



**Comparison Grounds for Construction Contracts
Termination under UAE Law and FIDIC Standard
Contracts**

دراسة تفصيلية لإنهاء عقود المقاولات بين القانون الاماراتي و عقود فيديك
القياسية

by

ISMAIL ABDULLA ALBAHAR

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of the requirements for the degree of
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Abstract

Termination rights in relation to a contract are significant as a practical way of applying pressure on other party in the contract. However, exercising the rights of termination ought to be approached using extreme caution. International Federation of Consulting Engineers (FIDIC) is a global body tasked with developing rules and regulations that ought to be put into consideration in the process of engaging in construction contracts. Thus, this body provides special guidelines on the conditions that parties follow while engaging in construction contracts. It also provides regulations for the grounds for construction contracts termination. On the other hand, the United Arab Emirates has its own specific provisions as it relates to terminating construction contracts. The provisions of United Arab Emirates are enacted from statutes and the civil code of this nation. As a consequence, there are various variations in the utilization of the grounds for the termination of construction contracts. Similarities also exist in relation to the application of the construction contract termination in tandem to these forenamed laws. However, there is laxity in the application of the provisions for the grounds on the termination of construction contracts. In this case, the UAE has to ensure that it enhances fairness in the application of the grounds for the termination of construction contracts. It is necessary to explore the comparisons between the UAE law and FIDIC Standard Contracts by looking at both contractual laws to establish the grounds on which they appear to be similar so that the context of their application is related and the standpoint of the disparities in their applicability. There is also the need for reviewing the conditions related to the termination of the contract based on the assertions by the laws of the United Arab Emirates and the FIDIC terms connected to the effective termination of construction contracts.

ملخص:

يعتبر حق انتهاء عقود المقاولات الهندسية من قبل احد طرفي العقد وسيلة ضغط هامة على الطرف الآخر في العقد و مع ذلك يتوجب الحذر الشديد قبل تطبيق هذا الحق اخذا بالاعتبار كل من عقود فيديك القياسية وكذلك القانون الاماراتي.

الاتحاد الدولي للمهندسين الاستشاريين "فيديك" هي هيئة عالمية مهمتها وضع القواعد و اللوائح التي يجب اخذها بالاعتبار في عملية صياغة عقود المقاولات كما انها توفر البنود واللوائح الخاصة بإنهاء هذه العقود ، من جهة أخرى فإن دولة الامارات العربية المتحدة لها احكامها الخاصة بما يتعلق ببند إنهاء عقود المقاولات ، حيث انه يتم تطبيق الأحكام عن طريق الرجوع الى النظام الاساسي والقانون المدني للدولة، ونتيجة لذلك فإن هناك العديد من اوجه الاختلافات و التشابه في تطبيق حق انتهاء عقود المقاولات بالترادف مع القوانين المحددة ، ولتحقيق اسس العدالة من قبل طرف المشرع الاماراتي وكذلك الجهات الهندسية والقانونية التي تصيغ عقود المقاولات فإنه من الضروري عمل مقارنة تفصيلية بين قانون دولة الامارات العربية المتحدة والبنود القياسية في عقود فيديك الهندسية من خلال النظر في كل من القوانين التعاقدية لتحديد اسس التشابه والاختلاف وكذلك وجهة التباين في قابليتها للتطبيق من عدمه ، كما ان هناك حاجة ماسة لمراجعة الشروط المتعلقة في انتهاء هذه العقود بحسب شروط ولوائح القانون الاماراتي وكذلك بنود عقود فيديك القياسية.

Keywords: Construction contract, FIDIC, Termination, United Arab Emirates

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CHAPTER ONE: INTRODUCTION

1.1 Background of the Research

Various differences and similarities exist between the FIDIC standard contracts and United Arab Emirates (UAE) law when it comes to the application of the grounds for construction contract termination. There exist parallels in law at the moment when various parties are seeking to engage in the termination of commercial relations¹. Construction contracts are mutual agreements or agreements that are legally binding between the parties that are part of the contract in tandem with conditions provided in the law. On numerous occasions, contracts are terminated in the cases whereby one of the parties involved in the contract breaches an essential term or engages in the repudiation of the contract. Contracts are characterized by various terms that are significant and fundamental in the application of the contract². For instance, a construction firm might provide specifications with respect to the roles of the contractor, subcontractor, and even the employer in the course of the contract for purposes of successful delivery of the set project. The right of the party within the contract to follow up the termination of the contract needs to be clearly separated from the approach that the law takes toward ensuring that the contract is effectively terminated while ensuring that all parties in the contract have the opportunity to get equal chances. The provisions for contract termination are critical remedies that strengthen the law and make it more effective in dealing with the existing challenges and ensuring that every party in the contract gets

¹ Ameer AL, *Handbook for Technical Auditors of the Construction Industry* (Notion Press 2015) 27

² Venoit WK, *International Construction Law: A Guide for Crossborder Transactions and Legal Disputes* (American Bar Association 2009) 40

the best possible level of treatment and damages, if any³. The termination right in tandem to the contract might not be with the exclusion of the termination right under the applicable law.

FIDIC is an acronym that refers to the International Federation of Consulting Engineers. The federation was established in 1913 with the aim of promoting the priorities and interests of firms that are concerned with consultation in the field of engineering all over the globe⁴. FIDIC is commonly known for its wide range of standards in line with conditions that are required for contracts in various industries such as the construction industry, the plant industry and the design industry. Clause 15 as affirmed by FIDIC in respect to the termination of contracts is vital in offering clearer articulations on circumstances under which the contract might be terminated by an employer due to a default by the contractor⁵. The clause also provides a description of the procedures that must be followed as well as the applicable financial arrangements related to the termination of a contract. The clause also provides the termination for convenience of the employer. Moreover, sub-clauses related the right of the employer in terminating the contract is also provided under the clause. There are various grounds for the termination of a contract by an employer. As provided by sub-clause 15.2 (a), there are various conditions that give the right of the employer to terminate a contract⁶. These conditions include the failure of the contractor in acting in compliance with the performance security of a contract. The meaning of this is that the

³ Baker E, Mellors B, Chalmers S, and Lavers A, *FIDIC Contracts: Law and Practice* (CRC Press, 2013) 55

⁴ Ulrichsen K, *The United Arab Emirates: Power, Politics and Policy-making* (Routledge, 2016) 18

⁵ Barrett K, *Defective Construction Work* (John Wiley & Sons 2009) 62

⁶ Ibid. 64

employer is free to induce the termination of the contract in situations where the contractor fails to effectively perform the roles that are outlined within the contract agreement and in instances where the contractor does not make the extension of the validity of the contract if required.

