Abu Dhabi Court of Cassation confirmed the same, clarifying that

"*upon a rescission, all agreements, obligations and undertakings included in the contract lapse, and when the principal obligation lapses the consensual compensation [agreed damages] will also lapse. A claim for compensation will be based on default and liability in tort, and to apply the provisions of article 390 of the Civil Code is a mistake of Law, which this court may rectify."*[119]

Hence the parties must be aware of whether the contract has terminated or not, as this may become a potential problem between the parties. For example, if there was a lack of understanding of the termination procedures or a wrong perception of the contract limitation, the parties may mistakenly consider the contract is discharged while in fact, it is still in force. For example, an employer may wrongly consider a "notice to correct" as sufficient notice of termination, or a contractor may think that the contract is expired upon completing all the work, forgetting the obligation of the defect liability period (maintenance period).

What if the parties agree to maintain the liquidated damages entitlement even after termination? Can such an agreement survive after the contract cancelation?

Abu Dhabi Court of Cassation clarified that the judicial principle *"Terminating any contract means terminating all its clauses"* (including the liquidated damages) is applied only if the liquidated damages clause forms a penalty for the breach of the obligations created by the contract.[120] However, if the agreement provides that the liquidated damages clause will remain valid after the contract termination as a penalty for the termination itself, rather than being a

[116] *Abu Dhabi Court of Cassation, Case No. 950/2011(226) dated 28 September 2011*
[117] *Adnan Amkhan, 'Termination For Breach In Arab Contract Law' (1995) Vol 10 Arab Law Quarterly.p.28 see also Michael Grose, Construction Law In The United Arab Emirates And The Gulf (John Wiley & Sons, 2016).p.188*
[118] *John Uff, Construction Law (12th edn, Sweet & Maxwell 2017).p209*
[119] *Abu Dhabi Court of Cassation, Case No. 519/Judicial Year 2 dated 30 December 2008 , Article 390 is the article in civil law that addresses the liquidated damages.*
[120] *Abu Dhabi Court of Cassation, Case No. 790/2014 (252)dated 22 October 2014*

penalty for the failure to perform the contractual obligation, in such case, this clause is regarded as an independent agreement that survives even though it is stipulated in an extinct contract.[121]

So, the reason why such a contractual clause remains despite the effect of termination is simply that the parties opted to make it so. In short, the survival of the damages clauses heavily depends on the drafting of these clauses.

[121] *Ibid*

Chapter Four

Unilateral Termination

Under Article 892, it is not open to the contracting parties to resile from the contract unilaterally. However, the parties' freedom to deviate from this rule is determined by its mandatory level[122]. The formulation of the termination clause plays accordingly essential part in deciding its fate. The termination clauses in the construction contracts usually allow both parties to terminate it unilaterally for a cause, i.e., if one has materially breached the contract. It is also common to permit the employer to terminate the contract with no particular cause[123] or "Termination for Convenience" as commonly called in construction contracts.

4.1 Unilateral termination for a cause

The parties to the contract may include a clause in the contract under which one party's failure to fulfil his contractual obligations grants the other party the right to terminate.[124] This type of termination has been codified in Article 271 of UAE civil law, which reads

"It shall be permissible to agree that a contract shall be regarded as being canceled spontaneously without the need for a judicial order failing performance of the obligations arising there out […]".

Termination by a contractual clause should be distinguished from termination by court order in that it frustrates the need for a court order under a clause in the contract. The clause will deprive the court of its discretionary powers in deciding the fate of the contract, the court cannot give a cure period, nor can deny the termination after it becomes effective; thus, the defendant cannot avoid the termination by resuming the performance.[125] In such a case, the court's role is only a declaratory one, i.e., it is limited to verify if the breach that gives rise to the termination exists.[126]

However, the contractual clause to terminate a contract unilaterally for a cause would not be sufficient to terminate the contract *ipso facto* if it did not include an explicit agreement to waive the court order requirement.

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[122] *As explained in chapter 3, contract termination and the associated procedure are not a matter of public order; therefore, the parties to the contract are free to set their own rules.*

[123] *Gail S Kelley, Construction Law (John Wiley 2013).p 181*

[124] *Adnan Amkhan, 'Termination For Breach In Arab Contract Law' (1995) Vol 10 Arab Law Quarterly.p.25*

[125] *ibid.p.26*

[126] *UAE Ministry of Justice Commentary, p.251.*

The Dubai court of cassation emphasized such a principle; it explained that when the obligations arising from a contract have not been fulfilled, the contract termination will not be cancelled spontaneously unless the two contracting parties agree to do so. While the law does not require specific wording for such agreement, however, such a clause should explicitly specify that the contract shall be considered automatically terminated upon the contract breach without a need for a court order.[127]

Contractual termination for cause requires a material breach. Once one party materially breaches the contract, the other party is relieved from his contractual obligations and may terminate the contract. If a contract is unilaterally terminated, then the party who terminated the contract bears the burden of proving that the termination was warranted.[128]

However, the party who wants to exercise his right to terminate a contract must strictly follow the termination mechanism as stipulated in the relevant clause; failure to do so may result in the termination is being considered wrongfully made.[129]

4.1.1 Termination by the contractor for a cause

If the contractor unilaterally terminated the contract for a cause, the contractor thus has the burden to prove that the termination is justifiable. Termination for cause requires a material breach of the contract. Once the employer has materially breached his contractual obligations, the contractor is excused from his counter obligations and may terminate the contract. However, the contractor in such a case must strictly abide by the termination procedures stipulated in the contract, as the failure to follow may amount to wrongful termination.

