



**Design Liabilities:
In Design Build Procurement in the UAE**

ميمصتلا تايلوؤسم:

ؤدحتما ءقبرعا تاراملا ءلود في ءانبلا و ميمصتلا عيراشم ريبدت في

by

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of the requirements for the degree of
MSc CONSTRUCTION LAW & DISPUTE RESOLUTION
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ABSTRACT

This dissertation explores contract design liabilities for Contractors and Engineers under Design Build procurement in the UAE. Firstly, a comparative study of the implied design liabilities provided by UAE Civil Law and DIFC Law is included. As DIFC Law incorporates English Law, a second comparison is made between UAE Civil Law and DIFC Law with English Law used as gap-filling law. This comparison utilizes the implied terms provided under English Law, specific to Design Build contract disputes, to discuss the probable outcomes of similar disputes in the UAE. Finally, FIDIC Design Build Contracts that are commonly used in the UAE are analysed to determine the expected contract design liabilities, when using these contracts, in the jurisdictions of UAE Civil Law and DIFC Law.

نبذة مختصرة

هذه الأطروحة تناقش الإلتزامات القانونية لتصميم عقود المقاولين والمهندسين المختصة في إدارة مشتريات مشاريع التصميم و الإنشاء في دولة الإمارات العربية المتحدة. أولاً يتم تضمين دراسة مقارنة للإلتزامات الضمنية للتصميم المنصوص عليها في القانون المدني لدولة الإمارات وقانون مركز دبي المالي العالمي. و ذلك كون قانون مركز دبي المالي العالمي يطبق القانون الإنجليزي ، ثم يتم إجراء مقارنة ثانية بين القانون المدني لدولة الإمارات وقانون مركز دبي المالي العالمي مع القانون الإنكليزي المستخدم كقانون سد الثغرات. تستخدم هذه المقارنة الشروط الضمنية المنصوص عليها في القانون الإنجليزي و بشكل خاص لنزاعات مشاريع التصميم و الإنشاء لمناقشة النتائج المحتملة للنزاعات المماثلة في دولة الإمارات العربية المتحدة. وأخيراً ، يتم تحليل عقود مشاريع التصميم و الإنشاء المأخوذة من الفيديك التي يشيع استخدامها في دولة الإمارات العربية المتحدة لتحديد الإلتزامات القانونية المتوقعة لتصميم العقود، عند استخدام هذه العقود في السلطات القضائية المتبعة للقانون المدني لدولة الإمارات وقانون مركز دبي المالي العالمي.

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INTRODUCTION

Design Build (DB) Contracts are considered by some as a reaction to the modern realities of the construction industry,¹ and by others as a return to a more traditional form of procurement.² Although there are many iterations of DB Contract relationships between the three main stakeholders: Employers, Contractors, and Engineers, they are defined by the measure that the Employer has engaged a Contractor to undertake design and construction obligations.³ The basis of most DB Contracts are standard form agreements drafted by non-governmental organizations. Bespoke⁴ and government⁵ drafted contracts, despite their deviations, use the standard form contracts as a basis.⁶ It is evident from the case history that DB Contracts have existed at least since the ninetieth century.⁷ However, it has only been since the late twentieth century that standard form contracts have begun to include Design Build versions.⁸ Regardless of their actual historical applications, the development of standard forms of DB Contracts

¹ J. Uff, *Construction Law* (11th edn Sweet & Maxwell, London 2013) 357

² J. Murdoch, W Hughes, *Construction Contracts: Law and Management* (4th edn Taylor & Francis, London 2008) 43

³ P. Chan, 'PSSCOC FOR D & B (2001 Edition) Singapore's First Design and Build Standard Form' (2002) 1 ICLR 22-52

⁴ H. Beale, *Chitty on Contracts* (31st edn Sweet & Maxwell, London 2012) 37-019

⁵ An example of a government construction contract based on a standard form contract, FIDIC Condition of Contract for Construction (1st Edition, FIDIC, Switzerland, 1999) contract, is the Abu Dhabi Law No.1 Construction Contract 2007

⁶ T. Reid, *The International Comparative Legal Guide to: Construction & Engineering Law 2016* (3rd edn Global Legal Group, London 2016) 191

⁷ *Francis v Cockrell* (1870) LR 5 QB 501 is an example of a case determined on a Design and Build Contract from the 19th Century.

⁸ J. Murdoch, W Hughes, *Construction Contracts: Law and Management* (4th edn Taylor & Francis, London 2008) 43

suggests that there is a general increase in this type of procurement method, and claims that their practice is on the rise⁹ are likely to be valid.

The use of DB Contracts is relatively common in the UAE,¹⁰ with their usual application on large-scale projects. The FIDIC standard form contracts dominate the market.¹¹ There are three FIDIC DB Contracts, the Yellow,¹² Silver¹³ and Orange¹⁴ Books. Recent reporting has the FIDIC Yellow Book more widely used than the FIDIC Silver Book,¹⁵ while there is little reporting that the FIDIC Orange Book is being utilized in the UAE. Considering the FIDIC Orange Book is an older form of contract that is intended to be replaced by the Yellow and Silver Books,¹⁶ the growth in use of FIDIC DB Contracts is likely to be with the FIDIC Yellow and Silver Books. Furthermore, these FIDIC DB Contracts allow the selection of jurisdiction,

⁹ N. Henchie, 'FIDIC Conditions of Contract for EPC Turnkey Projects - The Silver Book Problems in Store?' (2001) 1 ICLR 43, J. Murdoch, W Hughes, *Construction Contracts: Law and Management* (4th edn Taylor & Francis, London 2008) 57, C. Wade, 'FIDIC Standard Forms of Contract - Principles and Scope of the Four New Books' (2000) 1 ICLR 10, all believe DB Contracts are becoming more common while, P Dornan. C Davis, 'The Rise and Rise of Two-Stage Tendering' (2008) 4 ICLR 511-517 believe they are being supplanted by Two-Stage Tendering Procurement.

¹⁰ J. Emerson, 'Key issues in split EPC contracts' (Gulf Construction Online, 1 June 2014) http://www.gulfconstructionworldwide.com/news/160035_KeyissuesinsplitEPCcontracts.Html accessed 6 September 2015

¹¹ Al Tamimi & Co, 'Risk in EPC Contracts' (Al Tamimi & Company, 1 January 2015) <http://www.tamimi.com/en/magazine/lawupdate/section7/june5/riskinepccontracts.Html> accessed 6 September 2015

¹² FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999)

¹³ FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999)

¹⁴ FIDIC Condition of Contract for Design-Build and Turnkey (1st Edition, FIDIC, Switzerland, 1996)

¹⁵ Al Tamimi & Co, 'Risk in EPC Contracts' (Al Tamimi & Company, 1 January 2015) <http://www.tamimi.com/en/magazine/lawupdate/section7/june5/riskinepccontracts.Html> accessed 6 September 2015

¹⁶ J Delmon. J Scriven, 'A Contractor's View of BOT Projects and the FIDIC Silver Book' (2001) 2 ICLR 243

rather than just country of the law,¹⁷ allowing the jurisdiction of DIFC (Dubai International Financial Centre) Law to be incorporated into the contract.

Both FIDIC Yellow and Silver Book DB Contracts contain express terms for design liabilities; nevertheless, the resolution of disputes under these contracts may still depend on jurisdictional implied terms.¹⁸ This is a result of the nature of the procurement method, which combines both design and construction obligations:¹⁹ respectively one of services and the other of a providing a result.²⁰ Normally designers are required to undertake their design work with reasonable-skill-and-care, with the measure being an objective test to which another professional would have undertaken the work,²¹ while the liability for construction is that the works are fit-for-purpose; that they achieve the use for which the works are intended.²² However, as DB Contracts mix these two types of performance obligations, if the expressed terms fail to provide clear liability apportionment, implied terms are required to determine the allocated liabilities. These implied terms are derived from the jurisdictional law of the contract.²³

¹⁷ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-clause 1.4 and FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 1.4 cited in P. Britton, 'Choice of Law in Construction Contracts: The View from England' (2002) 2 ICLR 261

¹⁸ J. Murdoch, W Hughes, *Construction Contracts: Law and Management* (4th edn Taylor & Francis, London 2008) 185

¹⁹ D. Keating, S Furst, V Ramsey, *Keating on Construction Contracts* (9th edn Sweet & Maxwell, London 2012) 1-028

²⁰ J. Scriven, 'Design Risk and Liability Under Design and Build Contracts' (1996) 4 CLJ 229

²¹ J. Adriaanse, *Construction Contract Law* (3rd edn Palgrave MacMillan, Hampshire, United Kingdom 2010) 297

²² J. Adriaanse, *Construction Contract Law* (3rd edn Palgrave MacMillan, Hampshire, United Kingdom 2010) 292

²³ J. Scriven, 'Design Risk and Liability Under Design and Build Contracts' (1996) 4 CLJ 230

RESEARCH OBJECTIVES

The research objective is to provide guidance to Employers, Contractors and Engineers on the contract design liabilities they can expect when entering into commonly used DB Contracts in the UAE.

LIMIT OF STUDY

Jurisdiction Implied Terms Geographic Application

Two legal systems govern construction contracts in the UAE: the UAE Civil law, and DIFC law. The acceptance of a nominated jurisdictional law varies between the UAE Civil Law and the DIFC courts. It is generally accepted that DIFC courts will accept a nominated jurisdictional law,²⁴ while UAE Civil Law courts determine their acceptance of a nominated jurisdictional law on the facts of the case.²⁵ Furthermore, in UAE Civil Law courts the burden of acceptance of the nominated jurisdictional law is on the disputing parties.²⁶ Therefore, for the purpose of brevity and to avoid obfuscation, only DIFC Law within the geographic area of the DIFC, and UAE Civil Law elsewhere in the UAE, shall be considered.

²⁴ C. Kanakri, 'Choice of Law and Dispute Resolution in the United Arab Emirates' (Global Arbitration News, 7 November 2016) <https://globalarbitrationnews.com/choice-of-law-and-dispute-resolution-in-the-united-arab-emirates/> accessed 7 March 2018

²⁵ J. Heyka, 'Choice of Law and Jurisdiction Provisions in the UAE' (Al Tamimi & Co, 7 November 2016) <http://www.tamimi.com/law-update-articles/choice-of-law-and-jurisdiction-provisions-in-the-uae/> accessed 7 March 2018

²⁶ C. Kanakri, 'Choice of Law and Dispute Resolution in the United Arab Emirates' (Global Arbitration News, 7 November 2016) <https://globalarbitrationnews.com/choice-of-law-and-dispute-resolution-in-the-united-arab-emirates/> accessed 7 March 2018

Contract and Tort Design Liabilities

Contract design liabilities are the focus of this dissertation. Design liabilities can include tort action. Tort liabilities shall only be briefly discussed where particularly relevant to ensure the topic range is sufficiently constrained so that the issue of contract design liabilities can be adequately covered.

Damages for Design Liabilities

To retain the focus on the design liability, rather than the compensation, recoverable damages for design defects is not included in the discussion

Express Terms Contract Selection

Standard form contracts are considered by some as a form of law making due to their wide spread usage and their ability to change implied terms provided under jurisdictional law.²⁷ Considering the common usage of FIDIC contracts in the UAE, it would be bereft of practicality not to take into consideration the application of the express terms provided in the FIDIC Yellow and Silver Book DB Contracts. The FIDIC Orange Book has not been considered within this study as its common usage is not known and is not expected to increase in popularity. As uptake of new versions of standard form contracts is slow in the UAE,²⁸ the newly released FIDIC Yellow and Silver Books²⁹ have also not been included.

²⁷ J. Sweet, 'Standard Construction Contracts in the USA' (2011) 1 ICLR 111

²⁸ S. Nambiar, 'Slow Transition to FIDIC '99 Contract Forms in the UAE' (Emirates 24/7, 28 January 2010) <https://www.emirates247.com/eb247/companies-markets/slow-transition-to-fidic-99-contract-forms-in-the-uae-2010-01-28-1.5756?ot=ot.PrintPageLayout> accessed 20 May 2018

²⁹ J. Hvarre, J. Matilde 'New FIDIC Contracts' (Kromann Reumert, 1 December 2017) <https://www.kromannreumert.com/Insights/2017/New-FIDIC-contracts> accessed 20-May-18

RESEARCH METHODOLOGY

Doctrinal and comparative research methodologies were adopted in conducting this research.

The UAE Civil and DIFC Laws were analysed and compared to ascertain the differences between the two systems. These laws were then compared to the standard form FIDIC DB Contracts to understand the possible impacts of operating these contracts in the UAE. Primary source material, such as the UAE Civil Laws, DIFC Laws, and the FIDIC Contracts, were used wherever possible. Secondary sources were used for opinions and measured analysis of the relevant laws and contracts, particularly in relation to standard design liabilities and English Law. Due to the limited secondary source material on UAE laws, the majority of the research on the design liability UAE implied terms was dependant on the use of primary sources.

DEFINED TERMS

The following terms have been used to reduce verbosity:

- DB; Design Build,
- English Law; the Law of England and Wales

FIDIC contract terms have been used to describe:

- the Employer; the party commissioning the work,
- the Contractor; the party undertaking the construction work,
- the Engineer; the party designing the work for the Contractor, and
- the Subcontractor; the party engaged by the Contractor to undertake part of the work.
- Employer's Requirements; the Employer's stated purpose, scope, design, and other specification requirements for the works.

Where these terms are not capitalized, they do not refer to the FIDIC definition. The alternative usage of these terms is explained in the context of the discussion.

DISSERTATION STRUCTURE

This dissertation is structured as an iterative comparison wherein the results from the previous chapter, are compared with an additional element. The dissertation structure is as follows:

Chapter 1: Laws in the UAE

This chapter reviews the relevant UAE laws for contract design liabilities in DB Contracts.

Chapter 2: Design Liability under UAE Civil law

This chapter analyses the implied contract design liabilities under DB Contracts within the jurisdiction of the UAE Civil Law.

Chapter 3: Design Liability Comparison UAE Civil Law and DIFC Law

This chapter analyses the implied contract design liabilities under DB Contracts when within the jurisdiction of DIFC Law, and compares them with the design liabilities under UAE Civil Law.

Chapter 4: Design Liability Comparison UAE Civil Law and DIFC Law with the English Law

Following on from the conclusion in Chapter 1, that DIFC Law integrates English Law as gap-filling law, this chapter compares implied contract design liabilities under DIFC Law with UAE Civil Law to conclude the expected implied contract design liabilities within the UAE.

Chapter 5: FIDIC Contracts Design Liability in the UAE

The Contractor implied contract design liabilities in DB Contracts in the UAE jurisdictions are compared with the express terms in two commonly used FIDIC DB Contracts. FIDIC subcontract and consultancy contracts are used to discuss the possible Engineer's express

contract design liabilities. Where the express terms are not clear, or not included, the resultant design liability from jurisdictional implied terms are discussed.

Conclusion

The conclusion draws together the comparative discussions and proposes the potential contract design liabilities that may be commonly imposed on Contractors and Engineers in the UAE.

CHAPTER 1: SOURCES OF CONSTRUCTION LAW IN THE UAE

The United Arab Emirates has a two-tiered legal system: a civil law system and the DIFC law system. The DIFC law system was permitted through a combination of Federal and Dubai civil laws.³⁰ Although DIFC law owes its origin to the civil law system, it acts with its own set of legislation and courts. The application of DIFC Laws was initially limited to disputes within the geographic location of the Dubai International Financial Centre through, Dubai Law No. 9 of 2004.³¹ However, the DIFC courts remit has been widened under Dubai Law No. 12 of 2004,³² extending its jurisdiction to cases where parties have nominated the DIFC courts and law as their preferred method of dispute resolution for commercial and civil transactions. Consequently, the UAE Civil Law and DIFC Law should be analysed when considering potential implied terms of DB Contract design liabilities in the UAE.

CIVIL LAW

The legislation that governs construction contracts in the UAE Civil Law system is the UAE Civil Transaction Code (CTC).³³ The components of this law are clearly defined under Article 1 as a progressive selection list, stating:

³⁰ DIFC Courts, 'Legal Framework' <http://difccourts.ae/legal-framework/> accessed 15 November 2015. The specific laws that allow the autonomy of the DIFC are: Amendment to the UAE Constitution, Federal Law No. 8 of 2004, Federal Decree No. 35 of 2004, Dubai Law No. 9 The Law Establishing the Dubai International Financial Centre 2004, Dubai Law No. 12 The Law establishing the Judicial Authority at the Dubai International Financial Centre 2004, and Dubai Law No. 12 The Law establishing the Judicial Authority at the Dubai International Financial Centre 2004 as amended.

³¹ Dubai Law No. 9 The Law Establishing the Dubai International Financial Centre 2004

³² Dubai Law No. 12 The Law establishing the Judicial Authority at the Dubai International Financial Centre 2004 as amended

³³ Federal Law No.5 Civil Transactions Law 1985

'The(se) legislative provisions shall apply to all matters dealt with by those provisions in the letter and in the spirit. There shall be no scope for innovative reasoning in the case of provisions of definitive import.

If the judge finds no provision in this Law, he must pass judgment according to the Islamic sharia. Provided that he must have regard to the choice of the most appropriate solution from the schools of Imam Malik and Imam Ahmad bin Hanbal, and if none is found there, then from the schools of Imam al-Shafi'i and Imam Abu Hanifa as dictated by expediency.

*If the judge does not find the solution there, then he must render judgment in accordance with custom, but provided that the custom is not in conflict with public order or morals, and if a custom is particular to a given emirate, then the effect of it will apply to that emirate.'*³⁴

Summarised, these components in descending order of application are: the legislation without judicial jurisprudence, Islamic jurisprudence, and then custom.