On the other hand, as provided by the civil transaction code of the United Arab Emirates, there are three conditions that are applicable as it is connected to construction contracts termination. These conditions are by consent, by the use of a court order and by the operation of the law. In line with article 267 of the UAE Civil Code, a contract's unilateral termination can be void of legal impacts in the case of the UAE⁷. It is important to affirm that within the UAE, courts plays an instrumental role in terms of offering guidelines on what the employer needs to do when dealing with a unilateral termination of the construction contract and the rights that they are entitled to in the course of making the decision to stop the contracts. In essence, the country's law is clearer in affirming the position of the employer in dealing with construction contracts where it is affirmed that they can lawfully and comfortably stop the contractual work at any time before the period of completion without any potential legal implications on their parts. In specific terms, Article 267 of the UAE code of contract provides that in instances where the contract is valid and binding, it will not be allowable for the contracting parties to resile from it or to rescind⁸. They can only terminate it through mutual consent or under the law's provision. This is provided for the condition under, which compensation is given to the contractor for all the incurred expenses for the work already done. The contractor should also be compensated for the income that he or she could have generated after the performance of the contract within the stipulated time frame. The court might

⁷ Barrett K, *Defective Construction Work* (John Wiley & Sons 2009) 65

⁸ Uff J, *Construction Law* (Sweet & Maxwell, Limited 2017) 111

play the role of reducing the compensation of the contractor based on the circumstances that provide a justification for the reduction of the compensation⁹. The statutory code as well as the judges is the primary source of the UAE law. United Arab Emirates' legal system is significantly influenced by the legal system of Egypt, which is influenced by the French system to a larger degree. It is therefore essential to have an overview of the UAE law on the termination of construction contracts and the FIDIC conditions and grounds for the termination of construction contracts before identifying the similarities and differences between the two.

1.2 Research Aim and Objectives

Termination rights in relation to a contract are significant as a practical way of applying pressure on the other party in the performance of the contract. However, exercising the rights of termination ought to be approached with extreme caution. Therefore, the interaction of the principles of the common law under FIDIC as well as the application of the United Arab Emirates (UAE) law in the termination of construction contract brings about both similarities and differences¹⁰. Coping with termination is costly in respect to time and money hence the need to use caution in terms of approaching it. Nevertheless, with the unavailability of the options for effective commercial settlement of the contract, there is need to focus on the manner in which a country follows the laws that are laid in addition to the rights of the individuals in the contract. There is also the consideration of the interests that the parties are entitled to in the course of ensuring that there is effective termination without any potential challenges¹¹. Therefore, the main

⁹ Bunni NG, *The FIDIC Forms of Contract* (John Wiley & Sons, 2013) 22

¹⁰ Thomas R and Wright M, *Construction contract claims* (Palgrave Macmillan 2016) 44

¹¹ Ibid 58

aim of the paper is to establish the underlying similarities that exist between the law of the United Arab Emirates and the FIDIC contracts in the termination of the terms and the clauses used on building construction contracts. Therefore, the objectives of the paper are:

- To identify the United Arab Emirates laws that are directly applicable to the conditions that push for the termination of contracts in connection to the construction contracts.
- To identify the circumstances that necessitates the need for the termination of a contract as provided by the FIDIC on conditions for the termination of construction contracts.
- To examine the similarities and differences that exist between the United Arab Emirates law on the termination of contracts and the FIDIC provisions and rules and regulations surrounding the conditions for the termination of construction contracts.

1.3 Research Questions

The paper seeks to explore the similarities and differences between the UAE law and FIDIC Standard Contracts by looking at both contractual laws to establish the grounds on which they appear to be similar so that the context of their application is related and the standpoint of the disparities in their applicability. The paper also aims to review the conditions for the termination of a contract as provided by the United Arab Emirates law and the terms of the contract and the FIDIC terms for the termination of construction contracts. Therefore, the research questions for this paper are:

- Which United Arab Emirates laws are directly applicable to the conditions that push for the termination of contracts in relation to the construction contracts?

- What are the conditions for the termination of a contract as provided by the United Arab Emirates law and the terms of the contract and the FIDIC terms for the termination of construction contracts?
- What are the similarities and differences between the UAE law and FIDIC Standard Contracts by looking at both contractual in establishing the grounds on which they appear to be similar so that the context of their application is related and the standpoint of the disparities in their applicability?

1.4 Significance and Justification

The research has various significances. To begin with, the research will be significant to contractors in understanding the FIDIC terms and the conditions for the termination of contracts in line with construction contracts¹². It is essential to be aware of the conditions for the termination of contracts in order for employers to understand the circumstances that make them terminate a contract. This will help them to save on money by avoiding making losses in the process of engaging in contracts that might not be successful. More so, the significance of the research also lies in the understanding that firms involved in the course of the contract will be in a better position to comprehend the conditions of engaging in a construction agreement, the terms of the contract and the applicability of the contract¹³. This lies in the understanding there is the explication of the detailed analysis of the contractual terms and conditions as provided by the governing body of

¹² Clamp H, Cox S, Udom K and Lupton S, *Which Contract?: Choosing the Appropriate Building Contract* (Royal Institute of British Architects, 2012) 56

¹³ Srivastava S, *Administration of Construction Contracts* (Notion Press 2016)

the contracts in the world. The law firms will also be able to understand the important facets associated with construction contracts thus applying the laws appropriately. The research is also significant to contractors. Contractors will be able to understand the rules and regulations that are applicable to the construction contracts. They will also be able to understand their roles in construction contracts. They will also be able to understand the conditions under which a contract with their clients can be terminated. More so, they will gain the knowledge on the initial actions and steps that need to be taken before the ultimate termination of the contract¹⁴. They will also have the opportunity to comprehend the factors surrounding the compensation and any possible damages emanating from the contract termination. This aspect is anchored on the understanding that the paper entails a critical and in depth explication of the conditions that are applicable before and after the termination of a contract and the conditions of compensation. All parties stand the chance of benefitting from this knowledge because of the awareness of what action to take before and after contract termination. This is essential to avoid the violation of the applicable law during and after the termination of the contract.

1.5 Structure of the dissertation

There are Seven chapters in the dissertation.

- Chapter one will introduce the dissertation by providing background into the research, the research aim which is to establish the underlying similarities that exist between the law of the United Arab Emirates and the FIDIC contracts in the termination of the terms and the clauses used on building construction contracts. In line with this chapter, there is an in

¹⁴ Clamp H, Cox S, Udom K and Lupton S, *Which Contract?: Choosing the Appropriate Building Contract* (Royal Institute of British Architects, 2012) 61

depth explication of the research objectives, the questions that are to be explicated in the study besides the justification and significance of the research and the structure of the dissertation.

- Chapter two is the methodology. The methodology that is utilized for this dissertation is the doctrinal research design. This is because of the analysis of the legal rules that apply to the study in all the chapters explicated.
- Chapter three of the dissertation provides the literature review. The chapter narrows down on the aspects surrounding the termination of a contract as provided by United Arab Emirates law and the terms of the contract.
- Chapter four of the paper will focus on the review of the FIDIC terms for the termination of construction contracts.
- Chapter five looks at similarities and differences between UAE law and FIDIC Standard Contracts by looking at both contractual laws to establish the grounds on which they appear to be similar so that the context of their application is related and the standpoint of the disparities in their applicability.
- Chapter six will provide feasible recommendations in the context of using the UAE and the FIDIC contract laws relative to the value that would be deduced from them. The lawyers and industry people will note the applicability of the terms.
- Chapter seven will provide a summary of the paper by highlighting the major concepts covered and to underscore the justification of the situations under which the UAE and FIDIC contracts would be liable for termination.