If a dispute arises due to a wrong justification made by the contractor, then the termination will be costly for him. The conflicts hence may be avoided by clearly stipulating in the termination clause the type and details of the causes that can legitimate such termination.[130]

For example, the FIDIC conditions grant the contractor the right to terminate under specific causes.[131] Such as:

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[127] *Dubai Court of Cassation Case No.122 Judicial Year 2010 dated 23-01-2011. The question raised if such a general article applicable specifically to the construction contract (Muqalawla), this has been explained in the previous chapter.*
[128] *Gail S Kelley, Construction Law (John Wiley 2013).p 181*
[129] *ibid*
[130] *ibid*
[131] *Sub-clause 16.2. of FIDIC 1999 red book*

- The Contractor does not receive the reasonable evidence within 42 days after giving notice concerning a failure to comply with Employer's Financial Arrangements.
- If the engineer fails, within the specific period to issue the payment certificate.
- The contractor does not receive the amount due according to the payment certificate within 42 days after the expiry of the stated time.
- The employer becomes insolvent or bankrupt.[132]

The FIDIC requires the contractor to provide 14 days' notice of the termination to the employer[133] (7 days under the AIA's 2007 version of A201)[134]. This period assumed that it is enough for the Employer to remedy the problem described in the notice and avoid termination.[135]

Also, the contractor should be aware that if he is in default, even partially, he may not have the right to terminate. Therefore, he should not suspend the works if his prime election is to terminate the contract.[136]

4.1.1.1 Consequences of the termination by the contractor

In case the contract is terminated for the employer's breach, the contractor can cease all his obligation under the contract except if there is work required to protect life or property, then he is bound to execute it. Usually, the contractor is obliged to hand over all the documents, material, plants, and works he has been paid for and remove all other material and goods from the site.[137] However, the contractor may retain such if there are still outstanding payments the employer has not yet fulfilled.[138]

The contractor is entitled to receive the following compensations and consequential damages: [139]

[132] *Sub-clause 16.2. of FIDIC 1999 red book*
[133] *See FIDIC 1999 red book sub-clause 16.2*
[134] *see AIA A201 section §14.1.3*
[135] *See FIDIC 1999 red book sub-clause 16.2*
[136] *Gail S Kelley, Construction Law (John Wiley 2013).p 182*
[137] *Michael D Robinson, An Employer's And Engineer's Guide To The FIDIC Conditions Of Contract (Wiley 2013).p58*
[138] *Article 275 of UAE Civil Transaction Coed.*
[139] *Michael D Robinson, An Employer's And Engineer's Guide To The FIDIC Conditions Of Contract (Wiley 2013).p58*

(1) The payment for work performed and any other cost or liability that the contractor has sustained in anticipation of completing the works, as well as the cost of demobilization, clearing the site, and deploying the workforce.
(2) Any retention money retained by the employer
(3) Any insurances such as performance security should be returned to the contractor.
(4) Compensation for any loss of profit or other losses and damages incurred by the Contractor because of the termination.[140]

On the other hand, the employer is entitled to receive the balance amount of the advance payment he paid and has not recovered yet.

UAE Law accepts the loss of profits and other similar compensations such as loss of opportunity, direct damages, consequential damages, and moral damages. Loss of profits is recognized by the context of article 292 of the Civil Code, which provides that "*In all cases, the compensation shall be assessed on the basis the amount of harm suffered by the victim, together with loss of profit, provided that, that is a natural result of the harmful act." [141]*

The courts also accepted the loss of opportunity as a consequence of the contract termination; the Union Supreme court provided that:

"It is likewise settled law that although an opportunity may be [no more than a mere] probability, if it is lost then that will be a materialised loss, and there is nothing in the law to prevent such lost earnings being taken into account as an element of compensation." [142]

By considering the contractual conditions under which the employer is liable for loss of profit, it is worth noting that the standard contracts mostly provide no ceiling limits for such liability; thus, the consequences on the employer become very significant.[143]

I presume that; stipulating the grounds of termination in the context of the contractual liability is also beneficial to the employer, as it can limit the contractor's right to terminate the contract. For example, if the employer is only partially at fault, or his default is outside the scope of these reasons, the contractor will be stripped of his right to terminate.

4.1.2 Termination by the employer for cause

[140] *Sub-clause 16.4 of FIDIC 1999 red book. Noting that; the exclusion of liability for the Contractor's loss of profit and other types of loss identified in Sub-Clause 17.6 expressly does not apply to the Employer's liability under Sub-Clause 16.4 see Ellis Baker and others, FIDIC Contracts (5th edn, Informa Law 2009).p.497*
[141] *Article 292 of UAE Civil Transactions Code.*
[142] *Union Supreme court, Case No. 40/Judicial Year 21 2 dated 10 October 2000*
[143] *Ellis Baker and others, FIDIC Contracts (5th edn, Informa Law 2009).p.497*

Generally, the causes for terminating a contract by the employer are broader than what is available to the contractor. For example, under FIDIC conditions; the employer may terminate the contract for any of the following causes:[144]

(1) If the contractor failed to provide the performance security or to perform according to the given notice to correct.

(2) If the contractor abandoned the works or shows intention not to continue the performance.

(3) Without reasonable excuse, the contractor failed to proceed with the works or rectify the defective one.

(4) If the contractor subcontracted the whole of the works or assigned the contract without the required agreement.

(5) The contractor became bankrupt or insolvent.

(6) If the contractor gave or offered to contribute to any person concerning the contract any kind of bribe as an inducement or reward.