As there is acceptance of privity of contract in CTC Article 125,³⁵ contract agreements are under the umbrella of the first order precedence, legislation. Article 31³⁶ prevents mandatory articles of the CTC from being discharged. Therefore, the legislation has its own sub-set of precedence as firstly: mandatory provisions in the CTC, secondly: the contract express terms,

³⁴ Federal Law No.5 Civil Transactions Law 1985 Article 1

³⁵ United Arab Emirates Federal Law No.5 Civil Transactions Law 1985 Article 125

³⁶ United Arab Emirates Federal Law No.5 Civil Transactions Law 1985 Articles 31

and thirdly: the remaining provisions in the CTC that can be considered as the contract implied terms.

Islamic Jurisprudence, the second order precedence of law, refers to four schools of Islamic Law. These schools do not contain a general theory of contracts, only guiding principles.³⁷ Some have argued for an Islamic Jurisprudence interpretive stance for contract law, believing that it should adaptive by taking into consideration time and location, but within Islamic principles.³⁸ However, the UAE courts have taken a different view. In Federal Supreme Court case 336/2001,³⁹ Judge Muhammad Abdul Qadir Al Sulti stated that the legislation already contained Islamic Jurisprudence:

‘... Civil Code, the legislature has codified muqawala contracts, drawing its material from judicial principles already existing in the UAE and the rules of comparative law and jurisprudence, as well as the rules of the Islamic shari’ah.’⁴⁰

The court’s statement suggests the legislation contains all the laws necessary for construction disputes without referral to other laws in Article 1.⁴¹ This is evidenced by the recorded times Islamic Jurisprudence has been applied in construction disputes: once; Federal Supreme Court case 79/2000.⁴² Islamic Jurisprudence was only applied in this case because the CTC was not enacted at the time of the dispute. Considering this, it is unlikely that Islamic Jurisprudence will be utilized in construction disputes.

³⁷ C. Mallat, Introduction to Middle Eastern Law (1st edn Oxford University Press, New York 2007) 249

³⁸ Musa, ‘The Liberty of Individuals in Contracts and Conditions According to Islamic Law’ (1995) 2 IQ 70 cited in H. Ramadan, Understanding Islamic Law (1st edn AltaMira Press, United States 2006) 103

³⁹ United Arab Emirates Federal Supreme Court, 336/2001

⁴⁰ United Arab Emirates Federal Supreme Court, 336/2001

⁴¹ United Arab Emirates Federal Law No.5 Civil Transactions Law 1985 Article 1

⁴² United Arab Emirates Federal Supreme Court, 79/2000

The third and final tier of precedence is custom. Currently there are no recorded UAE commercial or civil court cases that have used customs as a source of law.⁴³ As customs remain unrecorded within a dispute, there is an absence of available information to analyse their impact. Consequently, customs cannot be considered, and are not anticipated to contribute, to design liability dispute resolution within the UAE.

Under UAE Civil Law the CTC provides the basis of construction contract laws, which is supplemented by the agreement between the parties. Neither Islamic Jurisprudence, nor Customs, is unlikely to be applied to the resolution of complex design liabilities issues. Therefore, only the first order precedence under the UAE Civil Law will be reviewed against DB Contract design liability issues.

DIFC LAW

Just as UAE Civil Law outlines the precedential order of the components of construction contract law, so does DIFC Law. Under DIFC Law No.3 of 2004 Article 8 (2):

‘The relevant jurisdiction is to be the one first ascertained under the following paragraphs:

- (a) so far as there is a regulatory content, the DIFC Law or any other law in force in the DIFC; failing which,*
- (b) the law of any Jurisdiction other than that of the DIFC expressly chosen by any DIFC Law; failing which,*

⁴³ This statement is based on research of available UAE court cases and books, articles and internet articles. As no information is available in these records, it is a reasonable to assume that customs, as a third tier law precedence, has not been used in the UAE.

- (c) *the laws of a Jurisdiction as agreed between all the relevant persons concerned in the matter; failing which,*
- (d) *the laws of any Jurisdiction which appears to the Court or Arbitrator to be the one most closely related to the facts of and the persons concerned in the matter; failing which,*
- (e) *the laws of England and Wales.*⁴⁴

Although the law is seemingly clear in the order of precedence: the highest priority to DIFC written laws, then to the law selected by the parties, thirdly to the law the courts consider most closely related to the case, and finally to the laws of England and Wales, rulings on this law provide further elaboration on its intent.

The Honourable Justice Michael Hwang in a DIFC case, *Dutch Equity Partners Limited v Daman Real Estate Capital Partners* (2006),⁴⁵ determined that if the DIFC Law was based on common law, common law jurisprudence could be used to supplement its understanding, stating:

*'...since the statutory... Law in the DIFC was based on common law principles, the common law jurisprudence of England and other Commonwealth countries was persuasive authority on principles of... law and the interpretation of similar statutory provisions.'*⁴⁶

This case precedent allows English Law to be used as an interpretive aid, if the DIFC Law is considered to have its origins in common law. DIFC Law No.6 Contract Law 2004,⁴⁷ which is

⁴⁴ DIFC Law No.3 Law on the Application of Civil and Commercial Laws in the DIFC 2004, Article 8(2)

⁴⁵ *Dutch Equity Partners Limited v Daman Real Estate Capital Partners* CFI 1/2006 (2006) DIFC C.L.R.3

⁴⁶ *Dutch Equity Partners Limited v Daman Real Estate Capital Partners* CFI 1/2006 (2006) DIFC C.L.R.3

⁴⁷ DIFC Law No.6 Contract Law 2004

the general law on civil and commercial contracts, governs all commercial and civil contracts, including construction contracts. DIFC considers this law to be based in common law.⁴⁸ Hence, it is clear that the English Law can aid as an interpretive device to DIFC Law No.6 Contract Law 2004. This was demonstrated in DIFC case, *Ithmar Capital v 8 Investments Inc. and 8 Investment Group Fze* (2007),⁴⁹ wherein English Law was referred to assist in understanding the intent of DIFC Law No.6 Contract Law 2004.

Under this role, English Law is solely an interpretive tool. In addition to this interpretive use, English Law remains as the last order precedent under DIFC Law 3 of 2004 Article 8(2).⁵⁰ However, there are currently two distinct judicial interpretations on whether the order of precedence is a singular or progressive selection criterion.

Judges in two cases brought before the DIFC Court of First Instance in 2006 were supportive of the singular selection criteria model. In DIFC case *Forsyth Partners Global Distributors Limited* (2007),⁵¹ the Honourable Justice Michael Hwang acknowledged English Law as the lowest precedent law, stating:

‘Article 8(2) of DIFC Law No.3 (set out above at para.13) provides a framework for determining the applicable law in specific situations, and provides that English law

⁴⁸ Al Tamimi & Co, ‘Liquidated Damages in the DIFC Courts’ <http://www.tamimi.com/en/magazine/law-update/section-8/march-7/liquidated-damages-in-the-difc-courts.html> accessed 21st November 2015

⁴⁹ *Ithmar Capital v 8 Investments Inc. and 8 Investment Group Fze* CFI 8/2007 (2007) DIFC C.L.R.3

⁵⁰ DIFC Law No.3 Law on the Application of Civil and Commercial Laws in the DIFC 2004, Article 8(2)

⁵¹ *Forsyth Partners Global Distributors Limited, Forsyth Partners Group Holdings Limited and Forsyth Partners (Middle East) Limited* CFI 5-7/2007 [2006-09] DIFC C.L.R.3

*applies in a default position. The applicable laws are set out in descending order of applicability*⁵²

In this case, DIFC law was silent on the part of the subject matter of the case and the judge needed to evaluate if it was appropriate to fill the DIFC Law gap with English Law. Taking into consideration that the subject matter did not involve universal principles, the judge concluded that if the subject matter is jurisdictionally specific, the first jurisdiction selected through order of precedence could not be supplemented by lower order jurisdictions, stating that there was:

*‘...no natural presumption that... English law was intended to apply in the DIFC.’*⁵³

This ruling was subsequently used by Justice Tan Sri Siti Norma Yaakob in DIFC case *Rasmala Investments Limited v various Defendants* (2009),⁵⁴ in support of his determination. This precedent in DIFC courts, wherein the silence of a DIFC Law on part of the subject matter which is jurisdictionally specific, does not allow parties to fill the gap with the lower order jurisdictions provided in DIFC Law 3 of 2004 Article 8 (2).⁵⁵ This interpretation of the law could be considered as a single selection criteria model.

The judge that set the singular selection criterion precedent, the Honourable Justice Michael Hwang, also created a precedent for a progressive selection criterion. In his ruling in the DIFC Court of First Instance case *Dutch Equity Partners Limited v Daman Real Estate*

⁵² *Forsyth Partners Global Distributors Limited, Forsyth Partners Group Holdings Limited and Forsyth Partners (Middle East) Limited* CFI 5-7/2007 [2006-09] DIFC C.L.R.3

⁵³ *Forsyth Partners Global Distributors Limited, Forsyth Partners Group Holdings Limited and Forsyth Partners (Middle East) Limited* CFI 5-7/2007 [2006-09] DIFC C.L.R.3

⁵⁴ *Rasmala Investments Limited v various Defendants* CFI 1-6/2009 (2009) DIFC C.L.R.3

⁵⁵ DIFC Law No.3 Law on the Application of Civil and Commercial Laws in the DIFC 2004, Article 8(2)

Capital Partners (2006),⁵⁶ he accepted the argument that one of the lower order jurisdiction laws could fill the DIFC Law gaps by stating:

*'Article 8(2)(e) of the Law on the Application of... Laws in the DIFC (DIFC Law No.3 of 2004) provided a framework for ascertaining the applicable laws in each case. Since neither... Laws of the DIFC provided an exhaustive... law, the default position under art.8(2)(e) of DIFC Law No.3 was that the laws of England and Wales (particularly the common law) applied to supplement the provisions of the DIFC Statutes...'*⁵⁷

This determination was also referred to in a subsequent DIFC case, *International Electromechanical Services Co. LLC v (1) Al Fattan Engineering LLC and (2) Al Fattan Properties LLC* (2012),⁵⁸ wherein Justice David Williams invoked the gap-filling model. The ability to fill in the gaps of higher order precedent laws with lower order precedent law could be considered as a progressive selection criteria model.

The decision to apply the singular or progressive selection model appears to be based exclusively on whether the subject matter has universal principles of law. As English Law can be used as an interpretive tool for DIFC Law, English Law may also be able to inform on the issue of universal principles. Lord Reid in the English common law case *Modern Engineering*

⁵⁶ *Dutch Equity Partners Limited v Daman Real Estate Capital Partners* CFI 1/2006 (2006) DIFC C.L.R.3

⁵⁷ *Dutch Equity Partners Limited v Daman Real Estate Capital Partners* CFI 1/2006 (2006) DIFC C.L.R.3

⁵⁸ *International Electromechanical Services Co. LLC v (1) Al Fattan Engineering LLC and (2) Al Fattan Properties LLC* CFI 4/2012 (2012) DIFC C.L.R.3. The DIFC transcript of the case does not include the section wherein it refers to *Dutch Equity Partners Limited v Daman Real Estate Capital Partners* CFI 1/2006 (2006) DIFC C.L.R.3. However, the Westlaw Gulf transcript is almost identical except for the following differences: the name of the judge, the case reference, and a missing paragraph that includes the reference to *Dutch Equity Partners Limited v Daman Real Estate Capital Partners* CFI 1/2006 (2006) DIFC C.L.R.3. It is clear from the DIFC transcript that the same precedent is being used. Therefore, it is assumed there are errors in the transcript, and these errors do not impact the effect of the ruling related to the precedent.

*(Bristol) Ltd v Gilbert-Ash (Northern) Ltd*⁵⁹ confirmed that the governing law for construction contacts is not different from was the universal legal principles of general contracts. Although subsequent construction contract legislation that was enacted after the case,⁶⁰ these did not affect universal principles, as they were geographically limited to the jurisdiction to England, Wales or Scotland.⁶¹ Currently DIFC courts have not ruled if construction law has universal principles, however, as discussed above, it could be argued that because construction law falls under the umbrella of the contract law, and contract law has universal principles, construction law also has universal principles.

Similar to the UAE CTC, DIFC Law No.6 Contract Law 2004 is immutable. This was confirmed by Justice Tan Sri Siti Norma Yaakob in DIFC Court of First Instance case *Rasmala Investments Limited v various Defendants* (2009),⁶² stating:

'I consider that the respondents claimants cannot contract out of the DIFC law by virtue of art.8(1) and resort to relying on a right that is present under (the other jurisdictions) Law'.⁶³

Thus, in understanding DB design liabilities within the DIFC, DIFC Law No.6 Contract Law 2004 shall be considered first. English Law shall be used as an interpretive tool for the law. As DIFC Law No.6 Contract Law 2004, does not refer to other jurisdiction laws, Article 8(2) (b)⁶⁴ is not applicable. Furthermore, as discussed in the Limit of Study, DIFC construction disputes

⁵⁹ *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] A.C. 689, 699H

⁶⁰ Housing Grants Construction and Regeneration Act 1996 and the Local Democracy, Economic Development and Construction Act 2009

⁶¹ Housing Grants Construction and Regeneration Act 1996 Article 104 (6) (b)

⁶² *Rasmala Investments Limited v various Defendants* CFI 1-6/2009 (2009) DIFC C.L.R.3

⁶³ *Rasmala Investments Limited v various Defendants* CFI 1-6/2009 (2009) DIFC C.L.R.3

⁶⁴ DIFC Law No.3 Law on the Application of Civil and Commercial Laws in the DIFC 2004, Article 8(2) (b)

outside of DIFC and DIFC Law will not be considered, making Articles 8(2) (c) and (d)⁶⁵ not applicable to this study. Finally, where DIFC Law No.6 Contract Law 2004 is silent, English Law shall be considered as gap-filling laws because, although conjecture, construction law has universal principles.

COMPARATIVE STUDY OF THE LAWS IN THE UAE

The following comparison of the UAE Civil Law to the DIFC Law, in the next three chapters, aims to assist in an understanding of both legal systems and their implied terms for design liability for DB Contract disputes where express terms are not agreed.

⁶⁵ DIFC Law No.3 Law on the Application of Civil and Commercial Laws in the DIFC 2004, Article 8(2) (c) and (d)

CHAPTER 2: DESIGN LIABILITY UNDER THE UAE CIVIL LAW

The UAE CTC includes an obligation of reasonable-skill-and-care under Article 383.⁶⁶ However, the Article does not clearly defined to which activities this level of liability is applicable, only stating:

*'(1) If that which is required of an obligor is the preservation of a thing, or the management thereof, or the exercise of care in the performance of his obligation, he shall have discharged that obligation if, in the performance thereof, he exercises all such care as the reasonable man would exercise, notwithstanding that the intended object is not achieved, unless there is an agreement or a provision of law to the contrary.'*⁶⁷

The UAE Civil Code and Ministry of Justice Commentary provides some clarification as follows:

*'This article divides the form of obligation to perform the work (or: an act) into two comprehensive categories. The first is the regulation of the requisite degree of care in the safekeeping or management of a thing or the taking of precautions in the performance of an obligation... The second is all other work, such as the obligation to repair a machine. This article is restricted to the first category.'*⁶⁸

⁶⁶ Federal Law No.5 Civil Transactions Law 1985 Article 383

⁶⁷ Federal Law No.5 Civil Transactions Law 1985 Article 383

⁶⁸ J. Whelan, UAE Civil Code and Ministry of Justice Commentary (Thomson Reuters, Abu Dhabi 2010), 106

Design activities could be considered to fall under the first category, and be subject to a reasonable-skill-and-care level of liability, if it is presumed that the obligor is required to exercise ‘...care in his performance of an obligation.’⁶⁹

Michael Grose, the author of ‘Construction Law in the United Arab Emirates and the Gulf,’ argues that UAE Civil Law requires specific performance for design services as this is the common standard under civil law countries.⁷⁰ However, civil law jurisdictions do not consistently apply specific performance obligations on Engineer design services, with many only requiring a duty of reasonable-skill-and-care.⁷¹ Furthermore, the Article 1 of the UAE CTC⁷² does not permit the incorporation of jurisprudence from other civil laws; therefore, drawing inference from select civil laws jurisdictions is unlikely to contribute a practical understanding of the UAE Civil Law.

Regardless, Michael Grose believes there is evidence that specific performance has been applied to design services in the UAE, stating:

‘Although not yet reduced to a well-established principle and not having any obvious source in the regions civil codes, this distinction has received some judicial recognition, specifically in the United Arab Emirates’⁷³

⁶⁹ Federal Law No.5 Civil Transactions Law 1985 Article 383

⁷⁰ M, Grose, Construction Law in the United Arab Emirates and the Gulf (John Wiley & Sons Ltd. London, 2016), 85

⁷¹ S. Lupton, 'Design Liability: An EU Comparison' (2013) 4 ICLR 395-416, however, exceptions are generally made for forms of Decennial Liability.

⁷² Federal Law No.5 Civil Transactions Law 1985 Article 1

⁷³ M, Grose, Construction Law in the United Arab Emirates and the Gulf (John Wiley & Sons Ltd. London, 2016), 85

UAE court case examples, used by Michael Grose to illustrate the application of specific performance, are on Decennial Liability disputes. As elaborated in Abu Dhabi Court of Cassation case 293/2009,⁷⁴ Decennial Liability is a distinct design liability applicable for structural collapse only, and not for other design defects. Therefore, the application of specific performance under Decennial Liability should not be considered analogous to level of performance required general design obligations.