CHAPTER TWO: METHODOLOGY

The research design employed in this paper is the doctrinal research design. This type of research design focuses on the formulation of specifically legal doctrines by analyzing the legal rules. As far as the jurisdictions of the common law is concerned, legal rules are found majorly within states as well as cases or the sources of law¹⁵. It is however essential to note that the legal rules cannot provide complete law statements in every particular situation. The provision of complete law statements can only be ascertained through the application of legal rules that are relevant to the specific situational facts under consideration. Legal doctrines presence provides significant ground for the making of decisions on the rules that ought to be applied in a given situation¹⁶. The legal doctrines presence includes the consideration doctrine as applicable by the law of contract. Legal doctrines provide clarification to ambiguities that exists within rules, placing them in a structure that is logical and coherent and providing a description of their relationship when compared to other rules. The doctrinal research methods are thus characterized by the studying of legal texts. Basing on the doctrinal approaches is vital in terms of ensuring that the correct law is applied to the construction contracts.

In this case, the doctrinal research is focuses on the discovery and the development of the legal doctrines for the purpose of publishing the legal doctrines in textbooks in addition to journal articles. The research questions of the legal doctrines thus take the direction ‘what is the law?’

¹⁵ Furst S, Ramsey V, Hannaford S and Williamson A, *Keating on Construction Contracts* (Sweet & Maxwell, 2012) 121

¹⁶ Smith EB, *Construction Law & Practice: Jurisdictional Comparisons* (Sweet & Maxwell 2012) 83

under specified contexts. Comparatively, the epistemological level is different from the questions that are asked by the investigators in empirical research in various areas of the environment of research that is built¹⁷. Natural science research seeks to explain natural phenomena in the study of causal relationships when it comes to variables. Despite the fact that the interpretive nature of the natural science research process has a resemblance that is superficial to the *verstehen* social science's tradition, there are significant epistemological differences that exist between doctrinal analysis and the other forms of scientific research. Essentially, scientific research consists of both natural science and social science and it depends on empirical data collection either as a basis for the theories of social sciences or as a way of testing these theories. With this respect, the research finding's validity is determined by an empirical investigation process.

¹⁷ Elliot F, 'Descoping in Construction Contracts in the UAE' (*fenwickelliott.com*, 26 Feb 2017) <<https://www.fenwickelliott.com/research-insight/annual-review/2015/descoping-construction-contracts-uae>> accessed 4 August 2017.

CHAPTER THREE: TERMINATION UNDER UAE PERSPECTIVES

3.1 Termination of a construction contract under UAE perspectives

Termination of a contract can be due to the fact that it was shoddy, there was breaching of the rules of the contract, and failure to complete the contract on time. In such cases, such contracts should meet the standards of the International Federation of Consulting Engineers (FIDIC). Additionally, when a contract that faces termination is within the United Arab Emirates, there are specific rules that apply in such scenarios. Under such circumstances, the employer is usually called upon to send on time to the contractor a notice for the correction or the failure to complete the contract within a specific period of time. Upon receiving of the notice, if the contractor fails to correct the mess, the employer will be liable to terminate that contract. After consultation, from the legal agencies, and the employer is satisfied with the decision, it will be legal for him/her to send the notice of termination.

Article 267 of the UAE Civil Transactions Law highlights the specific methods that are used in termination of construction contracts within the UAE. They include; mutual agreement of the parties involved, judgment by the court in addition to laws that are made by the accepted law of the land. In cases where the contract is acceptable, it is asserted that it will be illegal for any party that participated in the contract to get out of the agreement, end it or alter it unless it is done by the mutual consent of the parties involved in the contact, court order and according to the stipulations of the law. A successful termination of a contract by mutual consent is usually done before or after the contract has been entered. It has been critical to arrive at satisfactory conclusion when such situations occur thus leading to major disputes.

It is clear that termination of a construction contract within the UAE cannot be arrived at based on the decisions that have been arrived at and only favor one party involved in the dispute. In this case, where the contractor is unable to do what should be done based on the stipulations of the contract, the employer will demand from the contractor to write a notice on why there are inabilities to complete the contract and the reasons why the contract cannot be completed, the employer will finally be legalized to terminate the contract that seems controversial. In a case where the permission to terminate is put in words, automatic termination of any contract by the employer is not allowed. Additionally, stating unequivocally that ending of a contract is automatic, through the notice written by the employer, there is always need for the provision that establishes mutual consent to authorize termination which helps in evading recourse to the courts in UAE. There will thus be no need to have a order from the court or any other notice. This is in accordance to the provisions of article 271 of the Code. One of the key cases that provides guidance to the rescission of the contract is the Union Supreme Court case 235/2012¹⁸ where the judge decided that the failure to execute bilateral contracts leads to rescission, in cases where there is no intention on the other party to execute the agreed terms.

Failure to start on a contract that has already been agreed to start, is termed terminated automatically without consideration of the any court order. A written notice is however essential in such a case. However, if the parties involved in such a contract agree to solve the stalemate without a written notice, it is termed legal according to the law.

Contracts for construction in UAE, are similar according to the provisions of FIDIC. In the same way, the methods of terminating such contracts are similar in all areas within UAE. The Code¹⁹

¹⁸ Westlaw Gulf

¹⁹ Westlaw Gulf

that is followed during termination gives the employer the mandate to ask for ending of such contracts within the premises of the UAE courts. Alternatively, ending of a contract for construction on the basis of the default of the contractor is similar to any other procedure that can be followed when ending any construction act in UAE. This is in line with the provisions of article 877 Code. The Article 877 works in tandem with Case 446/21 of the Union Supreme Court where Judge Husayni²⁰ affirmed that all agreements that are put in place before the contract must be adhered to by all parties in the contract and if they are insufficient, then industry specific customs have to apply. In this case, construction customs will apply if the pre-agreements of the contract are insufficient.

Contractors within the UAE are called upon to work on their contracts based on the provisions that are agreed upon. In case the contractor starts working on construction projects contrary to the conditions that were laid down and agreed by the contractor and the employer, then such a contract will be liable to termination especially if it does not satisfy the needs of the employer. If the manner in which the contractor is working contrary to the conditions that they agreed upon with the employer, but the working is good according to the employer, the employer will allow the contractor to continue executing his/her duties but will have to abide by the agreed principles. Another case would be where the contractor works contrary to the conditions agreed upon and does not rectify the mess within a specified time, the employer might be forced to terminate such a contract and give it to another contractor who will be willing to complete the work at a specific time. In such a case, there should be clarity on what is likely to happen in case the contractor fails

²⁰ Westlaw Gulf

to abide by the conditions in addition to rectifying the mess. In such a case, the court is called upon to issue an order for termination of such a contract.