Similar to the termination by the contractor, the employer cannot terminate the contract for cause until he gives the contractor 14 days' written notice (7 days' under the AIA's 2007 version of A201)[145]. Nevertheless, in bribery and bankruptcy, such a notice period is waived; thus, the employer can terminate the contract immediately by just a written procedural notice.[146]

4.1.2.1 Consequences of termination by the employer

Generally, under construction contracts, the primary remedy available for the employer after the termination for cause is that he can complete the work, either by himself or by employing another contractor.[147] The employer to do so has the right to use *"any Goods, Contractor's Documents and other design documents made by or on behalf of the Contractor".*[148] The contractor is also liable to pay any extra costs required to complete the work.[149]

[144] *See FIDIC 1999 red book sub-clause 15.2*
[145] See *AIA A201-2007 section §14.2.*2
[146] *Ellis Baker and others, FIDIC Contracts (5th edn, Informa Law 2009).p.440*
[147] *See FIDIC red book clause 15.2 and 15.4 , see also AIA A201-2007 section §14.2.*2
[148] *See FIDIC 1999 red book sub-clause 15.2*
[149] *FIDIC 1999 red book sub-clause 15.4*

The contractor is also requested to deliver any required goods, documents, and design drawings made by him to complete the works. This obligation can be burdensome for the contractor as the definition of goods may extend to include not only plants and materials but also temporary works and contractor equipment.[150]

When the contract is terminated for the contractor's breach, the contractor loses his entitlement to payment until the necessary cost to finish the work is well determined so the employer can recover it from the contractor. The same applied to any delay damages, remedies of defects, and other costs sustained by the employer.[151]

The contractor accordingly is liable for the excess cost to completion and pays off any balance amount of the advance payment that has not been recovered yet. Only then, the employer is obliged to pay any balance to the contractor. On top of that, the consequences stipulated in a contract clause do not prejudice other employer's rights or remedies available out of the contract.[152]

Usually, the UAE civil law remedies are preserved, so the employer may also bring an action for damages caused by the contractor's breach. However, such will not be applicable if the contract stated otherwise. For example, in the Fidic contract, the loss of profit, loss of any contract, loss of use of any works, and any other indirect losses are not given to the employer (the contractor is not liable for that).[153]

Completing the works by the employer or other entity at the expense of the defaulted contractor is also available in UAE law.[154] However, such a remedy is not associated with the termination. It is rather a separate independent option available to the employer if the contractor fails to perform, bearing in mind that the contract still in force.

Article 877 states that

"the employer may require that the contract be terminated immediately if it is impossible to make good the work, but if it is possible to make good the work it shall be permissible for the employer to require the contractor to abide by the conditions of the contract and to repair the work within a reasonable period. If such period expires without the reparation being performed, the employer may apply to the judge for the cancellation of the contract or for leave to himself to engage another contractor to complete the work at the expense of the first contractor."

[150] *Ellis Baker and others,* FIDIC Contracts: Law And Practice *(5th edn, Informa Law from Routledge 2009).p.450*
[151]*FIDIC red book 1999 sub-clause 15.4 see also AIA A201 section §14.2.2*
[152]*FIDIC red book 1999 sub-clause 15.2*
[153]*ibid -clause 17.6*
[154] *Article 877 of the UAE Civil Transaction Code*

By looking at the contractor's remedies and the ones open to the employer, we notice that the contractor's remedies are less than what the employer has. It is maybe due to the more obligations the party who undertakes to deliver work/product bears.[155] However, in all cases, termination by either party should never be taken lightly.

4.2 Unilateral termination without cause (Termination for Convenience)

With regards to termination, construction contracts often give more power to the employer than the contractor. In this respect, the employer is granted an exclusive right to terminate the contract unilaterally without a specific cause or breach or as so-called "Termination for convenience."

A termination for convenience clause was best described as a powerful tool that is not balanced by an equal right or similar advantage given to the contractor. No other area of contract law gives one party such inclusive power to escape from his contractual obligation. [156]

So why do we have such complete authority given exclusively to one party?

Al-Sanhouri explained that the long duration of construction contracts might cause change to the circumstances and expectations, rendering the outcome of the contract futile for the employer. For example, if the employer entered into a contract to construct a building, and it turned out that the expected lease will not be profitable or the funds are no longer available, then the logical, reasonable choice for the employer is to end the contract. However, the employer ought to compensate the contractor for the performed work and any other incurred losses/damages such as loss of profit. That is to say, that the employer has completed his contractual obligations by way of compensation.[157]

If we analyse the rationale of the subject matter, we find that there is no harm or damage inflicted on the contractor as the essence of the employer's commitment has been fully satisfied in the sense that the contractor has been paid the cost of the work until the time of termination plus the loss of profit. On the contrary, it would be in the contractor's interest to obtain such monetary compensation without exerting the effort to plan and execute the work. It would be irrational for the contractor to demand the performance.

So, what if the contractual clause denies the damages? Could the termination succeed?

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[155] *Ellis Baker and others,* FIDIC Contracts: Law And Practice *(5th edn, Informa Law from Routledge 2009).p.454*

[156] *the District of Columbia v. Organization for Environmental Growth*

[157] *Abd El-Razzak El-Sanhuri, Al-Wasit Fi Sharh Al-Qanun Al-Madani Volume 7 (1964).p242-243*

I did not find any precedent that can clarify such a hypothesis; however, in my opinion, there are two scenarios:

First, the court may affirm the parties' freedom to enact their own law/rules, considering that the termination is not a matter of public order, thus upholding the exclusions of the damages; this is supported by article 257, which provides that

"*The basic principle in contracts is the consent of the contracting parties and that which they have undertaken to do in the contract."*[158] , such a scenario is more likely to succeed considering that the Employer will pay only the work performed until the time of termination.