The introduction of other civil law jurisprudence, and the use of Decennial Liability case examples, erroneously conflates the understanding of the level of liability for design services.⁷⁵ Unfortunately, there are no current detailed UAE court case determinations that elaborate on the general level of design liability beyond Decennial Liability. In the absence of a definitive law and court determinations, it would be prudent to examine other UAE CTC articles to understand the potential level of design liability under UAE Civil Law.

A duty of care, whether strict or of reasonable-skill-and-care, is determined by the relationship between the obligor and the harm caused by their act. UAE CTC Article 283 (2)⁷⁶ requires a strict liability for harm caused by a direct act, as follows:

*'If the harm is direct, it must unconditionally be made good, and if it is consequential there must be a wrongdoing or a deliberate act or the act must have led to the harm.'*⁷⁷

⁷⁴ Abu Dhabi Court of Cassation 293/2009

⁷⁵ Federal Law No.5 Civil Transactions Law 1985 Article 383

⁷⁶ Federal Law No.5 Civil Transactions Law 1985 Article 283 (2)

⁷⁷ Federal Law No.5 Civil Transactions Law 1985 Article 283 (2)

Acts that result in consequential harm require an element of wrongdoing or a deliberate act to attract liability. The UAE Civil Code and Ministry of Justice Commentary elaborates on the meaning of wrongdoing and deliberate acts, stating:

*'The meaning of deliberate here is the deliberate causing of harm, and not the deliberate doing of the act. The meaning of a wrongful act is that the person doing it does not have the right to perform the act out of which the damage has arisen.'*⁷⁸

Dubai Court of Cassation case 150/2007,⁷⁹ further elaborates on wrongful acts suggesting that they also includes acts of negligence, wherein there is a failure of a duty to exercise reasonable-skill-and-care. Article 293 (2) could be considered to define the liabilities for direct harm, a strict duty of care, and indirect harm, a duty to exercise reasonable-skill-and-care. Harm stemming from a design defect is consequential, as construction based on a defective design causes the harm, rather than the design itself. Therefore, a designer would need to have acted negligently to be considered liable for their act that caused harm. Drawing from this conclusion, it is more likely that designers have an obligation to use reasonable-skill-and-care under Article 283 (2)⁸⁰ and Article 383.⁸¹

However, the Maqawala provisions in the CTC⁸² impose a more detailed superimposition of liability for Contractors. These additional provisions can modify Contractor design defects liability beyond that of a reasonable-skill-and-care performance obligation. The three main

⁷⁸ J. Whelan, UAE Civil Code and Ministry of Justice Commentary (Thomson Reuters, Abu Dhabi 2010), 381

⁷⁹ Dubai Court of Cassation 150/2007

⁸⁰ Federal Law No.5 Civil Transactions Law 1985 Article 283 (2)

⁸¹ Federal Law No.5 Civil Transactions Law 1985 Article 383

⁸² Federal Law No.5 Civil Transactions Law 1985

Contractor design liabilities imposed by the Maqawala provisions in the CTC⁸³ are Performance, Damages, and Decennial Liabilities.

PERFORMANCE LIABILITY

As discussed in the Introduction, Performance Liabilities can be either a fit-for-purpose performance requirement, or an obligation to use reasonable-skill-and-care. Performance obligations, directly included under the Maqawala articles are for materials and fulfilment of contract requirements in Articles 875 and 877⁸⁴ respectively. Both of these requirements contain elements of fit-for-purpose and reasonable-skill-and-care performance obligations.

Under Article 875 (1),⁸⁵ the Contractor has liability for the materials used by stating the Contractor:

*'...shall be liable for the quality... (of materials) in accordance with the conditions of the contract if any, or in accordance with current practice.'*⁸⁶

The obligation is limited, as the Contractor is only required to provide materials *'in accordance with current practice.'* The term *'current practice'* imposes an objective test of negligence upon the Contractor's material selection. This is because, rather than their measure of liability being one of fit-for-purpose, it is one that is measured against what a professional would have undertaken at the time of design. Resultantly, the Contractors' design liability for the material selection is only held to a reasonable-skill-and-care obligation.

⁸³ Federal Law No.5 Civil Transactions Law 1985 Article 872 to 896

⁸⁴ Federal Law No.5 Civil Transactions Law 1985 Article 875 and 877

⁸⁵ Federal Law No.5 Civil Transactions Law 1985 Article 875 (1)

⁸⁶ Federal Law No.5 Civil Transactions Law 1985 Article 875 (1)

Unlike their material selection liability, it is not sufficient for a Contractor to undertake work at a reasonable professional level. Under Article 877,⁸⁷ the Contractor's performance obligation is to fulfil their duties under the contract by stating:

*'The contractor must complete the work in accordance with the conditions of the contract.'*⁸⁸

The Contractor has a strict duty to perform the contract. If there is an error in the contract, in the context of a DB Contract: an error in the Employer's Requirements, the Contractor is not liable for their performance of the error, as their duty is to strictly to perform the contract. Therefore, this performance obligation under the CTC, while strict, is not a natural Contractor fit-for-purpose obligation.

Concise Employer's Requirements may increase the probability of a fit-for-purpose obligation on the Contractor under the CTC Performance Liabilities. The less information in the Employer's Requirements, the less likely there are to be errors within the contract.⁸⁹ However, a reduction in information can be at the expense of Employer's control of quality.⁹⁰ Resultantly, the level of design liability, whether it is a fit-for-purpose obligation or a reasonable-skill-and-care level, for material section, under Article 875,⁹¹ and contract performance obligations, under Article 877,⁹² is dependent on the drafting of the Employer's Requirements. Despite the

⁸⁷ Federal Law No.5 Civil Transactions Law 1985 Article 877

⁸⁸ Federal Law No.5 Civil Transactions Law 1985 Article 877

⁸⁹ W. Godwin, *International Construction Contracts: A Handbook with Commentary on the FIDIC Design-Build Forms* (1st edn Wiley-Blackwell, Malaysia 2013) 42

⁹⁰ G. Kelly, *Construction Law: An Introduction for Engineers, Architects, and Contractors* (1st edn John Wiley & Sons, New Jersey 2013) 45

⁹¹ Federal Law No.5 Civil Transactions Law 1985 Article 875

⁹² Federal Law No.5 Civil Transactions Law 1985 Article 877

reduction in the general fit-for-purpose design liability, allowed under the CTC Performance Liabilities, ultimately the fit-for-purpose obligation provided under the CTC Damages Liability would determine the design liability of the Contractor.

DAMAGES LIABILITY

Under the CTC, Contractor liability for damages due to a defective design is strict, except in incidences where the Contractor is unable to prevent damage. Article 878⁹³ states:

‘The contractor shall be liable for any loss or damage resulting from his act or work whether arising through his wrongful act or default or not, but he shall not be liable if it arises out of an event which could not have been prevented.’⁹⁴

Dissimilar to the CTC Performance Liabilities, undertaking the design in accordance with the Contract does not absolve the Contractor from liability. Article 878 makes the Contractor liable for design defects that result in damage.

The Contractor’s liability is limited by the caveat that event causing the damage was unpreventable. This is a high level of limitation as it places an onus on the Contractor to prove their defective design, which resulted in the damage, was the only possible solution. Should the Employer insist the Contractor undertake a design that resulted in damage, the Contractor’s liability for defective design is removed as the Employer has removed the causal relationship as Article 287⁹⁵ states:

‘...If a person proves that the loss arose out of an extraneous cause in which he played no part such as (an)... act of the person suffering loss (the Employer), he shall not be

⁹³ Federal Law No.5 Civil Transactions Law 1985 Article 878

⁹⁴ Federal Law No.5 Civil Transactions Law 1985 Article 878

⁹⁵ Federal Law No.5 Civil Transactions Law 1985 Article 287

*bound to make it good in the absence of a legal provision or agreement to the contrary...*⁹⁶

Defective design within the Employer's Requirements cannot be considered to have broken the causal relationship, as they are not an act. Without an act by the Employer, the Contractor remains strictly liable for undertaking the work stated in the Employer's Requirements, as they remain liable for damages resulting from any work under the contract regardless of whether it is '*...wrongful act or default or not.*'⁹⁷

The strict liability of Article 878⁹⁸ does not directly impose a fit-for-purpose obligation as it is only applicable if damage occurs, not if the building does not function as the intended use. It will be incumbent on the Employer to demonstrate that a design defect rendered the project not fit-for-purpose resulting in damages due to rectification work. Consequently, the Contractor's liability for damages under Article 878⁹⁹ indirectly imposes a fit-for-purpose design liability on a DB Contractor.

DECENNIAL LIABILITY

Decennial Liability is a Contractor and Engineer joint liability for building failure or defects as defined under Article 880 (1) of the CTC as follows:

'If the subject matter of the contract is the construction of buildings or other fixed installations, the plans for which are made by an architect, to be carried out by the contractor under his supervision, they shall both be jointly liable for a period of ten years

⁹⁶ Federal Law No.5 Civil Transactions Law 1985 Article 287

⁹⁷ Federal Law No.5 Civil Transactions Law 1985 Article 878

⁹⁸ Federal Law No.5 Civil Transactions Law 1985 Article 878

⁹⁹ Federal Law No.5 Civil Transactions Law 1985 Article 878

to make compensation to the employer for any total or partial collapse of the building they have constructed or installation they have erected, and for any defect which threatens the stability or safety of the building, unless the contract specifies a longer period. The above shall apply unless the contracting parties intend that such installations should remain in place for a period of less than ten years.'¹⁰⁰

Resultantly Engineers and Contractors can attract Decennial Liability if there is a total or partial collapse, or if there is a defect that threatens the stability or safety of the building. This liability¹⁰¹ lasts for ten years commencing at the delivery of the building.¹⁰²

Decennial Liability is solely a contract, rather than tort liability, as expressed by the judge in the Dubai Court of Cassation case 150/2007:

*'...the contractor or the engineer will be liable to pay an indemnity by way of contractual liability towards the employer, and it is not open to any third party, who has no contractual relationship with either of them, to rely on such liability.'*¹⁰³

Article 880 (1) appears to restrict Decennial Liability to contracts wherein an Employer has engaged an Engineer to undertake design and supervision services. However, Article 881¹⁰⁴

¹⁰⁰ Federal Law No.5 Civil Transactions Law 1985 Article 880 (1)

¹⁰¹ It is worth noting that Dubai's additional Decennial Liabilities imposed on the developer, provided in Article 26 of Law No. (27) of 2007 Concerning Ownership of Jointly Owned Properties in the Emirate of Dubai, does not extend the liability of the Engineer or Contractor under the CTC.

¹⁰² UAE Abu Dhabi Court of Cassation 293/2009 cited in J. Ede, 'Decennial Liability in the UAE - a Commentary - Al Tamimi & Company' (Al Tamimi, 1 January 2015) <http://www.tamimi.com/en/magazine/law-update/section-11/december-january-2/decennial-liability-in-the-uae-a-commentary.html/print> accessed 8 July 2015

¹⁰³ Dubai Court of Cassation, 150/2007

¹⁰⁴ Federal Law No.5 Civil Transactions Law 1985 Article 881

implies that Decennial Liability is applicable without the Employer engagement of a design services Engineer by stating:

*'If the work of the architect is restricted to making the plans to the exclusion of supervising the execution, he shall be liable only for defects in the plans'*¹⁰⁵

Under this Article, the liability for defects in plans would not attract Decennial Liability. This is consistent with UAE Federal Supreme Court case 2/2001¹⁰⁶ wherein the design Engineer was not considered to have joint Decennial Liability with a Contractor, as they did not undertake supervision services. Furthermore, Contractor's subconsultant design Engineers do not attract Decennial Liability, as determined in Dubai Court of Cassation case 353/1999,¹⁰⁷ because Decennial Liability is a contract liability and there was no contract between the Employer and the Contractor's design Engineer.¹⁰⁸

The effect of Decennial Liability on DB Engineers is dependent on the Engineer's contractual relationship to the Employer. If the DB Contract does not include an Employer's supervising Engineer, such as the FIDIC Silver Book,¹⁰⁹ the Contractor would solely attract Decennial Liability. However, if an Employer's supervising Engineer is incorporated into a DB Contract, such as the FIDIC Yellow Book,¹¹⁰ the Employer's supervising Engineer would have joint

¹⁰⁵ Federal Law No.5 Civil Transactions Law 1985 Article 881

¹⁰⁶ UAE Federal Supreme Court, 2/2001 cited in M, Grose, Construction Law in the United Arab Emirates and the Gulf (John Wiley & Sons Ltd. London, 2016), 105

¹⁰⁷ Dubai Cassation, 353/1999 cited in M, Grose, Construction Law in the United Arab Emirates and the Gulf (John Wiley & Sons Ltd. London, 2016), 109

¹⁰⁸ M, Grose, Construction Law in the United Arab Emirates and the Gulf (John Wiley & Sons Ltd. London, 2016), 109

¹⁰⁹ FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999)

¹¹⁰ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999)

Decennial Liability exposure with the DB Contractor for design defects, despite not undertaking design activities. Resultantly, Considering Decennial Liability a mandatory contract provision,¹¹¹ Contractors and Employer's supervising Engineers are strictly liable for design defects that cause structural collapse.

ENGINEER LIABILITY

UAE Civil Law makes the Contractor wholly liable for the work of any Subcontractor as Article 890¹¹² states that the '*...contractor shall remain liable as towards the employer*' for the work of the Subcontractor. The Article does not differentiate between design or construction services. Therefore, when Contractors subcontract their design work to an Engineer they remain directly liable to the Employer, for the Engineer's design defects, at a fit-for-purpose level under Article 878.¹¹³ While, without express terms to the opposite, Engineer's liability towards the Contractor is likely to be at a lower reasonable-skill-and-care level performance obligation under Article 383.¹¹⁴

DESIGN LIABILITY UNDER UAE CIVIL LAW

The only mandatory requirements of the UAE CTC, related to design liabilities, are the Decennial Liability provisions, wherein the Contractors and Employer's supervising Engineers are strictly liable for design defects that cause structural collapse. Other UAE CTC design liabilities can be modified by the agreement between the parties. If the contract is silent, the CTC includes a combination of fit-for-purpose and reasonable-skill-and-care DB Contractor design liabilities for Performance, and Damages Liabilities. Ultimately, the Contractor's

¹¹¹ Federal Law No.5 Civil Transactions Law 1985 Article 882

¹¹² Federal Law No.5 Civil Transactions Law 1985 Article 890

¹¹³ Federal Law No.5 Civil Transactions Law 1985 Article 878

¹¹⁴ Federal Law No.5 Civil Transactions Law 1985 Article 383

obligation under the Damages liability, imposed under Article 878,¹¹⁵ requires a DB Contractor to provide a design facilitating works that are fit-for-purpose. A defective design provided in the Employer's Requirements would not absolve a Contractor from this fit-for-purpose obligation. Only when the Contractor has alerted the Employer of the design defect, and the Employer insisted the design defect is accepted; the Contractor's liability will be excluded. The CTC Maqawala provisions do not extend the Engineer's design defects liability beyond that of a reasonable-skill-and-care performance obligation that is arguably provided under Article 383.¹¹⁶ When Contractors subcontract their design work to an Engineer they remain directly liable to the Employer for the Engineer's design defects at the fit-for-purpose obligation, despite Engineers only required to use reasonable-skill-and-care. However, the Contractor can pass on the higher fit-for-purpose liability to the Engineer through express terms. As these CTC articles related to DB Contracts are not mandatory, they can be considered as implied terms when the contract express terms have failed to address the design liability issue.

¹¹⁵ Federal Law No.5 Civil Transactions Law 1985 Article 878

¹¹⁶ Federal Law No.5 Civil Transactions Law 1985 Article 383

CHAPTER 3: DESIGN LIABILITY COMPARISON UAE CIVIL LAW AND DIFC LAW

DIFC Law does not address contract design liability for construction contracts directly. Nevertheless, DIFC Law No.6 Contract Law 2004¹¹⁷ does provide a framework that can be interpreted for application with DB Contracts. DIFC Law No.6 Implied Terms and Unfair Terms in Contract Law 2005¹¹⁸ compliments DIFC Law No.6 Contract Law 2004 by providing implied terms that are not normally included as expressed contract terms.¹¹⁹ The two main contract design liabilities under DIFC Law are Performance and Damages Liabilities.

PERFORMANCE LIABILITY

Defective design in DIFC Law is considered as non-performance as Article 77¹²⁰ states:

‘Non-performance is failure by a party to perform any one or more of its obligations under the contract, including defective performance or late performance.’¹²¹

Similar to the CTC,¹²² the measure of culpability for non-performance is assessed as either a fit-for-purpose obligation or one of failing to use reasonable-skill-and-care.