Cases within UAE have occurred where there has been recourses to the UAE courts with the intention of getting decisions that permit ending of construction contracts²¹. This has been seen to take a lot of time by those involved that is the contractor and the employer. It is thus advisable that in cases of such disputes, the parties involved are allowed to arrive a quicker resolution without going to the courts which will help in saving of time. In tandem, an employer will not be allowed to hire the services of another contractor if the first contractor has not terminated his initial contract. There has thus been mechanisms that have helped both the contractor and the employer from wasting a lot of time by ensuring that there is a wording procedure that allows quicker termination of contracts.

The choice of terminating construction contract by the employer or by the contractor should not be made if there is the occurrence of a minor breach in the performance of the contract or rather in the circumstances whereby there is not breach in the performance of the contract. Rather, this decision should only be made in the cases whereby there is a major breach of the conditions or the performance of the contract. The decision to end the contract should also be made only in situations where there are defaults in the contract. In the current global environment where the construction industry of construction is characterized by the unprecedented rids in the costs that are used in buying the materials in construction especially in the developing countries, there is the prevalence of the issue of the termination of construction contracts. Contactors are the ones who typically engage in the termination of contracts due to the failure of making correct estimates

²¹ Westlaw Gulf

in relation to the contractual costs and conditions agreed upon before the contract commenced. Many contractors are forced to terminate contracts due to the prices of the materials or the pretext of the contractual positions. The decline in the number of contractors has also increased the rate at which the cases of contract termination are being experienced.

It is worth noting that the United Arab Emirates works in tandem with its own terms and conditions on the construction contracts in terms of ensuring that there is a high level of fairness in the course of contract termination. Being a sovereign state, the UAE has the capacity to set its own standards and guidelines for ensuring that the construction contracts on construction are always upheld and effectively promoted for the welfare of all individuals. Parties. In line with the provisions of Article 267 of the UAE Civil Code, one party's decision to activate the termination of the contract without the consideration of the implications it has on the other party comes with legal implications for the individual. Nonetheless, courts tend to give some flexibility on the employer's part by giving them the opportunity to freely undertake unilateral termination of the contracts of construction. Thus, in UAE law, an employer might engage in the termination of a contract and stop the contractual work at any time before the completion of the work of the contract. This is provided for the condition under which the contractor is compensated for the all the incurred expenses for the work already done. The contractor should also be compensated for the profit that he or she could have made after the performance of the contract within the stipulated time frame. The court might play the role of reducing the compensation of the contractor based on the circumstances that provide a justification for the reduction of the compensation. There are however various variations in the application of the conditions for the termination of construction contracts between the FIDIC and the UAE law.

3.2 The UAE Law

UAE, which is constituted of seven emirates earned its independence on December 2, 1971 under the auspices of Shaikh Zayed Bin Sultan Al Nahyan. The country adopted the use of a federal constitution after the entry of the last emirate, Ras Al Khaimah, the following year²². It is evident that the kind of legal system that a country adopts will have an impact on the parties that get into a contract. For instance, the UAE is a civil law country that solely relies on laws that have been codified. This system was influenced by the Egyptian design which itself was borrowed from both the Roman and French legal arrangements²³. It is vital to reiterate the view that the United Arab Emirates is an Islamic nation whose laws must conform to Sharia law. The laws have been incorporated into what is now called the ‘UAE Civil and Commercial Codes.’

In the UAE, the legal system is anchored on the country’s constitution and there are both local and federal courts that constitute its dual nature with the Supreme Court headquartered in the capital, Abu Dhabi. The primary source of the country’s law is civil law, which is pegged on the Egyptian as well as the Roman laws²⁴. Even with this in mind, Sharia law remains the dominant source of law. It is critical to note that all judges serving at the federal level are appointed by the decree of the Supreme Court following recommendations from the Ministry of Justice. The local courts are mainly situated in Dubai and Abu Dhabi for effective jurisprudence.

²² Srivastava S, *Administration of Construction Contracts* (Notion Press 2016) 42

²³ Elliot F, ‘Descoping in Construction Contracts in the UAE’ (*fenwickelliott.com*, 26 Feb 2017) <<https://www.fenwickelliott.com/research-insight/annual-review/2015/descoping-construction-contracts-uae>> accessed 4 August 2017.

²⁴ Ibid 63

In UAE, construction contracts fall under commercial contracts which are known in Emirati language as Muqawala contracts. Notably, the construction contracts are thus governed by the Muqawala laws. In tandem, termination of such contracts is facilitated by the provisions of article 892. These provisions are normally supported by court orders, mutual consent in addition to ensuring that all the work agreed is worked on. A contract is termed complete based on the completion of all services that should be worked on. The termination procedures for any construction are provided under the article 892. These provisions are keenly followed based on the consent of the parties involved. Construction has been among the major growing sectors in UAE according to the wishes of the first UAE president Sheikh Zayed Al Nahyan. There was thus need of development of rules and regulations that will help in running all the activities within UAE. Zayed was interested in in development of the education sector, health and transport sectors through construction of their infrastructures in modern ways.

3.3 The Construction Contract in the UAE

Before the in depth explication of the approach that is undertaken to terminate the construction contract, it is critical to understand how it is formed in the first place. According to the civil transactions law, a contract is an agreement where two parties come together in which one party makes an offer and the other party accepts it based on the provisions of Article 125 of the Civil Transactions Code²⁵. The agreement is binding and the contract stipulates a procedure in the event that the agreement is breached by any party. In addition, there may be other external

²⁵ Federal Law No. (5) of 1985 on the Civil Transactions Law of the United Arab Emirates. (Retrieved 10th February from <https://legaladviceme.com/legislation/126/uae-federal-law-5-of-1985-on-civil-transactions-law-of-united-arab-emirates>), Article 125

forces that may lead to the abuse of the contract terms thus the agreement is clear about the steps to be taken as well. The UAE construction contracts constitute items such as the *muqawala* which is a contract that involves two parties in tandem with the provisions of Article 872 of the UAE Civil Transactions Code related to Contract²⁶. One of them, say a contractor, undertakes to perform a task according to the specifications given by the employer. Construction contracts are unique given the nature of their subject matter. For instance, it is not practical to have a project constructed and completed with the strict adherence to the particular drawings and measurements that were outlined by the architects. As a result, a practical structure will be erected without much regard for the documented specifications.