Second, the court may consider that the absence of damages resulted from the termination (for example, loss of profit or any other losses) as a failure from the employer to perform his side of the bargain, thus may reject the termination or order the necessary damages. However, a distinction must be made between these damages and the contractor's rights in the cost of the works he carried out until the time of termination, as it is his natural right whether there is a termination or not.

This is supported by article 243(2), which provides that

"With regard to the rights (obligations) arising out of the contract, each of the contracting parties must perform that which he is obliged to do under the contract."[159]

Therefore, with regards to the payable damages upon termination, it is advisable for the contractor to carefully contemplate the terms of the contract and decide accordingly to either add satisfactory compensation/damages or abolish the termination clause.

In the UAE, the majority of construction contracts contain a clause that gives the employer, without restrictions, complete authority to terminate the contract without a specific cause or breach.[160] The contract often grants the contractor upon such termination appropriate compensation, including loss of profit. According to a contractual clause, the employer can terminate the contract at any moment without having to prove any specific reason.

However, the ability to enforce such a contractual clause under UAE civil law is still uncertain; this is because UAE law specifies in article 892 limited circumstances in which a construction

[158] *Article 257 of UAE Civil Transaction Code*
[159] *Article 243 of UAE civil Transaction Code*
[160] *Like the FIDIC contract which is widely used in UAE.*

contract can be terminated without any inclusion or reference to the right to terminate the contract without reason.

In my opinion, the root cause of the uncertainty is the significant influence of the Egyptian law and FIDIC Contracts on the UAE legal aspects, where the first is considered one of the main stems of the UAE civil code, and the latter is the most common form of contracts that primarily used in the construction industry in the UAE.

The Egyptian Civil law is explicit in giving the employer the right to terminate the contract unilaterally without identifying the cause. Article 663 of the Egyptian civil code provides that

"An employer may terminate the contract and stop its performance at any time before its completion, provided that he compensates the contractor for all expenses he has incurred, the work he accomplished, and the profit he could have realized had he completed the work […]"[161]

We can realize that, upon codifying the UAE law, the legislator totally disregarded the provision of the termination without cause and kept other articles related to the contract termination almost with no significant change from the general context of Egyptian law. For example, articles 892,893,894,895 and 896 in the United Arab Emirates Civil Code have their equivalents in Egyptian civil law.[162]

The aforementioned imposes the assumption that the legislator has decided to bar such form of termination. In contrast, the FIDIC, which is the most active form of contract in UAE, permits such form of termination; sub-clause 15.5 of FIDIC provides that.

"The Employer shall be entitled to terminate the Contract, at any time for the Employer's convenience by giving notice of such termination to the Contractor."[163]

Therefore, in the absence of a statutory clause and the effectiveness of the standard contracts that allow such termination, I assume that the only available ground to validate the termination for convenience clause is the 'freedom of contract principle.

Other grounds may be available; according to Dr. Haiarri, article 218 of the civil transaction code may offer the basis to validate such type of termination.[164] The said article states that

[161] *Article 663 of the Egyptian Civil Code.*

[162] *See the Egyptian Civil Law articles 663 to 667, The similarity in these articles can explain the extent to which the UAE law has been influenced by the Egyptian law.*

[163] *FIDIC red book 1999 and 2017 sub-clause 15.5.*

[164] *Omar Al-Hyari, 'Applicability Of The 2017 FIDIC Red Book In Civil Law Jurisdictions' (2020) 36 Arab Law Quarterly.p.11*

"(1)A contract shall not be binding on one or both of the contracting parties despite its validity and effectiveness if there is a condition that such party may cancel it without mutual consent or an order of the court.
(2) Each party may act unilaterally in canceling it if by its nature the contract is not binding upon him or if he has made it a condition in his own favor that he has the option to cancel."[165]

However, there is still high uncertainty, as the previously mentioned statute may be interpreted inversely; this can be seen in the UAE Ministry of Justice Commentary, where it implies that article 218 applies only to particular types of contracts whereof their specific nature permits the unilateral termination act, such as contracts of agency, gifts, bailment, partnerships, pledges, personal guarantee, and alike.[166] The construction contracts do not fall under the same category.

Nevertheless, if the termination without cause becomes available to the employer, it remains subject to the principle of good faith. Therefore, the employer should not take the availability of such authority as an open license to relinquish his contractual obligations.

4.2.1 Bad faith and abuse of rights

The principle of good faith is stipulated in article 246 of the U.A.E. Civil Code, which provides that:

"The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith"[167]

Additionally, article 106 forbids the misuse of rights, explaining that the exercise of rights will be illegal if there is an intentional infringement of another person's rights or if the prospective interests are disproportionate to others' harm.[168] Consequently, if a change in circumstances fails to justify the termination or is found to be contrary to the principles of good faith, it renders such termination unlawful. For example, if the purpose of the termination were to replace the contractor with another contractor who can deliver the same work at a lower price, or if the termination was made to avoid payment to the contractor when the work is nearly complete.

If the employer compensated the contractor for all damages involving the cost of work performed and loss of profits, the above examples would not constitute bad faith or abuse of right as the contractor obtained what was expected from the contract.

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[165] *Article 218 of UAE civil Transaction Law.*
[166] *UAE Ministry of Justice Commentary. p.194*
[167] *Article 246 of UAE civil transaction Law*
[168] *Article 106 of UAE civil transaction Law*

In short, I can assume that the primary basis to validate such type of termination is to provide the necessary compensations to the contractor.

This principle has some similarity with the "Theory of Effective Breach,"[169] The theory suggests that any party under the contract should be permitted to breach his contractual obligations and pay the consequential damages if doing so would be more cost-effective than performing the contract.[170] This means that when the cost of performing the contract and paying compensation is more than the value of breaching it, then the breach should be allowed.