¹¹⁷ DIFC Law No.6 Contract Law 2004

¹¹⁸ DIFC Law No.6 Implied Terms and Unfair Terms in Contract Law 2005

¹¹⁹ P. Terblanche, ‘Interpreting Contracts in the DIFC’ (Taylor Wessing, 15 September 2008) <https://www.internationallawoffice.com/Newsletters/Company-Commercial/United-Arab-Emirates/Taylor-Wessing-Middle-East-LLP/Interpreting-Contracts-in-the-DIFC> accessed 1 August 2017

¹²⁰ DIFC Law No.6 Contract Law 2004 Article 77

¹²¹ DIFC Law No.6 Contract Law 2004 Article 77

¹²² Federal Law No.5 Civil Transactions Law 1985

DIFC Law No.6 Contract Law 2004 Article 59¹²³ defines the application of the different performance obligations. Under Article 59 (1), there is a duty to achieve a specific result stating:

*'To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result.'*¹²⁴

This is not dissimilar to a fit-for-purpose obligation. While under Article 59 (2) there is a duty of best efforts, stating:

*'To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances.'*¹²⁵

This is a different obligation, one to use reasonable-skill-and-care. The application of these two types of performance requirements is defined under Article 60.¹²⁶

Article 60 sets out a four point criteria for determining the performance obligation as follows:

- (a) *the way in which the obligation is expressed in the contract;*
- (b) *the contractual price and other terms of the contract;*
- (c) *the degree of risk normally involved in achieving the expected result; and*
- (d) *the ability of the other party to influence the performance of the obligation.'*¹²⁷

The law acknowledges the four criteria are not the definitive by stating they are '*among other factors*,'¹²⁸ however, they are relatively comprehensive and have been used by DIFC courts.¹²⁹

¹²³ DIFC Law No.6 Contract Law 2004 Article 59.

¹²⁴ DIFC Law No.6 Contract Law 2004 Article 59 (1)

¹²⁵ DIFC Law No.6 Contract Law 2004 Article 59 (2)

¹²⁶ DIFC Law No.6 Contract Law 2004 Article 60

¹²⁷ DIFC Law No.6 Contract Law 2004 Article 60

¹²⁸ DIFC Law No.6 Contract Law 2004 Article 60

¹²⁹ An example is *Gabby v Gabe* (2016) DIFC SCT 15th February 2016

Under Article 60, unless there are expressed contract terms, the type of performance obligation may be able to be ascertained by implied contract terms under Article 60 (b), (c) and (d).¹³⁰

DIFC Law No.6 Implied Terms and Unfair Terms in Contract Law 2005 provides clarification on implied terms for design services and construction services separately. Article 17¹³¹ imposes reasonable-skill-and-care implied obligation for design services, stating:

*'In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill.'*¹³²

While Article 11¹³³ imposes a fit-for-purpose implied obligation for construction services, stating:

*'Where the transferor transfers property in the course of a business and the transferee, expressly or by implication, has made known to the transferor in the course of negotiations any particular purpose for which the property is being bought, there is an implied term that the property supplied under the contract is reasonably fit for that purpose, whether or not that is a purpose for which such property is commonly supplied, except where the circumstances show that the transferee does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the transferor.'*¹³⁴

DB Contracts provide both a supply of services: design services, and a transfer of property: construction services. As DIFC Law No.6 Implied Terms and Unfair Terms in Contract Law

¹³⁰ DIFC Law No.6 Contract Law 2004 Article 60

¹³¹ DIFC Law No.6 Implied Terms and Unfair Terms in Contract Law 2005 Article 17

¹³² DIFC Law No.6 Implied Terms and Unfair Terms in Contract Law 2005 Article 17

¹³³ DIFC Law No.6 Implied Terms and Unfair Terms in Contract Law 2005 Article 11

¹³⁴ DIFC Law No.6 Implied Terms and Unfair Terms in Contract Law 2005 Article 11

2005 does not elaborate on contracts of mixed services, DIFC Law does not provide an implied obligation for DB Contracts, and English Law should be considered.

DAMAGES LIABILITY

The Contractor is liable for damages resultant from design defects under DIFC Law No.6 of 2004 Contract Law. Although the Contractor is given the opportunity to remedy the defect, the Employer retains the right to claim damages if the cure is not performed or is unsuccessful under Article 80 (5):

*'Notwithstanding cure, the aggrieved party retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.'*¹³⁵

DIFC Law limits the liability of the Contractor for damage that are unpreventable with DIFC Law No.6 of 2004 Contract Law Article 113¹³⁶ stating:

*'The non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non- performance.'*¹³⁷

This decreases the strict fit-for-purpose liability of Contractors for unforeseeable events, to one of a duty of reasonable-skill-and-care. Similar to CTC, Article 878,¹³⁸ this is a high level of limitation as it places an onus on the Contractor to prove their defective design, which resulted in the damage, was the only possible solution. Also similar to the same CTC Article, DIFC Law No.6 of 2004 Contract Law Article 116¹³⁹ decreases the Contractor's liability if the Employer insists a defective design is followed, by stating:

¹³⁵ DIFC Law No.6 Contract Law 2004 Article 80 (5)

¹³⁶ DIFC Law No.6 Contract Law 2004 Article 113

¹³⁷ DIFC Law No.6 Contract Law 2004 Article 113

¹³⁸ Federal Law No.5 Civil Transactions Law 1985 Article 878

¹³⁹ DIFC Law No.6 Contract Law 2004 Article 116

*'Where the harm is due in part to an act or omission of the aggrieved party or to another event as to which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties.'*¹⁴⁰

DIFC Law, unlike the CTC wherein defective design within the Employer's Requirements cannot be considered an act that reduces the Contractor's liability, is silent in this regard. To determine the expected position of the DIFC Courts on defective design within Employer's Requirements, English Law should be considered.

DECENNIAL LIABILITY

DIFC Law does not include Decennial Liability. Although this form of liability was mandatory for construction contracts across the whole UAE before the creation of DIFC, as discussed in DIFC court case *Brookfield Multiplex Constructions LLC v (1) DIFC Investments LLC (2) Dubai International Financial Centre Authority* [2016],¹⁴¹ the formation DIFC and DIFC Laws created a separate legal system in which Decennial Liability does not apply. Furthermore, as there are no similar strict liabilities in English Law common law cases,¹⁴² there is no inference that a form of Decennial Liability can be drawn from English Law as a DIFC gap-filling law. Therefore, unlike UAE Civil Law, under DIFC Law strict liability is not applied to Contractors and Employer's supervision Engineers, in DB Contracts, for design defects that caused a structural collapse.

¹⁴⁰ DIFC Law No.6 Contract Law 2004 Article 116

¹⁴¹ *Brookfield Multiplex Constructions LLC v (1) DIFC Investments LLC (2) Dubai International Financial Centre Authority* [2016] DIFC CFI 020

¹⁴² S. Lupton, 'Design Liability: An EU Comparison' (2013) 4 ICLR 396. Although there are strict legislated liabilities for residential dwellings, as discussed in Chapter 4, these are not applicable to DIFC Law.

ENGINEER LIABILITY

Under DIFC Law, identical to UAE Civil Law, Contractors are liable for their Subcontractor's work. DIFC Law No.6 of 2004 Contract Law Article 94 (3)¹⁴³ states:

*'Neither delegation of performance nor a contract to assume the duty made with the obligor by the person delegated discharges any obligation or liability of the delegating obligor.'*¹⁴⁴

Therefore, when Contractors subcontract their design work to an Engineer the Contractor remains directly liable to the Employer for the Engineer's design defects. The level of liability the Contractor has to the Employer for the Subcontractor shall be at the same level afforded by the DB Contract express and implied terms. Unless there are express terms to the contrary, the Engineer shall only be liable to the Contractor at reasonable-skill-and-care level under Article 77.¹⁴⁵

DESIGN LIABILITY UNDER DIFC LAW

Under DIFC Law, a Contractor's obligation for construction is generally fit-for-purpose, while an Engineer's duty is to perform services with reasonable-skill-and-care. However, unless a fit-for-purpose obligation is an express term in the DB Contract, unlike UAE Civil Law, DIFC Law does not provide clear direction on the type of liability implied in DB Contracts. Resultantly, English Law should be used to determine the expected position of the DIFC Courts on level of implied contract design liability for design defects in DB Contracts.

¹⁴³ DIFC Law No.6 Contract Law 2004 Article 94 (3)

¹⁴⁴ DIFC Law No.6 Contract Law 2004 Article 94 (3)

¹⁴⁵ DIFC Law No.6 Contract Law 2004 Article 77

CHAPTER 4: DESIGN LIABILITY COMPARISON UAE CIVIL LAW AND DIFC LAW WITH ENGLISH LAW

DB Contracts have been disputed in the courts of England and Wales at least since the mid-to-late nineteenth century.¹⁴⁶ Resultantly, English Law has a significant body of legal precedence that covers a breadth of nuanced situations that neither the UAE Civil Law nor DIFC Law cover; or would have able to be cover, considering the creation date of both instruments. Since DIFC Law can use English Law as gap filling laws, the courts of the DIFC are fortunate to be able to draw upon the legal considerations provided in English Law. As such, the following compares the expected implied design liability terms of DIFC Law with English Law against UAE Civil Law, using specific English Law disputes as a basis of analysis.

LEGISLATIVE ACTS

Although English Law is predominately common law, there are two significant legislative acts specific to the construction industry, namely: The Housing Grants Construction and Regeneration Act 1996,¹⁴⁷ and the Local Democracy, Economic Development and Construction Act 2009.¹⁴⁸ Both Acts are geographically limited to the jurisdiction to England, Wales and Scotland by virtue of Article 104 (6) (b) of the Housing Grants Construction and Regeneration Act 1996.¹⁴⁹ Resultantly, the DIFC Law cannot use these legislative acts as gap-filling law. Therefore, only the common law cases of English Law can contribute to DB Contract disputes within DIFC Law.

¹⁴⁶ One of the first popularly referenced cases is *Francis v Cockrell* (1870) LR 5 QB 501, cited in J. Murdoch, W Hughes, *Construction Contracts: Law and Management* (4th edn Taylor & Francis, London 2008) 182

¹⁴⁷ Housing Grants Construction and Regeneration Act 1996

¹⁴⁸ Local Democracy, Economic Development and Construction Act 2009

¹⁴⁹ Housing Grants Construction and Regeneration Act 1996 Article 104 (6) (b)

COMMON LAW CASES

Normally under English Law common law cases design services have an implied reasonable-skill-and-care performance obligation.¹⁵⁰ This level of design liability is analogous to the liability for other professional service obligations, as stated by Lord Denning MR:

*‘The law does not usually imply a warranty that he (the professional man) will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win the case.’*¹⁵¹

However, as DB Contracts include services in addition to design work, English Law common law cases have determined that the implied level of design liability level may be different from the standard of reasonable-skill-and-care.¹⁵²

CONTRACTOR IMPLIED LIABILITY

Viking Grain Storage v TH White Installations Ltd (1985)

Viking Grain Storage v TH White Installations Ltd (1985)¹⁵³ is an English Law case wherein the Employer (Viking Grain Storage) claimed the DB Contractor (TH White Installations) failed to achieve a building that was fit-for-purpose. The project was a grain drying and storage facility wherein design failure resulted in a collapse. The Employer asserted that, the material selected by the Contractor was of insufficient quality, and the design of the facility was inadequate, culminating in a collapse that was a direct failure of the Contractor’s fit-for-purpose

¹⁵⁰J. Uff, *Construction Law* (11th edn Sweet & Maxwell, London 2013) 293 citing *George Hawkins v Chrysler* (1986) 38 B.L.R. 36 CA as an exemplar example.

¹⁵¹*Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners* [1975] 3 All ER 99

¹⁵²J. Scriven, 'Design Risk and Liability Under Design and Build Contracts' (1996) 4 CLJ 228

¹⁵³*Viking Grain Storage v TH White Installations Ltd* (1985) 33 BLR 103

obligation. The court found that there were no express fit-for-purpose terms within the contract, however, as the Employer relied on the Contractor's expertise for both design and material selection, the court interpolated that there was an implied fit-for-purpose obligation. Judge John Davies QC explained that the fit-for-purpose liability does not differentiate between a design or construction obligation, stating:

*'The virtue of an implied term of fitness for purpose is that it prescribes a relatively simple and certain standard of liability based on the "reasonable" fitness of the finished product, irrespective of considerations of fault and of whether its unfitness derived from the quality of work or materials or design.'*¹⁵⁴

Resultantly, the Contractor's service obligation for design was increased to the higher, strict level of fit-for-purpose obligation as the work was performed under a DB Contract.¹⁵⁵

Various arguments for the imposition of this fit-for-purpose obligation in DB Contracts have been provided. In *Viking Grain Storage v TH White Installations Ltd* (1985) Judge John Davies QC justified the obligation due to the Employer's reliance on the Contractor's expertise, while the ruling under *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980)¹⁵⁶ drew parallels to the sale of goods. A third justification, included in academic discussions,¹⁵⁷ is the equivalence to the Contractor's dwelling habitability obligation

¹⁵⁴*Viking Grain Storage v TH White Installations Ltd* (1985) 33 BLR 103

¹⁵⁵ N. Henchie, 'FIDIC Conditions of Contract for EPC Turnkey Projects - The Silver Book Problems in Store?' (2001) 1 ICLR 53 citing *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980) 14 BLR 1 as an example

¹⁵⁶*Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980) 14 BLR 1 cited in J. Scriven, 'Design Risk and Liability Under Design and Build Contracts' (1996) 4 CLJ 228

¹⁵⁷ H. Flemming, 'Fitness for Purpose: The Implied Design Obligation in Construction Contracts' (1997) Const. L.J., 227-242

under *Miller v. Cannon Hill Estates Limited*,¹⁵⁸ however, as Contractors are liable regardless of the form of contract, this justification conflates DB Contract fit-for-purpose liability with residential habitability liability. Regardless of the reasoning behind the imposition of fit-for-purpose design liability in DB Contracts under English Law, it is clear that this is the current ratio decidendi.¹⁵⁹

This DB Contractor English Law fit-for-purpose obligation can help determine the resultant obligation under DIFC Law. Provided there are no express terms in the contract to the contrary, under DIFC Law supplemented with *Viking Grain Storage v TH White Installations Ltd* (1985), there is an implied fit-for-purpose contract liability on a DB Contractor for both their design and build services.¹⁶⁰ As UAE Civil Law CTC Article 878,¹⁶¹ also imposes a fit-for-purpose liability on the Contractor for design defects,¹⁶² provided DIFC Courts allow this English Law case to be used as a gap-filling law, both DIFC Law and UAE Civil Law are in agreement that a DB Contractor has a natural fit-for-purpose design liability towards the Employer.

Viking Grain Storage v TH White Installations Ltd (1985) does not take into consideration the relationship between the Employer and a Contractor's design Engineer. Neither did it consider whether the action of a design Engineer would affect the level of liability the parties have to

¹⁵⁸ *Miller v. Cannon Hill Estates Limited* [1931] 2 K.B. 113.

¹⁵⁹ H, Flemming, 'Fitness for Purpose: The Implied Design Obligation in Construction Contracts' (1997) Const. L.J., 241-242

¹⁶⁰ DIFC Law No.6 Contract Law 2004 Article 59.

¹⁶¹ Federal Law No.5 Civil Transactions Law 1985 Article 878

¹⁶² The Contractor would also be subject to Decennial Liability under Federal Law No.5 Civil Transactions Law 1985 Article 880 to 883

one another. *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980)¹⁶³ deliberates these design liability issues.

ENGINEER IMPLIED LIABILITY

Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd (1980) English Law case *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980)¹⁶⁴ is a dispute was between an Employer (Independent Broadcasting Authority) and a DB Contractor (EMI Electronics) and a nominated Subcontractor (BICC Construction Ltd) acting as the design Engineer on the subject of the dispute; a telecommunications mast. It was found that an Engineer's design defect resulted in the collapse of the telecommunications mast. The Employer attempted to assert liability for the design defect on both the Contractor and the Engineer. The court found the Engineer liable under tort for negligent misstatement, due to the Engineer's correspondence assuring the Employer the design of the mast was adequate. However, the court rejected the Employer's claim that the Engineer had a contractual liability towards the Employer, from the same correspondence, as there was not an implied intention for the Employer and Engineer to enter into contract. The Contractor was found liable under contract for the design defect because the mast was not fit-for-purpose.

The decision in *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980) ensures the Contractor remains liable for subcontracted design work under the DB Contracts, at the Contractor's implied fit-for-purpose liability level, unless

¹⁶³*Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980) 14 BLR 1

¹⁶⁴*Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980) 14 BLR 1

express terms to the contrary. Both DIFC Law¹⁶⁵ and UAE Law¹⁶⁶ also require the Contractor to be wholly liable for the work of their Subcontractors.¹⁶⁷ In *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980), the Engineer was found liable outside of contract and under the tort of negligent misstatement. This tort liability arose due to direct correspondence between the Employer and the Engineer, rather than through the chain of contracts. Although both DIFC Law¹⁶⁸ and UAE Civil Law¹⁶⁹ include the tort of negligent misstatement within their laws, a duty would only arise dependant on the specific details of the case.¹⁷⁰ Therefore, there is no implied contract design liability, negligent or otherwise, for Engineers towards the Employers in DB Contracts.

EXTENT OF IMPLIED LIABILITY

The failure in *Viking Grain Storage v TH White Installations Ltd* (1985) and *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980) were irrevocable and irrefutable as it involved structural collapse. Complete structural collapse is a somewhat easier measure of failure than a building which is undamaged and has no issue other

¹⁶⁵ DIFC Law No.6 Contract Law 2004 Article 94 (3)

¹⁶⁶ Federal Law No.5 Civil Transactions Law 1985 Article 890

¹⁶⁷ However, the UAE Civil Law would also subject the Contractor to strict liability for the design defect causing the structural collapse under the Decennial Liability provisions under Federal Law No.5 Civil Transactions Law 1985 Article 880 to 883

¹⁶⁸ DIFC Law No.6 Contract Law 2004 Chapter 2

¹⁶⁹ Federal Law No.5 Civil Transactions Law 1985 Articles 283

¹⁷⁰ A. Nissen, 'The Duty to Review a Design - is it Real or Artificial?' (1997) 4 CLJ 221-226 discusses that the negligent misstatement liability only arises for Engineer Reviews under BB Contracts and P Harris. J Leech, 'Are Architects and Engineers Responsible for Buildability in Design?' (2000) 1 CLJ 3-12 conclude that Engineers are also not liable under negligent misstatement for designs that are not buildable, as buildability is the Contractor's liability.

than it cannot be used for its intended use; a failure of functionality. Failures of functionality have also been considered in English Law. In *Lowe v W. Machell Joinery Ltd* [2011]¹⁷¹ and *Trebor Bassett Holdings Ltd & Anr v ADT Fire and Security plc* [2011],¹⁷² both of which shall be discussed later, the construction did not collapse, but was deemed unusable for the intended purpose. In both cases, the DB Contract fit-for-purpose obligation was not reduced on the basis that failure was limited usability only. Thus, under English Law, and resultantly DIFC Law, fit-for-purpose obligations include failure of functionality. Similarly, UAE Civil Law CTC Article 878¹⁷³ does not limit the Contractor's fit-for-purpose obligations to just structural collapse.