Article 1 of the Civil Transactions Code stipulates that the execution of the contract is supposed to be in tandem with the consistency provisions of the law. The concept of good faith will complement the consistency. The contracts formed are clear and they empower the parties with certain rights. Furthermore, they define the duties to be performed by the parties²⁷. To some extent, the UAE civil code extends the privileges of the parties to their generations and next of kin. For this reason, it is difficult for the obligations to be imposed upon any individual who is not linked to the original contract parties. This concept is not a preserve for the UAE but many other countries who have adopted the civil law system. Having said this, one can confidently assert that

²⁶ Federal Law No. (5) of 1985 on the Civil Transactions Law of the United Arab Emirates. (Retrieved 10th February from <https://legaladviceme.com/legislation/126/uae-federal-law-5-of-1985-on-civil-transactions-law-of-united-arab-emirates>), Article 872

²⁷ Glover J, and Hughes S, *Understanding the FIDIC Red Book: A Clause by Clause Commentary* (Sweet & Maxwell, 2011) 59

only parties and those closely allied to them are liable to the court in the event that they are sued for breach of contract. The principle is known in other terms as the ‘doctrine of privity of contract’ and Article 10 of the CTC captures the relationships of the contracting parties clearly²⁸. The provisions of UAE law are not as stringent as in other nations. The reason is that the laws do not require any documentation. Nonetheless, for future reference, it is always critical to record the construction contracts. It is only through written records that the evidence can be sought during circumstances of breach²⁹. The idea of good faith is not recorded in any of the laws. However, it is a natural occurrence that is intuitive amongst the parties given the need to execute the contract without fraudulent tendencies and deception motives. Furthermore, the contracting parties should be loyal to one another with the need to empower each other through diligent conduct.

The different stakeholders need to be furnished with sufficient information about the contract so that they can provide a thorough interpretation. The construction contracts have a dense subject matter, therefore the types of transactions taking place should be a matter of concern³⁰. As mentioned before, loyalty and confidence should form the pillars of the contracting parties so that they can have a fulfilling business partnership. Interpretation should be implemented with consideration to the aspects of good will and the ultimate attribute of utmost good faith. Sometimes there may be disputes arising from either of the parties as a result of breach of the contract terms.

²⁸ Sergeant M and Wieliczko M, *Construction Contract Variations* (CRC Press 2014) 106

²⁹ Clamp H, Cox S, Udom K and Lupton S, *Which Contract?: Choosing the Appropriate Building Contract* (Royal Institute of British Architects, 2012) 71

³⁰ Ibid 27

The court comes in as an arbitrary organ to help and restore the terms³¹. The effectiveness of the court will be felt if it upholds the virtues of neutrality. This virtue is critical because the contractual terms were agreed upon by the two parties. If the court becomes biased, then it is deemed to be the third party that breeds conflict, contrary to the task that it was assigned. The literal meanings of the agreement terms may not be practical in the real life situation thus it is the duty of the courts to give an interpretation according to the intentions settled upon by both parties³². When doubts arise about the court's provision, then the benefit is awarded to the party who owes the money.

3.4 Termination of the Contract under the UAE Civil Code

The act of terminating a construction contract is not as simple as the process of engaging in it. It involves drastic steps with a lot of consequences to various parties that have vested interests. This is a step that involves thorough reflection before a decision is made. Given the clear stipulation of the laws defining the termination procedure, execution of the process is more or less simple³³. This is because the laws are clear and they provide the grounds on which termination will be implemented. The construction agreement is done by two parties that include the employer and the contractor. In the event that the termination decision is made by the employer, there is a likelihood that the entire process of finding a replacement contractor will be delayed. There is need

³¹ Glover J, and Hughes S, *Understanding the FIDIC Red Book: A Clause by Clause Commentary* (Sweet & Maxwell, 2011) 96

³² Hetreed J, Ross A and Baden-Powell C, *Architect's Pocket Book* (Taylor & Francis, 2017) 84

³³ Venoit WK, *International Construction Law: A Guide for Crossborder Transactions and Legal Disputes* (American Bar Association 2009) 72

to create an interface between the work that has been done by the contractor who is exiting the agreement and the duties that are expected to be accomplished by the replacement contractor.

On the other hand, a contractor would initiate a termination on the grounds that the employer has not fulfilled the payment schedule. Most of these cases involve the deliberate refusal by the employer to pay the contractor even if the former has that capacity. A good number of terminations are often characterized by such challenges hence it is advisable for the parties to institute measures that would provide warnings to them³⁴. These warnings inform the parties about the breaches so that they can counter them through curing. Part of the measures to counter the breach could be negotiating among the parties to eliminate the breach or carry out an appropriate postponement process. Nonetheless, termination is considered as a remedy to other challenges that could be a hindrance to the welfare of the contract. Within the negotiations, the parties may resolve to enter into the termination agreement on the basis of mutual understanding. Termination is the last resort in the event that one party has become insolvent. It may serve as a solution in case the contracted company has limited skills to execute the functions for which it was contracted. Other companies run out of resources despite having the required skills hence termination is inevitable. The whole process of termination is a vast phenomenon that entails several factors which should be known to both parties³⁵. The termination of the construction contract in the perspective of the UAE laws is explicit. The concept will be explored in the subsequent discussions, exploring the benefits and the negative consequences associated with it.

³⁴ Smith EB, *Construction Law & Practice: Jurisdictional Comparisons* (Sweet & Maxwell 2012) 37

³⁵ Bunni NG, *The FIDIC Forms of Contract* (John Wiley & Sons, 2013) 87

The first notable factor to be taken into consideration is the understanding that every party must possess the right to execute a termination. The parties should be guaranteed a legal procedure that would be followed in the event that any of them wishes to exit the contract. Part of the procedures includes the requirements of issuing notices prior to engaging into the contract³⁶. The tendency by the parties to implement a termination without regard to the law is widespread. Many companies terminate contracts devoid of the stipulated rules and this is done out of ignorance or deliberate sabotage of the law. The consequences of such a step are so devastating because the terminating party would be required to settle claims of the other party. The scenario that is created afterward is that the innocent party becomes the party causing the breach because of the lack of regard to the contract laws³⁷. The rights of terminating a contract are derived from the principles that govern the contract. For example, the different parties that are associated with the contract tend to engage in numerous negotiations that lead to the establishment of agreements between or among them for proper working relationships and the understanding of what would happen and lead to the termination of the contracts that binds them.

Another factor to be considered is UAE law and in this context, the right of any party to execute a termination is examined. The UAE has special contracts known as *muqawala* and their formation is based on the UAE civil code³⁸. *Muqawala* contracts basically deal in the executing

³⁶ Baker E, Mellors B, Chalmers S, and Lavers A, *FIDIC Contracts: Law and Practice* (CRC Press, 2013) 78

³⁷ Venoit WK, *International Construction Law: A Guide for Crossborder Transactions and Legal Disputes* (American Bar Association 2009) 111

³⁸ Bunni NG, *The FIDIC Forms of Contract* (John Wiley & Sons, 2013) 75

procedures carried out by firms. The provisions of the civil code dictate that a *muqawala* contract will only be terminated if the contractor has completed the duties which they were hired to do. In the scenario where the contractor is unable to complete the works due to the impending constraints, they are allowed to cancel the contract through mutual consent with the employer or by an injunction of the court as stipulated by Article 267³⁹. The clause about the parties not having to seek a court order is quite important. If it was a must for the case to be solved from the courts, then it would be costly and expensive because the either parties would have to seek consent from each other before visiting the courts. However, Articles 892-896 offer guidance for the termination of construction contracts that are also referred to as *muqawala* contracts⁴⁰. The grounds for termination are explicated below;

3.4.1 Termination by Court Order

This entails the parties involved in the contract going before a court of law and using the UAE acceptable laws to facilitate the termination of the contract. It is also possible that contracts can be cancelled once the agreed work is complete. This will be in accordance with the law which should be clarified before a court of law before an agreement is reached to terminate a contract.