Some scholars found this approach morally problematic, saying that the contracting parties should all the time uphold the moral obligation and fulfil their promises,[171] while others consider it merely an economic theory that has its rationale, where it leads to a better distribution of wealth and gives work to those who value it most.[172]

I remember a famous incident that happened in Dubai where a contractor entered into a contract to build an iconic building at the shore. After commencing the work, he found that the infrastructure and shoring works are so costly in a way his losses if he completed the work will be so devasted that his business may not survive thereafter, he calculated the performance cost and appeared to be much more than all the damages that he may pay. So, shall he continue the work or excuse himself and pay the damages?

To satisfy the curiosity, the contractor eventually abandoned the contract and paid the damages. It is difficult to deny the logic of such thinking. In my view, this is more rationale than the opinion that contract has a binding force and should be performed at any cost because morals require doing so.

Thus, termination without cause and efficient breach theory hold much logic in that they help the parties to take advantage of other opportunities. Consequently, this may assist the economy, considering that the other party will sufficiently receive the necessary compensation.

Further, termination without cause is different from the breach theory in the sense that termination without cause is a contractual condition; established based on a mutual agreement, thus, there will be no reason for a conflict with morality or the principle of good faith (the

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[169] *This theory is deeply rooted in common law and very controversial. The theory originated in the United States, and it has not been adopted in UAE. For further reading see Klass, Gregory, Efficient Breach (March 1, 2014). In The Philosophical Foundations of Contract Law 362-387, Georgetown Public Law Research Paper No. 13-018.*

[170] *Henry Campbell Black and Bryan A Garner, Black's Law Dictionary (8th edn, Thomson Reuters 2004).p.1563*

[171] *Klass, Gregory, Efficient Breach (March 1, 2014). In The Philosophical Foundations of Contract Law. P367*

[172] *Yusuf Mohammed GassimObeidat, 'The Efficient Breach Theory Under Jordanian Civil Law' (2016) 30 Arab Law Quarterly.p.337*

employer will pay what is owed on him under the contract as compensation). The recommended concept is to allow the parties to terminate a contract and pay the necessary damages if doing so would be economically more efficient than performing the contractual obligations.

To sum up, termination without cause in the absence of legal support (as the case in UAE) is troublesome; therefore, to avoid any legal consequences if the employer decides to invoke it, the following are needed:

First, the termination for convenience clause should be expressly written in the contract.

Second, the amount and the details of compensation upon the termination should be explicit; Oliver Holmes said when he referred to the breach of the contract, *"you must pay damages if you don't want to keep it- and nothing else."*[173]

Third, the employer should strictly follow the procedures and any prerequisites mentioned in the contract.

Fourth, the notice should be provided even if it is not included in the contract.

4.3 Waiver of right to terminate the contract

It is concluded if one party breaches the contract, the other party has the right to seek the termination to excuse himself from his contractual obligation. Each contracting party has such a privilege under the law. Accordingly, the contract should be deemed considered inclusive of such a right even if it is not stipulated therein.

The Union Supreme Court emphasized this principle where it provides that none of the contracting parties are deprived of the right to terminate the contract except under an agreement. It is always assumed that the terminating clause exists in each reciprocal contract, including such a clause in the contract is permission to invoke the termination if satisfied the conditions. The court stressed that the waiver of such a right must not be presumed, it has to be proven.[174]

[173] *Oliver Holmes JR, 'The Path Of The Law' (1897) 10 Harvard Law Review.*

[174] *Union Supreme court, case no. 123/1993 (12)*

4.4 Remedies for wrongful termination

Upon termination of the contract, the terminated party is absolved from any further performance of his contractual obligations. Besides, he may instantly file a legal case demanding damage if he believes that the termination was wrongfully made.

Termination might be wrongful if the allegations of non-performance were erroneous. For example, the defective performance did not reach the degree of a material breach or if the injured party had failed to comply with the stipulated required procedures. The wrongful termination itself is considered a material breach and gives the terminated party the right to obtain foreseeable damages. These damages aim to put the terminated party in a situation that he would have been in if he performed the contract.

Punitive damages are not awarded for wrongful termination, as the concept of punitive damages is not recognized by UAE Law;[175]article 389 stipulates that the amount of compensation should be equivalent to the losses sustained by the injured person at the time of occurrence.[176]

In short, if the employer wrongfully terminates the contractor, he will *prima facie* be in breach of his contractual obligations, and the contractor accordingly is entitled to elect either:

- To accept the termination by rescinding the contract and recovering the costs incurred upon the termination time. Or
- To seek the injunction and keep the contract in force and claim the damages plus the contract price. Or
- To terminate the contract and demand for the damages and profits that he could have achieved from performing. The contractor, in this respect, is usually entitled to the cost of labor and materials sustained in the performance of the work, any loss of profit even if he has not started the work, if the latter not available, loss of opportunity may be granted if he has missed bids on other projects.

The contractor's election depends heavily on the status and at what stage the completion of performance is.

[175]*Antonia Birt and Amr Omran, Arbitration Guide IBA Arbitration Committee UNITED ARAB EMIRATES (2019). Can be downloaded from www.Ibanet.org*

[176] *Article 389 of UAE Civil Transactions Code*

If the employer is terminated wrongly by the contractor, the employer is therefore entitled to receive additional costs sustained in completing the work.[177] The employer's cost to complete work after contract termination can be much higher than the original contract price.

As we see from the above, wrongful termination, even without punitive damages, can be substantively costly for the terminating party.