LIMITING AND INCREASING LIABILITY

Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners [1975]

Given, as demonstrated in *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980), there is not an implied fit-for-purpose obligation imposed upon Engineers in DB Contracts, it is incumbent on the Contractor to provide express terms in the subcontract that pass on this higher level of liability. In the case of *Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners* [1975]¹⁷⁴ the Engineer (Baynham Meikle and Partners) were subcontracted to the Contractor (Greaves & Co (Contractors) Ltd) to design a warehouse with significant structural live loadings on the first floor. It was found that the structural design

¹⁷¹*Lowe v W. Machell Joinery Ltd* [2011] EWCA 794 cited in J. Glover, 'Implied Terms' (Fenwick Elliot, 1 November 2011) <https://www.fenwickelliott.com/research-insight/annual-review/2011/implied-terms> accessed 31 March 2018

¹⁷²*Trebor Bassett Holdings Ltd & Anr v ADT Fire and Security plc* [2011] EWHC 193 (TCC) J. Glover, 'Implied Terms' (Fenwick Elliot, 1 November 2011) <https://www.fenwickelliott.com/research-insight/annual-review/2011/implied-terms> accessed 31 March 2018

¹⁷³ Federal Law No.5 Civil Transactions Law 1985 Article 878

¹⁷⁴ *Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners* [1975] 3 All ER 99

was inadequate, and the structure had begun to fail, initiating the dispute. The judge determined that the Engineer had increased their liability by implied terms wherein the Engineer warranted that the warehouse would be fit-for-purpose.

These implied terms, which resulted in the Engineer's fit-for-purpose liability, are terms of fact that should not be confused with terms of law.¹⁷⁵ The ruling magistrate in the case, Lord Denning MR, reconfirmed that designers only hold an implied term at law to perform their obligations with reasonable-skill-and-care by stating:

*'The law does not usually imply a warranty that he will achieve the desired result, but only a term that he will use reasonable care and skill.'*¹⁷⁶

However, because the parties had failed to include express terms, the judge accepted the Contractor's argument that the tender correspondence implied the Engineer had accepted a fit-for-purpose liability.¹⁷⁷ Although there is a concern that Engineers may attract this higher level of liability simply by being aware they are involved in a DB Contract,¹⁷⁸ further English Law cases have considered Lord Denning's ruling as a case specific imposition of fit-for-purpose liability, an implied term of fact. *Platform Funding Ltd v Bank of Scotland Plc* [2008] reconfirmed that the implied term of law for Engineer's design liability is an obligation of reasonable-skill-and-care, when discussing the application of *Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners* [1975], the court stated:

¹⁷⁵ H, Flemming, 'Fitness for Purpose: The Implied Design Obligation in Construction Contracts' (1997) Const. L.J, 232-233

¹⁷⁶ *Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners* [1975] 3 All ER 99

¹⁷⁷ H, Flemming, 'Fitness for Purpose: The Implied Design Obligation in Construction Contracts' (1997) Const. L.J, 232-233

¹⁷⁸ D. Keating, S Furst, V Ramsey, Keating on Construction Contracts (9th edn Sweet & Maxwell, London 2012) 1-032

*‘...it requires special facts or clear language to impose an obligation stricter than that of reasonable care...’*¹⁷⁹

Therefore, Engineers can increase their implied term of law reasonable-skill-and-care level of liability, either by implied term of fact or as an express term in the contract.

The ability for parties to increase their level of liability is considered differently under UAE Civil and DIFC Laws. Under UAE Civil Law CTC Article 296,¹⁸⁰ liability cannot be excluded, but no limits are placed on modifying the level of agreed liability, except for limiting Decennial Liability.¹⁸¹ Contract agreed liability limits can be contested in court on the grounds they significantly limit compensation for loss.¹⁸² Generally, Engineers can agree to increase their level of liability to that of fit-for-purpose. Conversely, Contractors would be able to decrease their liability to one of reasonable-skill-and-care, except for Decennial Liability,¹⁸³ should the parties agree. DIFC also allows the parties to decrease or increase their level of liability.¹⁸⁴ DIFC Law No.6 Implied Terms and Unfair Terms in Contract Law 2005¹⁸⁵ include provisions that limit the extent to which liabilities can be increased. Under Article 40 the extent to which parties can be considered to have agreed to increase their level of liability is governed by an objective test, which is defined as:

¹⁷⁹ Platform Funding Ltd v Bank of Scotland Plc [2008] EWCA Civ 930 from S Lupton lecture at Kings College London, Msc Construction Law and Dispute Resolution ‘Design Liability’ held 6th February 2014.

¹⁸⁰ Federal Law No.5 Civil Transactions Law 1985 Article 296

¹⁸¹ Federal Law No.5 Civil Transactions Law 1985 Article 880 to 883

¹⁸² J. Bueno, The Projects and Construction Review (1st edn Law Gideon Robertson, London 2011) 292

¹⁸³ Federal Law No.5 Civil Transactions Law 1985 Article 880 to 883

¹⁸⁴ DIFC Law No.5 Law of Obligations 2005 Article 59

¹⁸⁵ DIFC Law No.6 Implied Terms and Unfair Terms in Contract Law 2005

*'In relation to a contract term, the requirement of reasonableness for the purposes of this Law is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.'*¹⁸⁶

Considering English Law has permitted the expressed increase of Engineer liabilities under DB Contracts, from one of reasonable-skill-and-care to that of fit-for-purpose as demonstrated in *Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners* [1975], under DIFC Law it should be considered fair and reasonable to include such terms. The limit if the liability increase is to the level to which the party could have contemplated at the date of the contract. Therefore, under DIFC Law it may be possible that the extent of the Engineer's fit-for-purpose express agreement will be reduced should unforeseeable circumstances arise.

LIMITATIONS TO FIT-FOR PURPOSE LIABILITY

Five English Law cases considered situations where special conditions arose that might have made the fit-for-purpose design obligation unreasonable. These cases include Employer's Requirements errors, Employer's Requirements competing obligations, design innovation, undisclosed design purpose, and imposition of a nominated subcontractor. Although each ruling was based on the specifics of the case, they can provide a general understanding as to the reasonable limits of a fit-for-purpose obligation.

¹⁸⁶ DIFC Law No.6 Implied Terms and Unfair Terms in Contract Law 2005 Article 40

EMPLOYER'S REQUIREMENTS ERRORS

Lowe v W. Machell Joinery Ltd [2011]

Lowe v W. Machell Joinery Ltd [2011]¹⁸⁷ was a dispute related to an error in the Employer's Requirements in a DB Contract. The Contractor (Machell Joinery Ltd) constructed and supplied a staircase that was in accordance with the Employer's Requirements, but was not fit-for-purpose because the Employer's Requirements did not comply with the building regulations. The DB Contract mainly utilized implied terms because the contract was no more than a hand-written quote.¹⁸⁸

As the Employer relied upon the Contractor to be familiar with the building regulations and advised them of resultant errors the Employer's Requirements,¹⁸⁹ the Contractor was found in breach of their implied fit-for-purpose obligation. Consequently, in English Law, unless there are express terms otherwise, design defects in the Employer's Requirements do not alleviate Contractors from their fit-for-purpose obligations.¹⁹⁰ Resultantly, this case could be used under DIFC Law to argue that it is reasonable for the Employer to rely on the Contractor's expertise to correct defects in the Employer's Requirements. This conclusion is consistent with UAE

¹⁸⁷ *Lowe v W. Machell Joinery Ltd* [2011] EWCA 794 cited in J. Glover, 'Implied Terms' (Fenwick Elliot, 1 November 2011) <https://www.fenwickelliott.com/research-insight/annual-review/2011/implied-terms> accessed 31 March 2018

¹⁸⁸ J. Glover, 'Implied Terms' (Fenwick Elliot, 1 November 2011) <https://www.fenwickelliott.com/research-insight/annual-review/2011/implied-terms> accessed 31 March 2018

¹⁸⁹ J. Glover, 'Implied Terms' (Fenwick Elliot, 1 November 2011) <https://www.fenwickelliott.com/research-insight/annual-review/2011/implied-terms> accessed 31 March 2018

¹⁹⁰ L Rutherford. S Wilson, 'Design Defects in Building Contracts: A Contractor's Duty to Warn?' (1994) 2 CLJ 90-99 note that Contractors also have a reasonable-skill-and-care liability to warn Employer of errors in Employer's Requirements, however, since this liability is less strict than the fit-for-purpose liability discussed, it is unlikely to be imposed in DB Contracts.

Civil Law CTC Article 878¹⁹¹ wherein undertaking the design in accordance with the Contract does not absolve the Contractor from liability.

EMPLOYER'S REQUIREMENTS COMPETING OBLIGATIONS

MT Hojgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd [2017]

Similar to *Lowe v W. Machell Joinery Ltd* [2011], the English Law case of *MT Hojgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd* [2017]¹⁹² contends with an error in the Employer's Requirements. The Employer (E.ON Climate and Renewables UK Robin Rigg East Ltd) engaged the Contractor (MT Hojgaard A/S) to build sixty offshore wind turbines. The foundations of the turbines failed due to a design fault that originated from a foundation design based on an erroneous industry standard specified in the Employer's Requirements.

The case was eventually heard in the Supreme Court wherein the judges found the contract to have two competing requirements; one of performance and the other specified. The judges advised that the precedence of the two competing obligations should be decided on standard contract interpretation stating:

'There have been a number of cases where courts have been called on to consider a contract which includes two terms, one requiring the contractor to provide an article which is produced in accordance with a specified design, the other requiring the article to satisfy specified performance criteria; and where those criteria cannot be achieved by complying with the design. The reconciliation of the terms, and the determination of their

¹⁹¹ Federal Law No.5 Civil Transactions Law 1985 Article 878

¹⁹² *MT Hojgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd* [2017] UKSC 59

combined effect must, of course, be decided by reference to ordinary principles of contractual interpretation.'¹⁹³

Rather than compare the case to comparative DB Contract disputes, the judges considered historic Bid-Build Contract fit-for-purpose obligations, referencing such cases as *Thorn v The Mayor and Commonalty of London* (1876),¹⁹⁴ *The Hydraulic Engineering Co Ltd v Spencer and Sons* (1886),¹⁹⁵ and *Cammell Laird and Co Ltd v The Manganese Bronze and Brass Co Ltd* [1934].¹⁹⁶ This approach is consistent with the English Law case *Viking Grain Storage v TH White Installations Ltd* (1985), wherein liabilities of Bid-Build and DB Contracts are considered comparable. Resultantly, the court considered the performance obligation to take precedence over any erroneous specified design requirements by stating:

'...in many contracts, the proper analysis may well be that the contractor has to improve on any aspects of the prescribed design which would otherwise lead to the product falling short of the prescribed criteria, and in other contracts, the correct view could be that the requirements of the prescribed criteria only apply to aspects of the design which are not prescribed. While each case must turn on its own facts, the message from decisions and observations of judges in the United Kingdom... is that the courts are generally inclined to give full effect to the requirement that the item as produced complies with the prescribed criteria, on the basis that, even if the customer or employer has specified or approved the design, it is the contractor who can be expected to take the risk if he agreed

¹⁹³ *MT Hojgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd* [2017] UKSC 59

¹⁹⁴ *Thorn v The Mayor and Commonalty of London* (1876) 1 App Cas 120

¹⁹⁵ *The Hydraulic Engineering Co Ltd v Spencer and Sons* (1886) 2 TLR 554

¹⁹⁶ *Cammell Laird and Co Ltd v The Manganese Bronze and Brass Co Ltd* [1934] AC 402, 425

to work to a design which would render the item incapable of meeting the criteria to which he has agreed.'¹⁹⁷

Similar to *Lowe v W. Machell Joinery Ltd* [2011], it was not sufficient for the Contractor to have followed the specified requirement in the Employer's Requirements. Furthermore, the Contractor use of reasonable-skill-and-care, by following the specified industry standard, was negated by their higher fit-for-purpose obligation, despite the fact that the error in the industry standard was unforeseeable.

The ruling by the English Law courts may initially appear at odds with the DIFC Law reasonableness test in DIFC Law No.6 Implied Terms and Unfair Terms in Contract Law 2005 Article 40,¹⁹⁸ which includes elements of foreseeability. Neither of the parties in this case could have reasonably considered the industry design standard was in error at the time of engagement. However, it would also be reasonable, taking into consideration *MT Hojgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd* [2017], for the Contractor, despite not being able to foresee an error in the industry design standards, to have assumed a duty to achieve the performance requirement above all other considerations. Therefore, when undertaking design a DB Contractor, under DIFC Law using English Law as a gap-filling law, is obligated to achieve the performance requirement despite competing, and possibly erroneous, specification requirements.

¹⁹⁷ *MT Hojgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd* [2017] UKSC 59

¹⁹⁸ DIFC Law No.6 Implied Terms and Unfair Terms in Contract Law 2005 Article 40

UAE Civil Law CTC Article 878¹⁹⁹ places a strict fit-for-purpose obligation on the Contractor; yet, the Article also includes a caveat that the Contractor is not liable for damage they could have prevented. Preventability of damage does not directly correlate with foreseeability. In *MT Hojgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd* [2017] the Contractor could have prevented the damage by using a higher design tolerance than the industry standard. Resultantly, damages because of an error in an industry design standard can still be preventable, thereby, not absolving a Contractor from their fit-for-purpose obligations under UAE Civil Law CTC Article 878.²⁰⁰ Furthermore, if the design defect results in structural collapse, the Contractor would be subject to Decennial Liability²⁰¹ regardless of considerations of fault.

The UAE CTC²⁰² also determines the outcome where there are competing obligations of performance and specified design. Under CTC Article 258 (1),²⁰³ where there is ambiguity in the contract, the law requires the courts to give preference to the intentions of the parties by stating:

*‘The criterion in (the construction of) contracts is intentions and meanings and not words and form.’*²⁰⁴

Given the intent of DB Contracts is to place design liability with the Contractor, it would be likely that UAE Civil Law courts would agree with the English Law courts and consider the Contractor’s fit-for-purpose performance obligations as taking precedence over any specified

¹⁹⁹ Federal Law No.5 Civil Transactions Law 1985 Article 878

²⁰⁰ Federal Law No.5 Civil Transactions Law 1985 Article 878

²⁰¹ Federal Law No.5 Civil Transactions Law 1985 Article 880 to 883

²⁰² Federal Law No.5 Civil Transactions Law 1985

²⁰³ Federal Law No.5 Civil Transactions Law 1985 Article 258 (1)

²⁰⁴ Federal Law No.5 Civil Transactions Law 1985 Article 258 (1)

design requirement. Considering the effect CTC Article 258 (1)²⁰⁵ and the Contractor's fit-for-purpose obligation under Article 878,²⁰⁶ it is likely the same conclusion would be reached in UAE Civil Law as in DIFC Law.