³⁹ Clamp H, Cox S, Udom K and Lupton S, *Which Contract?: Choosing the Appropriate Building Contract* (Royal Institute of British Architects, 2012) 88

⁴⁰ Ibid 83

3.4.2 Termination of Construction Contract by Consent of Parties

In Article 274 the law is clear on the situations under which the parties can call for termination⁴¹. These circumstances have been mentioned several times and they include consent between both parties involved, the stipulations of the law, and the most common is through the judicial setups. All these circumstances are valid and executable only if the contracts are binding. Therefore the parties cannot deny associating with them when they happen to breach the contracts because they must own up the liability. Article 892 is specific about the contracting parties and it has no bearing on the judicial implications⁴². Basically, the article gives the parties leeway to rescind the contract through mutual consent once it has been concluded. It goes further to define the steps that an obliged party should do and if they fail to do it, the offended party has been empowered to demand that the terms of the agreement are adhered to or the contract be canceled. In extreme cases, especially when the obligator is adamant, the services of a judge may be sought to compel them to act in favor of the offended. It is also within the judge's discretion to intervene into such a case of mutual consent and they can issue a judgment, ordering the contract to be canceled if they see it fit to do so. At times the contract may have been breached because of failure to meet monetary obligations. In this case, the judge would order for a complete payment of the whole sum of money to the party that made the claim. There are however no provisions that allows contracts to be terminated in UAE through discussion among the parties involved in the contract .

⁴¹ Ameer AL, *Handbook for Technical Auditors of the Construction Industry* (Notion Press 2015) 132

⁴² Elliot F, 'Descoping in Construction Contracts in the UAE' (*fenwickelliott.com*, 26 Feb 2017) <<https://www.fenwickelliott.com/research-insight/annual-review/2015/descoping-construction-contracts-uae>> accessed 4 August 2017.

Termination by consent of the parties involved in the contract calls for mutual understanding of the parties and clarification of the rules that will be followed during the termination. However, the parties must work in tandem with the Union Supreme Court Case 457/Judicial Year 24 where Judge Salah Mahmud Uways ruled that the liability of the first contractor is always constant against the employer. Thus, a second contractor does not have a direct relationship with the employer. Thus, the mutual agreement here is between the first contractor and the employer and the first contractor based on their agreements in the contract.

3.4.3 Termination Due to Force Majeure

Article 894 is also vast and it defines the ruling that would be undertaken in the scenario where there is an external factor contravening the specifications of the contract⁴³. The external factor often inhibits the capacity of the contract to take effect and in legal terms, the concept is referred to as majeure supervenes. In addition to this, Article 878 emphasizes that the contractor shall always work in a manner that avoids losses emanating from negligence or trespass. However, no warrant exists if the loss emanates from an unavoidable accident⁴⁴. The Abu Dhabi Court of Cassation case 721/Judicial Year 3 case provides further guidance on Article 878 with the emphasis that in instances where the contractor breaches the agreements for performance under

⁴³ Barrett K, *Defective Construction Work* (John Wiley & Sons 2009) 55

⁴⁴ Federal Law No. (5) of 1985 on the Civil Transactions Law of the United Arab Emirates. (Retrieved 10th February from <https://legaladviceme.com/legislation/126/uae-federal-law-5-of-1985-on-civil-transactions-law-of-united-arab-emirates>), Article 218

muqawala contract or if the work that is done in contrary to the agreed conditions and standards, then the contractor is liable for losses and damages emanating from his work. More so, non-performance without justification also leads to termination and subsequent compensation to the affected party. The standard ruling for this kind of case is that both parties cease to be obliged to the contract and it is canceled without further reference to the law. The concept of force majeure supervenes may not be effective in totality. This gives rise to a new concept termed as partial impossibility⁴⁵. The bit that forms total impossibility will be reaped off, giving the obligator permission to do away with the contract. All the same, the obligee must be sufficiently informed about such a decision because the contract is binding on both parties. The next article defines the steps that can be taken in the scenario where both parties cancel the contract through an agreement. What happens is that the position of the parties before the agreement will be restored as though the contract never existed in the first place. Nonetheless, if the parties are opposed to this step, then a neutral party such as the courts will determine compensation issues.

Cases that are terminated using force majeure are those that do not necessarily require the law. They are not complex cases and are easily ruled out without bias. .

3.4.4 Termination Due to Completion

In tandem with Article 892, it is first provided that the completion of the works is a termination of the contract⁴⁶. However, the employer must ensure that he/she compensates the

⁴⁵ Robinson MD, *A Contractor's Guide to the FIDIC Conditions of Contract* (John Wiley & Sons 2011) 66

⁴⁶ Hogg M, *Promises and Contract Law: Comparative Perspectives* (Cambridge University Press, 2011) 23

contractor in totality based on the costs that have been agreed upon. Furthermore, Article 892 explicates the *muqawala* contract termination, which states that the completion of the duties must be settled upon by both parties. In this case, the contract will not be affected by any external forces. The procedure followed during this cancellation is acceptable before the court of law.

3.5 The Duty of the Court and the Parties in the Contract

The duty of the court is a dispute resolution agency will be to assess the circumstances under which the termination requests have been sought. It will perform an analysis of the seriousness of the breach and later give a judgment. It is within the court's discretion to give a ruling whether the termination has a legal basis or whether it would have been done in breach of the law⁴⁷. Where the court rules that termination should not be implemented, alternative measures can be employed which include a specific form of operations that will modify the previous system. The new system would then satisfy the aggrieved party. This alternative is only tentative as a lasting solution would be sought as a cure of the breach. This period of using the alternative solution gives the parties a chance to negotiate a way out to counter the termination. In particular, the party accused of the breach would have a chance to settle the case away from the courts. In some unique circumstances, termination may be considered as an option courtesy of external forces and not the contracting parties. Here the courts would rule in favor of a termination according to UAE laws.

⁴⁷ Sergeant M and Wieliczko M, *Construction Contract Variations* (CRC Press 2014) 57

3.6 Damages or Compensation for Termination

The party that calls for a termination should be aware that there exist several consequences from such a decision. Basically, the amount of compensation that they should pay to the innocent party should be equal to the harm that they may have caused. The civil code provides clear guidelines on the required compensation which should be done in the course of the breach⁴⁸. The termination may be an option in two events. First is under a circumstance of negligence and fraud and the second is the absence of the two attributes. In their absence, the damages for breaching the contract are recovered through directness and the capacity for the claiming party to foresee. This scenario is similar with other types of contracts where liability and consequential losses are excluded.