[177] *Article 877 of UAE Civil Law*

Chapter Five

Termination by Operation of Law

5.1 Force majeure

Several rules of law operate upon specific sets of circumstances under which the contract will be set aside.[178] Force majeure is a prime example of the circumstances that can terminate a contract by the operation of the rule of law. The main feature of such termination is that the contract is terminated automatically irrespective of the parties' wish. [179]

Construction contracts can be terminated by operation of law when the contract, after its formation, is canceled for a foreign reason that makes the contractual performance impossible. The UAE court explains that

"Termination of a contract by the force of law. It is only established when it cannot be performed due to a force majeure or an unforeseen event."[180]

Same conferred by virtue of the law in Article 893 of *muqawala* section, which states:

"If any cause arises preventing the performance of the contract or the completion of the performance thereof, either of the contracting parties may require that the contract be canceled or terminated as the case may be."[181]

Article 894 of the same section states

"If the contractor commences to perform the work and then becomes incapable of completing it for a cause in which he played no part, he shall be entitled to the value of the work which he has completed and the expenses he has incurred in the performance thereof up to the amount of the benefit the employer has derived therefrom."[182]

When a contract is terminated by operation of law, it is canceled prospectively and automatically; hence parties to the contract are relieved from the obligations that would have become due after the foreign cause exists but still bound by the occurred obligations. [183]

Gross says that the origins of these provisions lie in the concept of force majeure and the treatment of impossibility under civil law.[184] This can be elucidated in article 273, wherein it

[178] *J Beatson, A. S Burrows and John Cartwright, Anson's Law Of Contract (29th edn, Oxford 2010).p527*
[179] *Ewan McKendrick, Contract Law (11th edn, Macmillan Publishers Limited, 2015).p328*
[180] *Abu Dhabi Court of Cassation, Case No. 735/2012 (386) dated 31 December 2013*
[181] *Article 893 of UAE civil code*
[182] *Article 894 of UAE civil code*
[183] *Michael Grose, Construction Law In The United Arab Emirates And The Gulf (John Wiley & Sons, 2016).189*
[184] *ibid*

subjected all sorts of contracts to the principle of force majeure; it explained that in the event of a force majeure which makes the performance of a contract impossible, the contractual obligations would cease, the contract consequently cancelled without the need for a court order.[185]

The statute provides two attributes of force majeure event; the first is the impossibility of performance, and the second is extraneous in the sense that it is an external event in which the parties play no role. Courts were more comprehensive in determining how to assess an event if it amounts to force majeure or not. The courts have provided the following criteria to decide:

(1) The impossibility:

The obligation of a contract should be prevented by a substantive event that makes the performance absolutely impossible[186] irresistible, and uncontrollable.[187]

The impossibility is crucial to determine if the event amounts to force majeure or not. The COVID 19 pandemic is a clear example of that. The COVID 19 pandemic is a force majeure for the retail sector while it is not for the construction industry. For more clarity, there is a complete shutdown in the retail business, which makes its daily operations impossible; on the contrary, the construction industry remains running in the UAE even though there were difficulties, but it is still possible to progress.

(2) Foreign cause:

The impossibility must be due to an external cause related to the obligation itself and not related to any of the parties or attributable to their faults; these may include (if satisfied the other conditions) force natural disasters, sudden incident, or act of a third party like war.

(3) Unpredictability:

The event should be unforeseen upon signing the contract, so it cannot be mitigated or avoided. Nael Bunni clarified, ***"****The term force majeure covers a number of unforeseen circumstances which prevent, totally or partially, one or both parties from fulfilling their contractual obligations."*.[188]

[185] *Article 273 of UAE Civil Transaction Code*
[186] *Abu Dhabi Court of Cassation, Case No. 735/2012 (386) dated 31 December 2013*
[187] *Henry Campbell Black and Bryan A Garner,* Black's Law Dictionary *(8th edn, Thomson Reuters 2004).p1912*
[188] *Nael G Bunni, The FIDIC Forms Of Contract (3rd edn, Blackwell 2005).p470*

The criterion that governs such a condition is objective and drawn based on a layman's skills. However, the evaluation of this still falls within the discretion of the trial court.[189] So, for an event to amount to force majeure it must be unpredictable, in which no natural person could be reasonably foresight it. If the parties anticipate this, then they can avoid it or mitigate its negative impact. Thus, it should be included in the contract amount as the risk ought to be considered before it occurs. In this respect, the impossibility must occur after the contract's conclusion; otherwise, it becomes a predictable event for which the parties must prepare for it.

In short, to qualify an event as a force majeure event that prevents performance, it must be both irresistible and unforeseeable. If the event was foreseeable, then a dedicated provision should be inserted in the contract.[190]

After reviewing the precedent cases, I observed that the court sets repetitive rules when assessing the force majeure events. Such rules can be utilized as a guideline when relying on the force majeure as a cause for terminating a contract:

1- The burden of proving the impossibility rests on the obligor.[191] Therefore, if the party opts to rely on the force majeure as grounds to relieve himself from his obligation, he must prove that such circumstances are not merely unforeseen but also exceptional[192] , and that the performance has been rendered impossible and not only onerous.[193]

2- The force majeure event must be the only reason for the damage. Thus, if another reason is attributed to one of the parties rendering the performance impossible, then the parties will not be discharged from their obligations. However, if the work remains impossible, compensation will be applied.[194]

3- The assessment of whether the event is a force majeure or not is an objective assessment that falls within the powers of the trial court.[195]

   This means that the court may not uphold the contractual clause if it contains a substantive event viewed by the parties as a force majeure. Hence found inconsistent

[189] *Union Supreme court, Case No.730/Judicial Year 2015dated 27 december 2016 see also Dubai Court of Cassation, Case No. 268/2009 -290(215) dated 15 November 2009*