DESIGN INNOVATION

Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd (1980)

The case of *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980),²⁰⁷ as previously described, included the design of structures that had not previously been undertaken. However, the courts held that DB Contractors had an implied requirement to take additional care when providing innovative design solutions.²⁰⁸ Therefore, under DIFC Law using English Law as gap-filling law, the state of the art defence,²⁰⁹ that has been successfully used by Engineers in consultancy contract disputes such as *Wimpey Construction UK v Poole* (1984)²¹⁰ and *NYE Saunders and Partners (a Firm) v Alan E Briston* (1987),²¹¹ wherein designers can limit their liability to that of a standard rather than specialised level of care, may not be available to DB Contractors. Similarly, UAE Civil Law CTC Article 878²¹² strict fit-for-purpose liability provisions would make it unlikely for courts to entertain the state of the art

²⁰⁵ Federal Law No.5 Civil Transactions Law 1985 Article 258 (1)

²⁰⁶ Federal Law No.5 Civil Transactions Law 1985 Article 878

²⁰⁷ *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980) 14 BLR 1

²⁰⁸ J. Adriaanse, *Construction Contract Law* (3rd edn Palgrave MacMillan, Hampshire, United Kingdom 2010) 294

²⁰⁹ S. Van Gulijk, 'A New Design for European Architect Law' (2010) 1 ICLR 23 and S. Lupton, 'Design Liability: An EU Comparison' (2013) 4 ICLR 396

²¹⁰ *Wimpey Construction UK v Poole* (1984) 2 Lloyd's Rep 499 cited in D. Keating, S Furst, V Ramsey, Keating on *Construction Contracts* (9th edn Sweet & Maxwell, London 2012) 14-030

²¹¹ *NYE Saunders and Partners (a Firm) v Alan E Briston* (1987) BLR 93 cited in J. Adriaanse, *Construction Contract Law* (3rd edn Palgrave MacMillan, Hampshire, United Kingdom 2010) 287

²¹² Federal Law No.5 Civil Transactions Law 1985 Article 878

defence in DB Contracts, and certainly not in the case of structural collapse that are subject to Decennial Liability.²¹³

EMPLOYER'S REQUIREMENTS PURPOSE NOT DEFINED

Trebor Bassett and Cadbury v ADT Fire and Security and Trebor Bassett and Cadbury v ADT Fire and Security [2012]

Unlike cases where there are errors in Employer's Requirements, or where design innovation was required, Contractor's fit-for-purpose obligation is removed if the Employer has not made them aware of the intended purpose²¹⁴ within the Employer's Requirements.²¹⁵ In *Trebor Bassett and Cadbury v ADT Fire and Security and Trebor Bassett and Cadbury v ADT Fire and Security* [2012],²¹⁶ the Employer (Trebor Bassett Holdings Ltd & Anr) contested that the DB Contractor (ADT Fire and Security plc) failed in their obligation to provide a suitable fire suppression system in their popcorn factory. The Employer's Requirements required the Contractor to replicate the existing system and did not to mention any performance requirements specific to the cooking of popcorn. The popcorn factory was destroyed in a fire because of failure of the fire suppression systems, one of which was provided by the Contractor. The judge found that, despite the contract being a DB Contract with implied and expressed fit-

²¹³ Federal Law No.5 Civil Transactions Law 1985 Article 880 to 883

²¹⁴ S. Lupton, 'Liability for Design of a System: Trebor Bassett v ADT Fire' (2014) 3 ICLR 339 and

²¹⁵ G. Hok, 'Employer's Requirements in Design-Build Contracts under FIDIC - A Comparative Study' (2012) 2 ICLR 141 advises that the intended purpose is normally found within the Employer's Requirements, however, this information can also be located within other contract documents.

²¹⁶ *Trebor Bassett and Cadbury v ADT Fire and Security and Trebor Bassett and Cadbury v ADT Fire and Security* [2012] EWCA Civ 1158 cited in S. Lupton, 'Liability for Design of a System: Trebor Bassett v ADT Fire' (2014) 3 ICLR 322-340 and A. Pigott, 'Trebor Bassett and Cadbury v ADT Fire and Security: Allsorts of Contractual Issues' (Lexology, 6 December 2012) <https://www.lexology.com/library/detail.aspx?g=a94eed20-04f3-47b9-962b-1dbb694b0de3> accessed 24 March 2018.

for-purpose obligations, the Employer's Requirements did not to provide sufficient description of the purpose of the construction and, consequently, the Contractor's liability for design was reduced to one of reasonable-skill-and-care, stating:

*'... no doubt have been that no such absolute but undefined obligation could be undertaken or guarantee given... (therefore)... in my view... the obligation undertaken as one of the exercise of reasonable-skill-and-care.'*²¹⁷

Because of this reduced level of liability, the Contractor was not considered to be at fault. Therefore, a Contractor's design liability is reduced from fit-for-purpose to reasonable-skill-and-care when an Employer has failed to fully disclose a specialized purpose.

Considering the ruling under *Trebor Bassett and Cadbury v ADT Fire and Security and Trebor Bassett and Cadbury v ADT Fire and Security* [2012], DIFC Law may allow Contractors to limit their liability threshold to one of reasonable-skill-and-care where a failure was a direct result of a nondisclosed specialized purpose. Under the UAE Civil Law CTC Article 878²¹⁸ Contractors are not liable for damages they could not have prevented. Unlike DIFC Law supplemented by English Law, UAE Civil Law does not reduce liability, it excludes liability on the grounds the Contractor was unaware of a specialized purpose and could not have prevented the damage.

²¹⁷ *Trebor Bassett and Cadbury v ADT Fire and Security and Trebor Bassett and Cadbury v ADT Fire and Security* [2012] EWCA Civ 1158

²¹⁸ Federal Law No.5 Civil Transactions Law 1985 Article 878

NOMINATED SUBCONTRACTORS

Norta Wall Papers (Ireland) v Sisk & Sons (Dublin) Ltd [1978]

Despite being a common law case outside of the jurisdiction of English Law, as English Law courts commonly refer to other common law jurisdiction cases,²¹⁹ *Norta Wall Papers (Ireland) v Sisk & Sons (Dublin) Ltd* [1978]²²⁰ may also help define the limits of Contractor's fit-for-purpose obligations. In this Irish Law dispute, the Employer (Norta Wall Papers (Ireland)) imposed a nominated Subcontractor to undertake the roofing design for the DB Contractor (Sisk & sons (Dublin) Ltd). The roof structure subsequently leaked due to a defective design by the nominated Subcontractor. The court found that due to the nomination of the Subcontractor, the Employer implied that they relied on the nominated Subcontractor, rather than the Contractor, for the design of the roof. The court held that this Employer reliance on the nominated Subcontractor excluded the Contractor's fit-for-purpose liability towards the Employer stating:

*'(the Employer) ...cannot hold the contractor liable if, because of bad design, it (the construction) turns out not to be suitable for a particular purpose... if he (the Employer) nominated it (the subcontractor) ...he (the Employer) has, in effect, accepted the design as being suitable for the particular purpose.'*²²¹

Unlike *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980), wherein the Subcontractor was native to the Contractor, the process of nominating a

²¹⁹ C, Feikert-Ahalt, 'The Impact of Foreign Law on Domestic Judgements: England and Wales' (Library of Congress, 1 March 2010) <https://www.loc.gov/law/help/domestic-judgment/englandandwales.php> accessed 26 May 2018

²²⁰*Norta Wall Papers (Ireland) v Sisk & Sons (Dublin) Ltd* [1978] IR 114

²²¹*Norta Wall Papers (Ireland) v Sisk & Sons (Dublin) Ltd* [1978] IR 114

Subcontractor may dissolve the Contractor's contractual design liability for the nominated Subcontractor's work.

Parallels can be drawn between DIFC Law No.6 of 2004 Contract Law Article 94 (1)²²² and *Norta Wall Papers (Ireland) v Sisk & Sons (Dublin) Ltd* [1978].²²³ The DIFC Law prohibits additional risk placed upon the Contractor due to nomination of Subcontractors stating:

*'A contractual right can be assigned unless... the substitution of a right of the assignee (the nominated Subcontractor) for the right of the assignor (Contractor) would materially change the duty of the obligor (the Contractor), or materially increase the burden or risk imposed on him (the Contractor) by his contract (the BD Contract), or materially impair his (the Contractor) chance of obtaining return performance, or materially reduce its value to him (the Contractor) ...'*²²⁴

However, it could be argued that if the Contractor agrees the nomination, the risk has also been accepted, and the nominated Subcontractor's obligations fully transferred to the Contractor under DIFC Law No.6 Contract Law 2004 Article 94 (3).²²⁵ Considering this, and also broadening the definition of the DIFC gap-filling laws to other jurisdiction cases that can be considered in English Law courts, *Norta Wall Papers (Ireland) v Sisk & Sons (Dublin) Ltd* [1978] is perhaps only applicable to DIFC cases wherein the Contractor had not expressed acceptance for the liability of the nominated Subcontractor.

²²² DIFC Law No.6 of 2004 Contract Law Article 94 (1)

²²³ *Norta Wall Papers (Ireland) v Sisk & Sons (Dublin) Ltd* [1978] IR 114

²²⁴ DIFC Law No.6 of 2004 Contract Law Article 94 (1)

²²⁵ DIFC Law No.6 Contract Law 2004 Article 94 (3)

UAE CTC Article 890²²⁶ does not differentiate between domestic and nominated Subcontractors. This Article makes the Contractor wholly liable for the work of any Subcontractor. Furthermore, if the nominated Subcontractor's design defect results in structural collapse, the Contractor would be subject to Decennial Liability.²²⁷ Therefore, unlike DIFC where Contractors may be able to exclude liability for nominated Subcontractor's work, under UAE Civil Law the Contractor would remain liable for design errors.

DB CONTRACT IMPLIED DESIGN LIABILITIES IN THE UAE

Under both UAE Civil Law and DIFC Law DB Contractors are generally held to the same liability level as Bid-Build Contractors, in that they have an implied fit-for-purpose obligation unless expressed otherwise. Except for Decennial Liability, which is only present in UAE Civil Law, minor divergences between the laws may change the extent of liability for DB Contractors in specific circumstances. Unlike UAE Civil law, under DIFC Law, a Contractor or Engineer might not be held to an expressed liability, higher than an implied liability, if an unforeseeable event negates the basis the party accepted the increased liability level. Furthermore, DB Contractors under DIFC Law may be able to exclude liability for nominated Subcontractor design if there are no express terms of acceptance, whereas under UAE Civil Law Contractors would be completely liable for all Subcontractor's design. Perhaps the subtlest difference is where an Employer has not disclosed a specialized purpose in the Employer's Requirements. Under UAE Law, the DB Contractor could exclude their liability, while under DIFC Law they may only be able to reduce their liability to reasonable-skill-and-care. UAE Civil Law applies Decennial Liability to Contractors and the Employer's supervising Engineers for design defects

²²⁶ Federal Law No.5 Civil Transactions Law 1985 Article 890

²²⁷ Federal Law No.5 Civil Transactions Law 1985 Article 880 to 883

causing structural collapse, while DIFC Law does not include this specific provision. However, the implied design liability differences between UAE and DIFC Law are mutable, except for Decennial Liability, if there are opposing express terms.

CHAPTER 5: FIDIC CONTRACTS DESIGN LIABILITY IN THE UAE

The FIDIC Design Build, subcontractor, consultancy, and sub-consultancy contracts provide express terms for the level of liability for both Contractors and Engineers. Although the drafting of these contracts is detailed, the resolution of disputes can be dependent on implied contract terms in specific liability issues. The following shall review the design liability expressed by the FIDIC contracts in relation to implied terms derived from UAE Civil Law or DIFC Law where the FIDC express terms do not sufficiently cover the design liability issues discussed in the previous chapter.

FIDIC DB CONTRACTS

There are numerous similarities between the two FIDIC DB Contracts, commonly known as the FIDIC Yellow Book²²⁸ and the FIDIC Silver Book.²²⁹ There are some areas of divergences in the express design liability terms. These divergences may also be compounded when taking into consideration the influence of the implied contract terms provided under both UAE Civil Law and DIFC Law.

²²⁸ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999). As discussed in the Limit of Study, Express Terms Contract Selection: as uptake of new versions of standard form contracts is slow in the UAE the recent 2017 version of the contract shall not be considered.

²²⁹ FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999). As discussed in the Limit of Study, Express Terms Contract Selection: as uptake of new versions of standard form contracts is slow in the UAE the recent 2017 version of the contract shall not be considered.

CONTRACTOR EXPRESSED AND IMPLIED LIABILITY

Both FIDIC contracts express the Contractor's general design liability under Sub-Clause 4.1.²³⁰

This obligation is to design the works such that the outcome is fit-for-purpose, stating:

*'The Contractor shall design, execute and complete the Works in accordance with the Contract...the Works shall be fit for the purposes for which the Works are intended as defined in the Contract.'*²³¹

The same Sub-Clause elaborates on the definition of 'in accordance with the Contract' by stating that this also includes implied terms, as follows:

*'The Works shall include any work which is necessary to satisfy the Employer's Requirements... or is implied by the Contract, and all works which (although not mentioned in the Contract) are necessary for stability or for the completion, or safe and proper operation, of the Works.'*²³²

As previously discussed, both UAE Civil Law and DIFC Law provide 'implied' terms for DB Contracts. The definition of the purposes of the works '...as defined in the Contract'²³³ in Sub-Clause 4.1 is less clear, however, the Employer's Requirements normally achieve this

²³⁰ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.1 and FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.1

²³¹ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.1 and FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.1

²³² FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.1 and FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.1

²³³ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.1 and FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.1

purpose.²³⁴ The FIDIC DB Contracts include further clauses related to specific liabilities for the Employer's Requirements, and together with implied terms from the selected jurisdiction, can limit the general fit-for-purpose obligation.

LIMITATIONS TO FIT-FOR-PURPOSE LIABILITY

The Contractor's design obligations are further defined in both FIDIC contracts under Sub-Clause 5.1.²³⁵ This Sub-Clause requires the Contractor to be responsible for the design, stating in the Yellow Book that the:

*'...Contractor shall carry out, and be responsible for, the design of the Works,'*²³⁶

and in the Silver Book that the:

*'...Contractor shall be responsible for the design of the Works.'*²³⁷

However, differences between the drafting of Sub-Clause 5.1²³⁸ and other clauses can result in variances between the extents of the Contractor's fit-for purpose obligations.

²³⁴ G. Hok, *'Employer's Requirements in Design-Build Contracts under FIDIC - A Comparative Study'* (2012) 2 *ICLR* 141

²³⁵ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1 and FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1

²³⁶ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1

²³⁷ FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1

²³⁸ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1 and FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1

EMPLOYER'S REQUIREMENTS ERRORS

Under the Yellow Book Sub-Clause 5.1,²³⁹ the Contractor's liability for errors in Employer's Requirements is significantly less than their fit-for-purpose obligations. Sub-Clause 5.1 includes a liability exclusion for errors in the Employer's Requirements²⁴⁰ not reasonably discoverable during the tender period, stating:

*'If and to the extent that (taking into account of cost and time) an experienced contractor exercising due care would have discovered the error, fault or other defect, when examining the Site and the Employer's Requirements before submitting the Tender, the Time for Completion shall not be extended and the Contract Price shall not be adjusted.'*²⁴¹

Upon expiration of this notification time-bar, the Contractor becomes liable for reasonably undiscoverable errors as explained in the FIDIC guidance notes:

*'Thereafter there remains the possibility that the Employer's Requirements are found to contain an error which could not previously have been discovered by an experienced Contractor exercising due care. In this event the Contractor may give the notice...'*²⁴²

²³⁹ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1

²⁴⁰ For the purposes of brevity, Sub-Clause 4.7 [Setting-out Data] shall be considered as Employer's Requirements.

²⁴¹ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1

²⁴² FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1 cited in EIC, 'EIC Contractor's Guide to the FIDIC Conditions of Contract for Plant and Design Build (The New Yellow Book)' (2003) 3 ICLR 332-365. It is worth noting that it was originally considered that the Contractor's liability after the expiration of the time-bar was at the same level of the Silver Book, fit-for-purpose, as explained in E. Corbett, 'FIDIC's New Rainbow 1st Edition - An Advance?' (2000) 2 ICLR 253-275, and J. Hoyle, 'The Rainbow Down Under - Part 1: Some Reflections From the Antipodes on Aspects of the New FIDIC Design-Build Contracts' (2001) 1 ICLR 14, however subsequent academic discussions and guidance notes from FIDIC have changed this considered opinion.

Therefore, the Yellow Book's level of design liability, which stem from errors in the Employer's Requirements, becomes one of reasonable-skill-and-care, significantly lower than UAE Civil Law, DIFC Law, and the Silver Book.

The Silver Book makes no concessions to the tender period. Sub-Clause 5.1²⁴³ specifies that Contractor shall have reviewed the Employer's Requirements prior to the contract award and shall accept full responsibility for their accuracy, stating:

*'The Contractor shall be deemed to have scrutinised, prior to... (the submission of tender), the Obligations, the Employer's Requirements (including design criteria and calculations, if any). The Contractor shall be responsible for the design of the Works and for the accuracy of such Employer's Requirements (including design criteria and calculations)...'*²⁴⁴

Reinforcing the Contractor's full and strict liability for errors in the Employer's Requirements, the Sub-Clause further states:

*'The Employer shall not be responsible for any error, inaccuracy or omission of any kind in the Employer's Requirements as originally included in the Contract and shall not be deemed to have given any representation of accuracy or completeness of any data or information...'*²⁴⁵

²⁴³ FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1

²⁴⁴ FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1

²⁴⁵ FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1

However, the Silver Book does limit the complete transfer of liability to the Contractor for errors in the Employer's Requirements, or any other information, by excluding liability for unverified data, stating the Contractor is not liable for '*...portions, data and information which cannot be verified by the Contractor, except as otherwise stated in the Contract.*'²⁴⁶ Sub-Clause 4.7²⁴⁷ explicitly excludes the Employer's responsibility for setting-out information errors. Furthermore, the Contractor's performance obligation to verify data is strict, data is either verifiable or not; and unlike under the Yellow Book, it would not be possible for a Contractor to have only used reasonable-skill-and-care during verification. Resultantly, the breadth of this liability exclusion is limited,²⁴⁸ considered by some as ambiguous,²⁴⁹ and would hang on the specifics of the dispute.

The liability for Employer's Requirements errors is significantly different between the two FIDIC contracts. The Yellow Book only holds the Contractor accountable for reasonably discoverable errors. Contrastingly, the Silver Book places the liability for all but the much higher burden of unverifiable errors with the Contractor. Therefore, the Silver Book is generally consistent with UAE Civil Law CTC Article 878²⁵⁰ and the DIFC Law using *Lowe v W.*

²⁴⁶ FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1

²⁴⁷ FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.7

²⁴⁸ W. Godwin, *International Construction Contracts: A Handbook with Commentary on the FIDIC Design-Build Forms* (1st edn Wiley-Blackwell, Malaysia 2013) 25 and J. Hosie, 'Turnkey Contracting under FIDIC Silver Book: What Do Owners Want? What Do They Get?' (Mayer Brown, 1 November 2007) <http://fidic.org/sites/default/files/hosie06.pdf> accessed 9 June 2015

²⁴⁹ J. Huse, 'Use of the FIDIC Silver Book in the Context of a BOT Project' (2000) 3 ICLR 392

²⁵⁰ Federal Law No.5 Civil Transactions Law 1985 Article 878

Machell Joinery Ltd [2011]²⁵¹ as a gap-filling law, while the Yellow Book reduces the Contractor's liability from what would normally be afforded under these jurisdictions.