The period after termination should be properly managed hence the two parties must come up with a viable mechanism that will facilitate a smooth transition. It is obvious that when the employer initiates the termination process as a result of a contractor's misconduct, the former will cease to make any further payments until the whole cost of completing the assigned duties are finalized by the contractor⁴⁹. Another consideration is the cost of hiring another contractor, which is another expensive venture as well. This decision is made out of goodwill to keep the employer in a better financial position where they will have the capacity to replace the contractor. The

⁴⁸ Venoit WK, *International Construction Law: A Guide for Crossborder Transactions and Legal Disputes* (American Bar Association 2009) 89

⁴⁹ Godwin W, *International Construction Contracts: A Handbook*, (John Wiley & Sons, 2012) 68

contract should empower the employer so that they can make claims of recovery from the contractor especially in the event of breach.

The opposite is also true in that the employer who breaches the contract is also liable to the contractor. In this case, the employer would have to remit all the payments due to the contractor according to the initial contract terms⁵⁰. Additional sums of money would also be paid to the contractor and they include compensation for pocket expenses and demobilization costs and interests. The parties within the contract are at liberty to negotiate on the amounts of compensation especially the calculations of interests. Nonetheless, UAE laws call for a 12% interest rate. In any given situation that the parties fail to reach a strong consensus on the interest rate terms, 9% default rate is always applied⁵¹.

⁵⁰ Ibid 69

⁵¹ Hetreed J, Ross A and Baden-Powell C, *Architect's Pocket Book* (Taylor & Francis, 2017) 28

CHAPTER FOUR: TERMINATION UNDER FIDIC CONTRACTS

As it was discussed in the previous chapter, the UAE has a set of laws that are enshrined in the civil conduct. The preceding chapter discussed the various sections of the UAE laws related to termination of contract of muqawa. In this chapter, much attention will be paid towards the FIDIC, which are standard contracts, which are often used in this country. More specifically, the contract terms will be explicated, giving a review of the grounds under which they can be applied and the various conditions under which the contracts can be terminated.

FIDIC stands for the International Federation of Consulting Engineers which was founded in 1913 by European countries like France, Belgium and the UK. The contracts for FIDIC were put in the fourth edition of the article. The provisions were initially provided based on the conditions that were stipulated by the contractor, employer and the engineer. Such conditions were termed suitable for the civil engineering and construction sector. The conditions suited construction dams, bridges, roads and tunnels. It thus worked best for plants where manufacturing was not done at the sites. At this time, there was use of yellow books and red books to give guidelines on what was supposed to be done.

New FIDIC reforms were channeled in 1999 which are currently suitable to the construction sector within the UAE. It Should be understood that there has been a tremendous growth in the development of the construction sector within UAE since it came into existence in December 1971. President Sheikh Zayed Al Nahayan. He was determined to improve infrastructure in health, sports, education and in commerce and travelling. He was to achieve this through construction of many buildings. Since the country was young and naïve, there was need to identify already recognized institutions that will help in construction of such structures. FIDIC with its regulations came in handy to help in giving direction as to what the international community looked at in terms of constructions and how contracts could be awarded and terminated with regard to construction.

4.1 General Provisions

It is prudent to first demystify the facts about the FIDIC standard contracts. In the initial bits of the contract, there must be clear definitions of terms so that both parties getting into the contracts can understand them. Some of the terms include parties and persons, dates and completion periods, money and the terms of payment and the kinds of documents to be filled⁵². After the definitions, the s standard contract provide for interpretation of certain terms such as drawings, Bill of Quantity, Variation etc. . It is important to also give an interpretation on the use of the words ‘written’ and ‘in writing’⁵³. This is because these words are used either for a document

⁵² Baker E, Mellors B, Chalmers S, and Lavers A, *FIDIC Contracts: Law and Practice* (CRC Press, 2013) 12

⁵³ Furst S, Ramsey V, Hannaford S and Williamson A, *Keating on Construction Contracts* (Sweet & Maxwell, 2012) 22

that is handwritten or one that has been typed. The contract terms call for a standard form of communication where the information written should be disseminated electronically through the email or via courier services. FIDIC contracts are specific about the language that should be used in drafting the contract. Normally the language governing the contract is stated in the appendix but in the event that it is not listed, then the language of the country is used instead. In the event that more versions of the language exist, then the language in the appendix shall be strictly followed.

The time period under which the contract shall be executed is within 28 days after the contractor takes the acceptance letter. It is clear that all the costs relating to the delivery of the letter are born by the employer⁵⁴. Assignment of contract benefits or interests cannot be done by any party as stipulated in the contract segment that deals with assignment. Nonetheless, assigning may be done under the condition that both parties have arrived at a mutual agreement. In this case, either party may assign the benefits to a financial institution in the form of security. The FIDIC arrangement dictates that the drawings and specifications of the project shall be held by the employer but two copies of the contract together with a drawing will be given to the contractor. The documents that the contractor holds will be duplicated and the engineer supplied with six of the copies. Besides, the contractor shall provide some other copies to the site of the project which include drawings, variations and specifications⁵⁵. Any other document relating to the contract will also be provided and the representative to the employer will have permission to access the documents as they see fit. The contract states that in the event that any party identifies a mistake

⁵⁴ Furst S, Ramsey V, Hannaford S and Williamson A, *Keating on Construction Contracts* (Sweet & Maxwell, 2012) 76

⁵⁵ Srivastava S, *Administration of Construction Contracts* (Notion Press 2016) 15

within the documents, they are required to ensure that the other party is given adequate notification in connection to the aspects surrounding the termination process.

Sometimes the project execution may be delayed and when this happens, it is the responsibility of the contractor to notify the engineer within an appropriate amount of time. The causes of delay may be the contractor's incapacitation to make the drawings in the stipulated time. Nevertheless, the contractor should give a specific time period within which the drawings will be made available⁵⁶. The impact of delay made by the engineer in terms of delivery of the drawings is detrimental to the duty execution process of the contractor. This means that the contractor will have to incur some costs so as to cover up for the delay. However, the contract is quite clear that such a case will call for the compensation of the contractor through an additional payment. Alternatively, the time period for project execution shall be extended accordingly.

4.2 Obligations of the Employer

The employer is under obligation to give the contractor access to the site and the right to possess the property at the site for the stipulated time within the contract. The time lines are often outlined in the appendix of the tender, but under the circumstance of their absence; the employer will provide sufficient time for the contractor to execute the rights⁵⁷. If the employer does not honor the time lines and the contractor suffers delays, then the latter will incur heavy costs. Consequently, the contractor will be forced to inform the engineer. The employer is also under obligation to provide the contractor with any assistance that they require in line with the project specifications. Such assistance will be in regard to obtaining of the copies that contain the clauses

⁵⁶ Jaeger A.-V and Hök GS, *FIDIC - A Guide for Practitioners* (Springer Science & Business Media 2009) 79

⁵⁷ Ibid 102

of the law governing the contract. The employer shall also be required to guide the contractor on the requisite applications for licenses and operating permits in times when they will be needed.