[190] *Ewan McKendrick, Force Majeure And Frustration Of Contract (2nd edn, Informa Law 1995).p6*

[191] *Abu Dhabi Court of Cassation, case No. 735/2012 (386), dated 31 December 2013*

[192] *Michael Grose, Construction Law In The United Arab Emirates And The Gulf (John Wiley & Sons, 2016).p.190*

[193] *Ewan McKendrick, Force Majeure And Frustration Of Contract (2nd edn, Informa Law 1995).p6*

[194] *Supreme Court Case no. 730 for the year 2015 dated 27 december 2016*

[195] *ibid*

with the definition set by the law. However, the court's according to article 249, has the power to reduce the obligations in case the unforeseen exceptional circumstances kept the contractual obligations still possible to be performed but makes them onerous on the debtor, i.e., threatens him with a substantial loss.[196]

As we noticed, determining whether the exceptional circumstances amount to a force majeure or not falls within the trial court's power. But what about a contract clause? In other words, is it open to the parties to agree on what constitutes a force majeure and what is not? Does the court's assessment prevail over the contractual clause?

Article 287 explicitly recognizes the right to agree on allocating such risks. It states that:

"If a person proves that the loss arose out of an extraneous cause in which he played no part such as a natural disaster, unavoidable accident, force majeure, act of a third party, or act of the person suffering loss, he shall not be bound to make it good in the absence of a legal provision or agreement to the contrary."[197]

However, even if the agreement exists, the parties still have the right to relieve themselves from such clause on the following basis:

If the contractual clause is employed in a very harmful manner, the contractor might be able to seek relief under article 246, which states:

"(1) The contract must be performed in accordance with its contents and in a manner consistent with the requirements of good faith. (2) The contract shall not be restricted to an obligation upon the contracting party to do that which is (expressly) contained in it but shall also embrace that which is appurtenant to it by virtue of the law, custom, and the nature of the transaction."[198]

Also, article 248 may provide another approach to escape from such a harmful clause if it appeared unfair. It provides that

"If the contract is made by way of adhesion and contains unfair provisions, it shall be permissible for the judge to vary those provisions or to exempt the adhering party therefrom in accordance with the requirements of justice, and any agreement to the contrary shall be void."[199]

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[196] *Article 249 of UAE civil Code provides that " If exceptional circumstances of a public nature which could not have been foreseen occur as a result of which theperformance of the contractual obligation, even if not impossible, becomes oppressive for the obligor so as to threatenhim with grave loss, it shall be permissible for the judge, in accordance with the circumstances and after weighing up theinterests of each party, to reduce the oppressive obligation to a reasonable level if justice so requires, and anyagreement to the contrary shall be void*"

[197] *Article 287 of UAE Civil Transaction Code*

[198] *Article 246 of UAE Civil Transaction Code*

[199] *Article 248 of UAE Civil Transaction Code*

In this context, the contractor should pay more attention to the contract's language, particularly any provision demanding the contractor to bear excessive, arbitrary risks. Vice versa, the employer should not allow for any provision that the contractor may operate as a tactic to escape from his contractual obligations, for example, considering the sudden equipment failure or a disruption in the supply chain as a cause to terminate the contract.

4- The force majeure is a legal matter that does not fall within the expert competence.[200] The courts may not accept the parties' request to appoint an expert to provide his opinion on such a matter; this supports the conclusion that the assessment of force majeure is strictly protected by the court.

5.2 Consequences of force majeure:

Force majeure sets a limit to strict liability.[201] Thus, if a contractor because of a force majeure event fails to complete the works that he started to execute, then the contract will automatically be terminated without the need for a court order. The parties to the contract must restore their original positions. If not possible, the employer following Article 894 shall pay the contractor the value of the works completed plus the expenses sustained to execute the work that he has not completed to the extent of the benefit accruing to the employer from these works and expenses.[202] The contractor accordingly has no right to compensation for loss of profit. It should also be noted that force majeure may have only a temporary or partial impact on the obligation; consequently, thus it provides a temporary or partial discharge.[203]

In short, if the contract is terminated due to a force majeure event, neither party is entitled to compensation for damages; the employer accordingly is not bound to pay the contract price; As a result, the contractor is the party who is most affected by the force majeure event.[204] However, this is not a mandatory provision; hence the parties can agree to dispense these risks.

[200] *Abu Dhabi Court of Cassation, Case No. 90/2013 (193) dated 3 June 2013*

[201] *Ewan McKendrick, Force Majeure And Frustration Of Contract (2nd edn, Informa Law 1995).p21*

[202] *See article 894 of UAE Civil TransactionsCode, see also Dubai Court of Cassation, case No. 213/2003 (195) case 8 June 2003*

[203] *Ewan McKendrick, Force Majeure And Frustration Of Contract (2nd edn, Informa Law 1995).p22*

[204] *SalwaFawzy • Tarek Hamed and Mohamed Abdelwahab • Islam El- Adaway, Practicing FIDIC In Civil Law Jurisdictions (LAP LAMBERT 2020).P169*

5.3 Hardship

The force majeure concept is intended to be invoked only in extreme circumstances.

During the World Economic Crisis, many contractors and employers relied on the force majeure concept to relieve themselves from their contractual obligations under the pretext of the commercial hardships they suffered.

We may consider the World Economic Crisis an unpredictable event or perhaps an external cause; but, if we test the impossibility factor, we found it not applicable because the impossibility in such a case is attributed to the parties and not to the obligation. That is to say that the economic crisis had affected the parties' financial position but not the promise where it is still possible to be performed.[205]

It is also reasonable to view the economic recession and the hardship as a commercial risk that the contracting parties are expected to protect themselves against it in the contract. Market depreciation, currency fluctuation, and labor disputes are all common risks that parties to commercial contracts are commonly exposed to and so expected to foresee.