EMPLOYER'S REQUIREMENTS COMPETING OBLIGATIONS

Competing obligations of performance and specification in the Employer's Requirements are not directly addressed in FIDIC DB Contracts. As the Contractor's primary obligation under Sub-Clause 4.1²⁵² is to provide a project that is fit-for-purpose, and the Contractor has acceptance responsibility²⁵³ for the Employer's Requirements under Sub-Clause 5.1,²⁵⁴ the Contractor is liable to achieve Employer's performance requirements regardless of Employer's specification requirements. Some have argued that these sub-clauses may result in competing obligations if there is an error in the Employer's Requirements.²⁵⁵ However, the Yellow Book's regard for Employer's Requirements errors does not negate that performance requirements take precedent over specification requirements.²⁵⁶

²⁵¹ *Lowe v W. Machell Joinery Ltd* [2011] EWCA 794 cited in J. Glover, 'Implied Terms' (Fenwick Elliot, 1 November 2011) <https://www.fenwickelliott.com/research-insight/annual-review/2011/implicit-terms> accessed 31 March 2018

²⁵² FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.1 and FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.1

²⁵³ Under FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1 the acceptance is only after the expiration of the time-bar notification period as described earlier.

²⁵⁴ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.1 and FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1

²⁵⁵ J Delmon, J Scriven, 'A Contractor's View of BOT Projects and the FIDIC Silver Book' (2001) 2 ICLR 249

²⁵⁶ EIC, 'EIC Contractor's Guide to the FIDIC Conditions of Contract for Plant and Design Build (The New Yellow Book)' (2003) 3 ICLR 348

Ultimately, it may be that the incorporation of implied DB Contract terms resolves this conflict by ensuring that FIDIC DB Contracts in the UAE uphold performance requirements over specification requirements. UAE Civil Law CTC Article 878²⁵⁷, when also taking into consideration Article 258 (1),²⁵⁸ implies a Contractor would be strictly liable to ensure the works are fit-for-purpose regardless of any contradiction between a performance and specified requirement. Similarly, DIFC Law, using English Law case *MT Hojgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd* [2017]²⁵⁹ or *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980)²⁶⁰ as a gap-filling law, would also likely draw the same conclusions. Therefore, Contractors are likely to be strictly liable to achieve the performance requirements, stipulated in the Employer's Requirements, above any specified requirements.

DESIGN INNOVATION

Neither FIDIC DB Contract addresses the issue of design innovation. The Contractor's design, weather innovative or standard, remains at the level of liability provided under Sub-Clause 4.1²⁶¹ and 5.1.²⁶² As previously noted, the Silver Book Sub-Clause 5.1²⁶³ allows the exclusion

²⁵⁷ Federal Law No.5 Civil Transactions Law 1985 Article 878

²⁵⁸ Federal Law No.5 Civil Transactions Law 1985 Article 258 (1)

²⁵⁹ *MT Hojgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd* [2017] UKSC 59

²⁶⁰ *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980) 14 BLR 1

²⁶¹ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.1 and FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.1

²⁶² FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.1 and FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1

²⁶³ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.1 and FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1

of Contractor design liability if the data provided in the Employer's Requirements are unverifiable.²⁶⁴ Under this exception, it may be able to be argued that the design requirements were so innovative that the ability to achieve the Employer's purpose was unverifiable. The English Law case of *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980)²⁶⁵ may have had a different outcome, should a similar clause have been included, as the works failed because of a performance requirement that was not verifiable at the time of construction. However, similar to other incidences of unverifiable data, the application of this liability exclusion is limited and hangs on the specifics of the dispute. Therefore, it is likely that Contractors under FIDIC DB Contracts retain their fit-for-purpose obligation regardless of the level of design innovation, this is consistent the UAE Civil Law²⁶⁶ and DIFC Law.²⁶⁷

EMPLOYER'S REQUIREMENTS PURPOSE NOT DEFINED

In addition to the possible liability exclusions for unverifiable data within the Employer's Requirements, Silver Book Sub-Clause 5.1²⁶⁸ also specifically excludes liability where the Employer has not stated the purpose of the design. The sub-clause states:

²⁶⁴ FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1

²⁶⁵ *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980) 14 BLR 1

²⁶⁶ *NYE Saunders and Partners (a Firm) v Alan E Briston* (1987) BLR 93 cited in J. Adriaanse, *Construction Contract Law* (3rd edn Palgrave MacMillan, Hampshire, United Kingdom 2010) 287

²⁶⁶ Federal Law No.5 Civil Transactions Law 1985 Article 878

²⁶⁷ As previously discussed *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980) 14 BLR 1 could be used as a gap filling law, wherein despite innovation in design, the Contractor retained their fit-for-purpose obligation.

²⁶⁸ FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1

'...the Employer shall be responsible for the correctness of the following portions of the Employer's Requirements and of the following data and information provided by (or on behalf of) the Employer:

b) definitions of intended purposes of the Works or any parts thereof,...

*c) criteria for the ...performance of the completed Works...'*²⁶⁹

Unlike the Silver Book, the Yellow Book does not elaborate on issues where the Employer has failed to disclose the purpose of the works. Yet, this does not mean that Contractors will be liable for work where the purpose has not been defined in the Employer's Requirements,²⁷⁰ as they will be subject to the jurisdictional implied contract terms.

Under UAE Civil Law CTC Article 878²⁷¹ Contractors are not liable for damages that they could not have prevented. Considering an undisclosed purpose does not allow the Contractor the means to prevent harm, the Employer's failure to advise the purpose of the works excludes the Contractor's design liability. Under DIFC Law, however, dependant on the particulars of the dispute and taking into consideration the determination provided in *Trebor Bassett and Cadbury v ADT Fire and Security and Trebor Bassett and Cadbury v ADT Fire and Security* [2012],²⁷² the Contractor's liability may only be reduced to reasonable-skill-and-care. Where

²⁶⁹ FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1

²⁷⁰ N. Bunni, *The FIDIC Forms of Contract* (3rd edn Blackwell Publishing, Great Britain 2005) 553 cited in M. Chao-Duvis, 'An Analysis and Comparison of the Dutch Standard Contract for Integrated Contracts (Turnkey/Design and Build) and the FIDIC Yellow Book' (2006) 4 ICLR 455

²⁷¹ Federal Law No.5 Civil Transactions Law 1985 Article 878

²⁷² *Trebor Bassett and Cadbury v ADT Fire and Security and Trebor Bassett and Cadbury v ADT Fire and Security* [2012] EWCA Civ 1158 cited in A. Pigott, 'Trebor Bassett and Cadbury v ADT Fire and Security: Allsorts of Contractual Issues' (Lexology, 6 December 2012) <https://www.lexology.com/library/detail.aspx?g=a94eed20-04f3-47b9-962b-1dbb694b0de3> accessed 24 March 2018.

the purpose has not been disclosed, the Silver Books fit-for-purpose obligation is excluded, while Contractors under the Yellow Book may be dependent on the jurisdictional implied terms as to whether their liability is excluded or limited.

NOMINATED SUBCONTRACTORS

FIDIC DB Contracts allow Subcontractors to be nominated through the variation procedure after the contract award. Under Sub-Clause 4.5,²⁷³ the Contractor's liability for nominated Subcontractors is no different from named or domestic Subcontractors. FIDIC DB Contracts stipulates Contractors are fully liable for the design work of Subcontractors, stating under Sub-Clause 4.4:

*'...The Contractor shall be responsible for the acts or defaults of any Subcontractor, his agents or employees, as if they were the acts or defaults of the Contractor....'*²⁷⁴

However, the Contractor has the right to reasonable objection to a nominated Subcontractor under Sub-Clause 4.5:²⁷⁵

*'...The Contractor shall not be under any obligation to employ a nominated Subcontractor against whom the Contractor raises reasonable objection....'*²⁷⁶

²⁷³ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.1 and FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.5

²⁷⁴ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.4 and FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.4

²⁷⁵ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.5 and FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.5

²⁷⁶ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.5 and FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.5

Provided the Contractor does not object²⁷⁷ to the nomination, they shall remain liable towards the Employer for the design work of the nominated Subcontractor. Therefore, FIDIC eliminates any necessity to defer to implied jurisdictional terms.

FIDIC SPECIFIC LIMITATIONS TO DESIGN LIABILITY

The FIDIC DB Contracts also include additional, specific liability limitations applicable to narrow applications.

EMPLOYER'S DESIGN

Both FIDIC DB Contracts exclude Contractor's design liability for works designed by the Employer or their subconsultants. The Yellow Book directly apportions the risk to the Employer under Sub-Clause 17.3²⁷⁸ stating the Employer is responsible for '*...Design of any part of the Works by the Employer's Personnel or by others for whom the Employer is responsible...*'²⁷⁹ Although the Silver Book also includes Sub-Clause 17.3, it does not include risk allocation for Employers design. However, Silver Book Sub-Clause 5.1²⁸⁰ clearly assigns the Employer risk by stating:

²⁷⁷ A. Gaede, 'The Silver Book: An Unfortunate Shift from FIDIC's Tradition of Being Evenhanded and of Focusing on the Best Interests of the Project' (2000) 4 ICLR 482 casts doubt on the practicality of the term 'reasonable objection', however, the Contractor can escalate their objection to be resolved in arbitration if required.

²⁷⁸ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 17.3

²⁷⁹ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 17.3

²⁸⁰ FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1

‘...the Employer shall be responsible for the correctness of the following portions of the Employer’s Requirements and of the following data and information provided by (or on behalf of the Employer:

- a) portions, data and information which are stated in the Contract as being immutable or the responsibility of the Employer...’²⁸¹*

The difference between the apportionments of liability for Employer design in the Silver Book is that if there are no express terms making the Employer responsible for a specific portion of the design, the Contractor retains liability. The resultant implication is that a Contractor under the Yellow Book can rely on the design provided by the Employer, while under the Silver Book, unless express terms to the opposite, the Contractor must verify and accept the Employer’s design, as they will retain their fit-for-purpose obligation regardless of who produced the design.

CONTRACTOR’S PROPOSAL

During the tender the Contractor may provide design information that is incorporated into the contract. The Yellow Book uses the defined term ‘Contractor’s Proposal’²⁸² for this document. The Silver Book, although it does not use a defined term, also incorporates Contractor’s tender documents²⁸³ into the contract under Sub-Clause 1.5.²⁸⁴ Both DB Contracts nominate that the Contractor’s tender proposal as the lowest precedent contract document, below the Employer’s

²⁸¹ FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1

²⁸² FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 1.1.1.7

²⁸³ The term Contractor’s Proposal shall be used hereafter for the Contractor’s tender documents incorporated into the FIDIC Yellow and Silver Books.

²⁸⁴ FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 1.5

Requirements.²⁸⁵ Therefore, design, performance requirements, or specified requirements in the Employer's Requirements supersede those provided in the Contractor's tender proposal. Unlike the Employer's Requirements, the Contractor's liability for their tender proposal in both FIDIC contracts is a strict fit-for-purpose design obligation under Sub-Clause 4.1.²⁸⁶

CONTRACTOR'S DOCUMENTS

In addition to Contractor's Proposals, Contractor provide design documents during the duration of the contract, namely Contractor's Documents. Both FIDIC DB Contracts include a design review process of Contractor's Documents under Sub-Clause 5.2.²⁸⁷ Despite the Contractor may receive design information in Contractor's Document reviews, Yellow Book Sub-Clause 3.1²⁸⁸ and Silver Book Sub-Clause 3.3,²⁸⁹ reaffirms that the Contractor's obligations are not affected by the received data by stating any information received:

*'...shall not relieve the Contractor from any responsibility he has under the Contract, including responsibility for errors, omissions, discrepancies and non-compliances...'*²⁹⁰

²⁸⁵ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 1.5 and FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 1.5

²⁸⁶ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.1 and FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.1

²⁸⁷ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.2 and FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.2

²⁸⁸ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 3.1

²⁸⁹ FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 3.3

²⁹⁰ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 3.1 and FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 3.3

The Yellow Book and the Silver Book reinforce the Contractor's strict liability for any Contractor's Documents under Sub-Clause 5.8:

*'If errors, omissions, ambiguities, inconsistencies, inadequacies or other defects are found in the Contractor's Documents, they and the Works shall be corrected at the Contractor's cost, notwithstanding any consent or approval under this Clause.'*²⁹¹

Silver Book Sub-Clause 5.1 compliments this sub-clause by ensuring the Contractor cannot rely upon any data received by stating:

*'...The Employer shall not be responsible for any error, inaccuracy or omission of any kind in the Employer's Requirements as originally included in the Contract and shall not be deemed to have given any representation of accuracy or completeness of any data or information...'*²⁹²

The Yellow Book does not include a similar exclusion of liability. However, in the Yellow Book, the Contractor is not liable for any design provided within the review, as this is the Employer's risk under Sub-Clause 17.3.²⁹³ Some consider the Silver Book strict liability places an unfair risk on the Contractor as reviews could include design instructions.²⁹⁴ However, the Contractor can remedy this risk through their right to claim a variation under Sub-Clause

²⁹¹ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.8 and FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.8

²⁹² FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1

²⁹³ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 17.3

²⁹⁴ M. Chao-Duivis, 'An Analysis and Comparison of the Dutch Standard Contract for Integrated Contracts (Turnkey/Design and Build) and the FIDIC Yellow Book' (2006) 4 ICLR 463. A. Gaede, 'The Silver Book: An Unfortunate Shift from FIDIC's Tradition of Being Evenhanded and of Focusing on the Best Interests of the Project' (2000) 4 ICLR 481 takes this further by stating the review process allows the Employer's representative to have authority without responsibility.

13.1.²⁹⁵ Furthermore, the Contractor may be able to recover contract imposed damages through a tort action against the Engineer for professional negligence misstatement.²⁹⁶

FORCES OF NATURE

Also included in the Yellow Book Sub-Clause 17.3²⁹⁷ Employer's risks, but excluded in the Silver Book, are forces of nature. Under this sub-clause, Contractors are liable for damages resulting from an act of a force of nature that would not have been reasonably unforeseeable. Therefore, the Yellow Book reduces the general fit-for-purpose obligation to one of reasonable-skill-and-care for this type of risk. The Silver Book is silent concerning forces of nature, consequentially implied terms should be considered.

The effect of the implied terms on the Silver Book varies between the jurisdictions of UAE Civil Law and DIFC Law. The UAE Civil Law CTC Article 878²⁹⁸ is clear that Contractors are not liable for damage that was unpreventable. Damage caused by unforeseeable forces of nature is unpreventable and, consequently, the Contractor has no implied liability for such an event.

²⁹⁵ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.2 and FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 13.1. The right of the Contractor to raise a Variation if they receive information that provides design changes was recommended prior to the draft of the FIDIC Yellow and Silver Books in J. Scriven, 'Design Risk and Liability Under Design and Build Contracts' (1996) 4 CLJ 235

²⁹⁶ *Gilliford Try Construction Ltd v Mott MacDonald Ltd* [2008] EWHC 603 (TCC); [2008] T.C.L.R. (QBD (TCC)) cited in 'Case Report: Gilliford Try Construction Ltd v Mott MacDonald Ltd [2008] EWHC 603 (TCC); [2008] T.C.L.R. (QBD (TCC))' (2008) 4 CLJ 52-62, and *Storey v Charles Church Developments* (1996) H.C.J. (QBD) cited in 'Case Report: Storey v Charles Church Developments' (1996) 3 CLJ 206-216 are an example of negligent misstatement tort action of a Contractor against an Engineer relating to a Design Build Contract.

²⁹⁷ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 17.3

²⁹⁸ Federal Law No.5 Civil Transactions Law 1985 Article 878

However, should the force of nature event have been foreseeable, even if reasonably unforeseeable, the design liability imposed by the UAE Civil Law is strict. Dissimilar to UAE Civil Law, DIFC Law does not exclude Contractor's liability for unforeseeable events, rather it reduces their liability to one of reasonable-skill-and-care under DIFC Law No.6 of 2004 Contract Law Article 113.²⁹⁹ In Contrast to UAE Civil Law jurisdiction, under the Silver Book and DIFC Law, the Contractor's liability is the same as the Yellow Book for reasonably unforeseeable events.

FIDIC CONSULTANCY CONTRACTS

The agreement between the Contractor and their design Engineer will define the extent of the Contractor's fit-for-purpose obligation they pass onto the Engineer. The standard FIDIC Subcontract: Conditions of Subcontract for Construction³⁰⁰ recommends this contract is not used in conjunction with the Yellow or Silver Books by advising the contract is:

*'...not intended for use where most of the Main Works are designed by the Contractor. For these works, it would be more appropriate to use conditions of subcontract drafted for use in conjunction with either the FIDIC Conditions of Contract for Plant and Design-Build, First Edition 1999, or the FIDIC Conditions of Contract for EPC/Turnkey Projects, First Edition 1999.'*³⁰¹

Unfortunately, to date FIDIC have not published a subcontract for the FIDIC Yellow or Silver Books. In the absence of a contract specifically drafted for DB Subcontractors, the following FIDIC contracts may be used for agreements between the Contractor and Engineer: FIDIC

²⁹⁹ DIFC Law No.6 Contract Law 2004 Article 113

³⁰⁰ FIDIC Condition of Subcontract for Construction (1st Edition, FIDIC, Switzerland, 2011)

³⁰¹ FIDIC Condition of Subcontract for Construction (1st Edition, FIDIC, Switzerland, 2011) 2

Conditions of Subcontract, FIDIC Subconsultancy Agreement,³⁰² or the FIDIC Client/Consultant Model Services Agreement.³⁰³

CONDITIONS OF SUBCONTRACT

Despite agreement³⁰⁴ that the FIDIC Conditions of Subcontract for Construction should not be used in conjunction with the FIDIC DB Contracts, the FIDIC guidance notes include modifications to standard clauses where a Subcontractor is expected to undertake significant design work. The FIDIC guidance notes recommend modification would result in the Contractor partially passing their FIDIC DB Contract fit-for-purpose obligation to the Engineer by the following additional text added at the end of Sub-Clause 4.1:

*'The Subcontractor's obligations to design any part of the Permanent Works are as expressly referred to in Annex B... This part of the Permanent Works shall, when the Main Works are completed, be fit for the purposes for which the part is intended.'*³⁰⁵

The fit-for-purpose liability is limited to parts of the works designed by the Engineer,³⁰⁶ and any subsequent design such as shop drawings will not be the liability of the Engineer. This level of liability is greater than the jurisdictional Engineer's design liability implied term of reasonable-skill-and-care normally afforded under UAE Civil Law Article 283³⁰⁷ and DIFC Law No.6 Contract Law 2004 Article 59 (1).³⁰⁸

³⁰² FIDIC Subconsultancy Agreement (1st Edition, FIDIC, Switzerland, 1992)

³⁰³ FIDIC Client/Consultant Model Services Agreement (4th Edition, FIDIC, Switzerland, 2006)

³⁰⁴ G Hok, S Fahey, 'Observations on the FIDIC Construction Subcontract 2011 - Part 2' (2015) 4 ICLR 366-391

³⁰⁵ FIDIC Condition of Subcontract for Construction (1st Edition, FIDIC, Switzerland, 2011) Sub-Clause 4.1

³⁰⁶ G Hok, S Fahey, 'Observations on the FIDIC Construction Subcontract 2011 - Part 1' (2015) 3 ICLR 337

³⁰⁷ Federal Law No.5 Civil Transactions Law 1985 Article 283

³⁰⁸ DIFC Law No.6 Contract Law 2004 Article 59 (1).

SUBCONSULTANCY AGREEMENT

The FIDIC Subconsultancy Agreement is drafted as a contract between an Engineer and their subconsultant. Due to the nature of the contract, the level of design liability is one of reasonable-skill-and-care, as defined under Sub-Clause 3.3.³⁰⁹ However, the contract is intended as a subcontract to an Employer-Engineer agreement, and not FIDIC DB Contract.³¹⁰ Therefore, use of this contract, as a DB Contract subcontract, would require ad hoc amendments.

CLIENT/CONSULTANT MODEL SERVICES AGREEMENT

Similarly, the FIDIC Client/Consultant Model Services Agreement has not been drafted as a subcontract to one of the FIDIC DB Contracts. The contract is suitable for the provision of design services to a Contractor, provided the Contractor does not want to incorporate the DB Contract into the agreement. The level of design liability under this contract is one of reasonable-skill-and-care as defined under Sub-Clause 3.3.³¹¹ This level of liability is the same design liability afforded to an Engineer under UAE Civil Law Article 283³¹² and DIFC Law No.6 Contract Law 2004 Article 59 (1).³¹³

DECENNIAL LAIBILITY

Contractors under UAE Civil Law are subject to Decennial Liability; however, Engineers liability is dependent on the FIDIC DB Contract selection. The FIDIC Yellow Book, unlike the Silver Book, includes a role for an Employer engaged Engineer responsible for undertaking

³⁰⁹ FIDIC Subconsultancy Agreement (1st Edition, FIDIC, Switzerland, 1992) Sub-Clause 3.3

³¹⁰ This is evidenced by the definition of the main agreement related to the subcontract agreement as ‘...the Consultancy Agreement between the Consultant and the Client’. FIDIC Subconsultancy Agreement (1st Edition, FIDIC, Switzerland, 1992)

³¹¹ FIDIC Client/Consultant Model Services Agreement (4th Edition, FIDIC, Switzerland, 2006) Sub-Clause 3.3

³¹² Federal Law No.5 Civil Transactions Law 1985 Article 283

³¹³ DIFC Law No.6 Contract Law 2004 Article 59 (1).

specified or implied³¹⁴ ‘duties assigned to him under the Contract.’³¹⁵ These duties include ‘...approval, check, certificate, consent, examination, inspection, instruction, notice, proposal, request, test, or similar,’³¹⁶ which are in effect the same duties as a supervision Engineer under BB FIDIC Contracts.³¹⁷ Engineers who undertake supervision services on behalf of an Employer are subject to Decennial Liability for harm caused by design defects, regardless of whether they provided the design.³¹⁸ Conversely, Engineers subcontracted to the Contractor, under either FIDIC DB Contract, to undertake design would not attract Decennial Liability, as they have no direct contractual relationship to the Employer.³¹⁹ As DIFC Law does not include Decennial Liability, Contractors and Engineers in this jurisdiction are not exposed to this strict performance liability for structural collapse.

FIDIC DESIGN LIABILITIES IN THE UAE

A general fit-for-purpose obligation is imposed on Contractors under the FIDIC DB Contracts. Both contracts prioritize performance requirements over specified requirements and ensures the Contractor remains fully liable for the design of accepted nominated Subcontractors. However, some variances in sub-clauses can limit the extent of the Contractor’s fit-for-purpose liability differently in the two contracts.

³¹⁴ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 3.1 (a)

³¹⁵ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 3.1

³¹⁶ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 3.1 (c)

³¹⁷ EIC, 'EIC Contractor's Guide to the FIDIC Conditions of Contract for Plant and Design Build (The New Yellow Book)' (2003) 3 ICLR 335

³¹⁸ Refer to Chapter 2 Decennial Liability

³¹⁹ Refer to Chapter 2 Decennial Liability

The Yellow Book reduces the Contractor's design liability to a greater extent than the Silver Book. The foremost liability reduction is for Employer's Requirements errors. The Yellow Book only holds Contractors to a reasonable-skill-and-care level for undiscoverable errors in Employer's Requirements. Contrastingly, the Silver Book maintains the Contractor's general fit-for-purpose liability for Employer's Requirements errors, except for limited cases of unverifiable data. Considering the Employer's Requirements are the main source of disputes in DB Contracts,³²⁰ the Silver Book exposes the Contractor to a substantial design liability risk. The Silver Book risk apportionment, despite some believing it is a departure from FIDIC's normal balanced risk approach,³²¹ is consistent with the implied jurisdictional terms of the UAE.

Similar to Employer's Requirements errors, the Yellow and Silver Books also diverge on design liability for Employer provided design. Although both contracts exclude the Contractor's liabilities for design provided by the Employer, the Silver Book requires the Employer's design risk to have been specifically assigned in the contract documents; otherwise, the Contractor will be responsible for this design under their general fit-for-purpose obligation. Similarly, the Silver Book maintains the Contractor's liability for additional design provided in the course of Contract Document reviews, while the Yellow book excludes liability. Some consider the Silver

³²⁰ N. Henchie, 'FIDIC Conditions of Contract for EPC Turnkey Projects - The Silver Book Problems in Store?' (2001) 1 ICLR 47

³²¹ M. Bell, 'Will the Silver Book Become the World Bank's New Gold Standard? The Interrelationship Between the World Bank's Infrastructure Procurement Policies and FIDIC's Construction Contracts' (2004) 2 ICLR 164-188

Book unfairly apportions the risk design liability to Contractor, as they have no control over the Engineer's design.³²²

The additional Contractor design liability under the Silver Book also originated from the implied terms. Despite both contracts excluding Contractor liability for unforeseeable forces of nature, only the Yellow Book also excludes liability if they are reasonably unforeseeable. Under the Silver Book in UAE Civil Law Contractors would retain the fit-for-purpose liability for reasonably unforeseeable forces of nature, while under DIFC Law their liability would be reduced to one of reasonable-skill-and-care. Although, not all implied terms result in greater liability under the Silver Book.

The Silver Book excludes Contractor's liability for a non-disclosed purpose, while a Contractor under the Yellow Book is reliant on the implied terms. Under DIFC Law Contractors may not be able to exclude liability, but attract a reduced reasonable-skill-and-care level for undisclosed purposes of the works. Although Contractor's design liability is generally higher in the Silver Book, in this instance, due to the jurisdictional implied contract terms, the Yellow Book apportions a greater level of risk on the Contractor.

At the present, there are no specific FIDIC contracts for Engineers working as a Subcontractor to a DB Contractor. Of the two contracts that can be used without ad hoc amendments, the FIDIC Conditions of Subcontract for Construction would place a fit-for-purpose liability on the Engineer, while the FIDIC Client/Consultant Model Services Agreement would result in the

³²² A. Gaede, 'The Silver Book: An Unfortunate Shift from FIDIC's Tradition of Being Evenhanded and of Focusing on the Best Interests of the Project' (2000) 4 ICLR 483

lower level liability of reasonable-skill-and-care. The former contract is consistent with the implied contract terms of the UAE Civil Law and DIFC Law.

Under UAE Civil Law, both FIIDC DB Contracts subject Contractors to the mandatory Decennial Liability. Engineers would only attract this liability if they were engaged by the Employer to undertake supervision services under the FIDIC Yellow Book. Contractors and Engineers are not subject to Decennial Liability, or any similar mandatory provisions, under DIFC Law.

CONCLUSION

Although the extent of the study is limited to DB Contracts in geographically aligned jurisdictions, the constraints imposed do not restrict a general understanding of how the two UAE court systems could determine cases. If there are no express contract terms, both jurisdictions include an implied general fit-for-purpose obligation on DB Contractors, and a general reasonable-skill-and-care obligation on the Contractor's design Engineer. However, in certain circumstances, UAE Civil Law and DIFC Law limit the extent of the Contractor's fit-for-purpose design liabilities in DB Contracts.

Under the UAE Civil Law, the Contractor's liability requires a DB Contractor to provide a design enabling works that are fit-for-purpose.³²³ Errors in the Employer's Requirements do not absolve a Contractor from this fit-for-purpose obligation unless the Contractor has alerted the Employer to the error, and the Employer has insisted the design defect is accepted.³²⁴ When the Employer's Requirements include competing performance and specification requirements, the performance requirement will take precedence.³²⁵ Contractors remain directly liable to the Employer for their subcontracted Engineer's design defects at a fit-for-purpose obligation,³²⁶ despite Engineers only attracting a reasonable-skill-and-care performance obligation.³²⁷ However, Contractors may be able to exclude their liability altogether if the Employer has failed

³²³ Federal Law No.5 Civil Transactions Law 1985 Article 878

³²⁴ Federal Law No.5 Civil Transactions Law 1985 Article 287

³²⁵ Federal Law No.5 Civil Transactions Law 1985 Article 258 (1) and Federal Law No.5 Civil Transactions Law 1985 Article 878

³²⁶ Federal Law No.5 Civil Transactions Law 1985 Article 890

³²⁷ Federal Law No.5 Civil Transactions Law 1985 Article 283

to disclose the purpose of the works.³²⁸ DIFC Law also includes an implied fit-for-purpose obligation on Contractor's design; however, it is less explicit than the UAE Civil Law.

Under DIFC Law, when a contract includes performance obligations of both design and build, the courts may use English Law as gap-filling law to determine the liabilities under a DB Contract.³²⁹ English law, similar to UAE Civil Law, includes an implied fit-for-purpose liability on DB Contractors for both design and build obligations.³³⁰ However, unlike UAE Civil law, DB Contractors under DIFC Law may be able to limit this liability where unforeseeable circumstances have arisen,³³¹ and where damage is unpreventable,³³² despite express fit-for-purpose terms to the contrary. Furthermore, DB Contractors under DIFC Law may be able to exclude liability for nominated Subcontractor design if there are no express terms of acceptance of liability.³³³ Unlike UAE Civil Law, DB Contractors are unlikely to be able to exclude their liability if the Employer has not disclosed the intended purpose of the works, rather, their fit-for-purpose obligation may be reduced to one of reasonable-skill-and-care.³³⁴ Furthermore, if the Employer's Requirements include competing performance and specification requirements, the performance requirement will take precedence.³³⁵ Therefore,

³²⁸ Federal Law No.5 Civil Transactions Law 1985 Article 878

³²⁹ DIFC Law No.3 Law on the Application of Civil and Commercial Laws in the DIFC 2004, Article 8(2)

³³⁰ DIFC Law No.3 Law on the Application of Civil and Commercial Laws in the DIFC 2004, Article 8(2) with *Viking Grain Storage v TH White Installations Ltd (1985) 33 BLR 103 as gap filling law.*

³³¹ DIFC Law No.6 Contract Law 2004 Article 113

³³² DIFC Law No.6 Contract Law 2004 Article 116

³³³ DIFC Law No.6 Contract Law 2004 Article 94 (3)

³³⁴ DIFC Law No.3 Law on the Application of Civil and Commercial Laws in the DIFC 2004, Article 8(2) with *Trebor Bassett and Cadbury v ADT Fire and Security and Trebor Bassett and Cadbury v ADT Fire and Security [2012] EWCA Civ 1158 as gap-filling law.*

³³⁵ DIFC courts may take into consideration *MT Hojgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd [2017] UKSC 59*

UAE Civil Law and DIFC Law, provide a mixture of exclusion and limitations to design liabilities in DB Contracts if the parties have failed to provide express terms.

The exception to the above liability apportionment is Decennial Liability under UAE Civil Law. Contractors and Employer's supervising Engineers are subject to a mandatory and strict liability for structural collapse resultant from design defects. Under the UAE CTC, the Employer's supervising Engineer are exposed to design defects liability despite not contributing to the design. DIFC does not include any mandatory obligations similar to Decennial Liability.

FIDIC contracts are commonly used in the UAE. There currently are no specific FIDIC contracts for Engineers working as a subconsultant to a DB Contractor. However, both the FIDIC Conditions of Subcontract for Construction³³⁶ and the FIDIC Client/Consultant Model Services Agreement³³⁷ could be used by a Contractor to engage an Engineer to undertake design work. The former includes a fit-for-purpose design liability, while the latter affords the Engineer's liability to a reasonable-skill-and-care level consistent with UAE Civil Law and DIFC Law.

Similar to UAE Civil Law and DIFC Law, the two commonly used DB Contracts in the UAE, the FIDIC Yellow Book³³⁸ and the FIDIC Silver Book;³³⁹ express a general fit-for-purpose

³³⁶ FIDIC Condition of Subcontract for Construction (1st Edition, FIDIC, Switzerland, 2011) Sub-Clause 4.1

³³⁷ FIDIC Client/Consultant Model Services Agreement (4th Edition, FIDIC, Switzerland, 2006) Sub-Clause 3.3

³³⁸ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.1

³³⁹ FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 4.1

design obligation on the Contractor. However, this obligation is extensively limited in the Yellow Book, when compared to the Silver Book. While both contracts exclude liability for Employer's design,³⁴⁰ this liability exclusion is only valid in the Silver Book if expressed in the contract for the specific scope.³⁴¹ Under the Silver Book, the Contractor is liable, with minor exceptions, for errors in the Employer's Requirements,³⁴² while under the Yellow Book the Contractor's level of liability is one of reasonable-skill-and-care.³⁴³ Where express terms are not provided, the jurisdictional law selected can have an impact on the level of liability under both contracts. The Silver Book excludes Contractor's liability for a non-disclosed purpose of the works;³⁴⁴ whereas under the Yellow Book implied terms from jurisdictional law may result in the Contractor either excluding full liability under UAE Civil Law,³⁴⁵ or their liability reduce to the level of reasonable-skill-and-care under DIFC Law.³⁴⁶ Furthermore, as the FIDIC contracts are silent with regard to precedence of information contained within the Employer's Requirements, the jurisdictional implied terms obligation is to achieve the performance

³⁴⁰ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 17.3

³⁴¹ FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1

³⁴² FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1

³⁴³ FIDIC Condition of Contract for Plant and Design-Build (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1

³⁴⁴ FIDIC Condition of Contract for EPC/Turnkey Projects (1st Edition, FIDIC, Switzerland, 1999) Sub-Clause 5.1

³⁴⁵ Federal Law No.5 Civil Transactions Law 1985 Article 878

³⁴⁶ DIFC Law No.3 Law on the Application of Civil and Commercial Laws in the DIFC 2004, Article 8(2) with *Trebor Bassett and Cadbury v ADT Fire and Security* and *Trebor Bassett and Cadbury v ADT Fire and Security* [2012] EWCA Civ 1158 as gap-filling law.

requirement regardless of any specified requirements.³⁴⁷ Perhaps the most significant design liability difference between the two contracts is a result of the impact of UAE Civil Law Decennial Liability obligations that would place a strict liability on the FIDIC Yellow Book Engineer for design defects, despite not having undertaken design activities. Considering FIDIC DB Contracts express terms do not cover all possible contract design liability issues, just as when selecting the law of the country,³⁴⁸ Employers, Contractors, and Engineers should carefully weigh the impact of the implied and mandatory terms within the UAE.

³⁴⁷ Under UAE Civil Law refer to Federal Law No.5 Civil Transactions Law 1985 Article 258 (1) and Federal Law No.5 Civil Transactions Law 1985 Article 878, while under DIFC courts may take into consideration *MT Hojgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Ltd* [2017] UKSC 59

³⁴⁸ P. Britton, 'Choice of Law in Construction Contracts: The View from England' (2002) 2 ICLR 280

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