The English law has the same approach where it considers the change in economic circumstances even if it affects the contract profitability or made the parties' obligation hard to perform is not a force majeure event.[206]

Therefore, it will be hard for a contractor to demand contract termination on the ground that performing the contract became excessively expensive, for example, when the rebar or concrete price has increased.

A particular separate clause can be employed to satisfy the hardship issue and to overcome the problem. Such a clause usually defines what constitutes hardship and allocates procedures to be followed if it occurs, such as imposing an obligation on the parties to renegotiate the terms of the contract.[207]Article 249 provides a different relief where the law gives the court the power to reduce or adjust the contractual obligations if these became oppressive.[208]

[205]*Abu Dhabi Court of Cassation, Case No. 735/2012 (386) dated 31 December.2013*
[206]*SalwaFawzy • Tarek Hamed and Mohamed Abdelwahab • Islam El- Adaway, Practicing FIDIC In Civil Law Jurisdictions (LAP LAMBERT 2020).P162*
[207]*Ewan McKendrick, Force Majeure And Frustration Of Contract (2nd edn, Informa Law 1995).p62*
[208]*Article 249 of UAE Civil Transactions Code*

5.4 Death and bankruptcy:

If we subjected the contractor's or the employer's death to the force majeure test, then such event cannot be considered a force majeure because the death does not render the work impossible, as the obligations of the parties can be passed to their heirs. In that sense the UAE law devoted a separate clause addressing the contractor's death where it sets that the death of the contractor is not the end of the contract,[209] except if there is an agreement to the contrary (for example the works to be performed only by the contractor himself) or if his personal qualification has a material effect on the contracted work.

Article (896) provides that

"1. The job contract shall expire upon the death of the contractor if it is agreed that he shall work by himself or if his personal qualifications have a significant consideration in the contract. 2. If such a condition does not exist in the contract or if the contractor's personal qualifications have no significant consideration in the contract, the client may request rescission of the contract if the heirs fail to provide sufficient guarantees for the performance of the contract. 3. In both cases, the value of completed works and expenses shall pass to the inheritance according to the conditions of the contract, and as per the custom."

The same applies to bankruptcy, as such an event is substantively attributable to one of the parties, also does not render the performance impossible in the sense that the employer may call the bonds and perform the obligations by himself or by another contractor.

5.5 Adverse weather

To rely on the adverse weather conditions or any natural disaster as an event of force majeure is subject to satisfy the force majeure rules. According to the Abu Dhabi court of cassation, the claimant must prove that the weather is not merely unusual or unexpected but has to be exceptionally poor and unavoidable.[210] For building contracts, the effect of the exceptionally adverse weather conditions should be long enough to render the obligation impossible to be performed. In UAE, any extreme weather may last for a couple of days only. In such a case, if the contractor proves that the weather is exceptional and unusual, he is entitled to an extension of time, not the termination (This is, of course, subject to the specific terms of the contract).

[209] *See Article 896 of UAE Civil Transaction Code*

[210] *Michael Grose, Construction Law In The United Arab Emirates And The Gulf (John Wiley & Sons, 2016).p190*

Chapter Six

Conclusions

Protection of performance is one of the distinguishing features of UAE law. The same level of protection that UAE law provides can also be observed in case law, where the courts offer specific performance plus compensation as a primary remedy for breach of contract and consider the termination as a last resort. Accordingly, the court has been given broad discretionary power over the fate of the contract, rendering the court a guard who prominently upholds the contractual relationships. Consistent with that, courts usually grant the defaulting party a second chance to correct his performance.

Corresponding to such a strict position, the UAE legislator was reluctant to adopt the Egyptian approach in respect of allowing the unilateral termination without cause. The solution that may succeed to enforce such termination is to have a combination of employing a contractual clause that explicitly allows for such termination plus including therein the necessary compensation and damages for any incurred cost, most importantly, the loss of profit. Similarly, if the parties to the contract elect to deprive the court of its control over the termination, it is advisable to state indubitably such intention in the contract.

Apart from the above, in certain expressly agreed circumstances, UAE Law allows the contracting parties to automatically absolve themselves from the contractual obligations without a court order.

Nevertheless, the provisions of the UAE Civil Law in respect of the termination act are subject to many criticisms:

First, there is no guidance in the code of law regarding what degree of seriousness the breach should be to justify the termination.

Second, upon the termination of a contract, there is no clear understanding of the survival of contractual damages clauses. However, the courts have reached many decisions to consider the contractual damages destroyed along with the contract termination. Thus, the calculations of the damages must be made according to the general rules of the law. Though, such an approach still did not find its way into the UAE civil code. In my view, the courts' position has its logic, but until such logic is codified, the specific case of the contractual damages after termination remains subject to many arguments.

Third, there is no explicit parameter in the UAE law for what constitutes a force majeure or not. The courts, however, provided some criteria that may be used as a guideline.

Forth, whether the fate of the contract should be left in the hands of the contracting parties or the court is a legitimate question. It is not just a matter of freedom of contract; there is also an economic part and the efficiency factor when preferring the performance over the termination.

In view of the UAE economic progress, the investors may require a legal system that can swiftly excuse them from a problematic contract rather than waiting for the conventional lengthy litigation process. Hence, there should be a real opportunity to reform the civil law to boost the investment by clearing the disputable matters such as the contractual damages after termination, force majeure events, and termination without cause. The law should give more flexibility for spontaneous termination (termination out of the courts). Of course, all should be subject to include the necessary restrictions and measures to protect all parties' interests for example forcing the essential compensation and damages.

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