In a contract bearing this level of significance, the employer has to ensure that he/she balances the third parties and the contractor because the lack of such a balance will result in contract breach. Basically, the employer has to ensure that other contractors affiliated to them cooperate with the contractor within the current contract⁵⁸. The third party contractors are also required by this clause to conduct themselves in a similar manner as the current contractor for the sake of protecting the work environment under which the project is to be undertaken. In regard to compensation of the contractor, clause 14 of the FIDIC standard contracts are elaborate that the employer has to state clearly the modes of payment and the time lines within which they will remunerate the contractor⁵⁹. The employer must show tangible evidence towards this commitment and they only have 28 days to make the submission. Sometimes the employer may request a share of the compensation process in the event that the contract is extended⁶⁰. This is possible but the employer has to provide notification to the contractor either directly or through the engineer. If the contractor approves the request by the employer, then a payment certificate will be issued, allowing the employer to be furnished with some amounts of money that is deducted or the employer will have the right to make a claim upon the contractor's pay.

⁵⁸ Thomas R and Wright M, *Construction contract claims* (Palgrave Macmillan 2016) 17.

⁵⁹ Potts K and Ankrah N, *Construction Cost Management: Learning from Case Studies* (Routledge 2014) 39

⁶⁰ Sergeant M and Wieliczko M, *Construction Contract Variations* (CRC Press 2014) 33

4.3 Obligations of the Engineer

It is the sole responsibility of the employer to select the engineer of their choice. The engineer will be expected to work with another set of professionals from the engineering field. The group must be certified by engineering boards and they must prove that they are fit for the project. The contract is only binding on the employer and the contractor, thus the engineer does not have any authority whatsoever to alter any sections of the contract. They only execute what is termed as implied authority within the contract. The duties of the engineer are subject to particular conditions as per the requirements of the employer. Nonetheless, the employer is limited in the extent to which they can impose constraints upon the engineer except through the agreement with the contractor. The contract law states that any moment the engineer executes a duty; they are doing so to serve the interests of the employer. Within the functions of the engineer, their roles have been limited and they do not have the capacity to lessen the amount of responsibility vested upon the parties within the contract⁶¹. The role of the engineer includes examining, inspecting, testing among others. However, as mentioned before, these functions do not relieve the contractor of their errors of either non-compliance or omission.

Engineers work with a set of staff thus, they are at liberty to delegate part or all of their assignments to such parties as long as they have the requisite accreditation to perform the duties. It is upon the engineers to review the decision of delegation and in the event that there is breach of the terms, then they may revoke the assignments⁶². The exercise of assigning, delegating, and

⁶¹ Kondev D, *Multi-Party and Multi-Contract Arbitration in the Construction Industry* (John Wiley & Sons 2017) 66

⁶² Ulrichsen K, *The United Arab Emirates: Power, Politics and Policy-making* (Routledge, 2016) 39.

revoking must to be done in writing and every party to these events must receive the documented records before the contract can be rendered enforceable. Delegation shall be done in accordance with the law and the engineer is not allowed to perform a delegation for the reason of determining a matter⁶³. The parties that should perform on behalf of the engineer must be fluent in the language that was stipulated within the contract appendix. They are only required to give instructions according to the limits given within the delegation and any overlap will amount to contract breach. It is evident that an assistant who executes a contract in line with the delegated duties produces an outcome similar to the impacts of the engineer.

4.4 Obligations of the Contractor

A contractor is required by law to effectively respond to the engineer in regard to the methods of construction. At any moment in which the engineer requires such information, the contractor must avail it in original form. This implies that any amendment by the contractor can be done only after the engineer has been notified. In some extremes, the contractor is often persuaded by circumstance to implement a design of his own upon the permanent works. In this scenario, the contractor is under obligation to issue the relevant documents to the engineer reflecting the same.

4.5 Termination of the Contract

Having discussed the circumstances under which the FIDIC contracts can be applied, there is need to explore the terms under which the contracts can be canceled. The roles of the parties such as the employers, engineers and contractors have been examined. The contracts often get

⁶³ Uff J, *Construction Law* (Sweet & Maxwell, Limited 2017) 93

terminated through breaches by the same parties when they fail to execute their roles effectively⁶⁴. In some cases, these parties may not be directly involved in the circumstances that may lead to a breach. When other elements come into play, the contract is terminated through what is referred to as force majeure. All these factors will be discussed, giving the details under which each of the factors can be remedied.

Over the years construction contracts have evolved to meet the growing demands of the construction practices. The contracts are known in a single phrase as Standard Forms of Construction Contracts (SFCCs)⁶⁵. Many SFCCs have been constructed in the past in order to satisfy the needs of various project developers. There are various parameters which are used to assess a particular SFCC whether it is viable for a given project. The parameters include size, complexity, country, the procurement route and the overall risks associated with the project.

4.6 Termination by the Employer

The FIDIC contracts are precise and the termination of the construction contract by the employer relies on the conduct of the contractor. The employer will execute termination if the contractor does not heed to the specifications of clause 4.2 which outlines the security of performance⁶⁶. It extends to the conditions where the contractor does not correct the actions even after being served with a notice. Another form of behavior by the contractor that has the capacity

⁶⁴ IBP, Inc., *UAE Largest Importers Directory Volume 1 Strategic Information and Contacts* (Lulu.com 2013) 80

⁶⁵ Rowlinson M, *Practical Guide to the NEC3 Engineering and Construction Contract* (Wiley 2016) 37

⁶⁶ Hughes K, *Understanding the NEC3 ECC Contract: A Practical Handbook* (Routledge 2012) 128

to lead the employer in a situation where he/she terminates the contract is when the former abandons the project deliberately without being allowed by the employer. In a situation where the contractor fails to start working on the date that has been agreed upon, then this allows the employer to terminate it without any potential legal implications. Furthermore, the contractor may breach the contract by subcontracting the entire project yet they only need to subcontract a section of it. If the contractor is a company which plunges into bankruptcy and subsequent liquidation, then the employer has no option but to bring the contract to an end.

The issue of integrity comes to play within this contract. The contract is only likely to hold if the parties will conduct themselves with integrity. In instances where the contractor is adjudged to take part in practices that are unethical or illegal behavior including bribery, and solicitation of money to have an advantage over the other party in the contract, then the employer should go ahead to ensure that the contract is terminated effectively⁶⁷. Indecency also spreads into the tendency to exercise favoritism among the contractors so that they would subcontract the works through bias. As mentioned before, the employer will have to act upon the process of terminating within 14 days after issuing a notice to the contractor. As soon as the notice is issued, the engineer will come in to analyze the amount of work that would have been done by the contractor and any other compensation that is required⁶⁸. Any other sums of payment due to the contractor will be calculated by the engineer in line with the contract. Nonetheless, the need by the employer to make the payments will not be fulfilled until after the engineer has assessed the works and determined the costs. In the analysis, the employer will seek to establish the costs that they may have incurred and before compensating the contractor, they would need to recover their money.

⁶⁷ Hughes K, *Understanding the NEC3 ECC Contract: A Practical Handbook* (Routledge 2012) 77

⁶⁸ Ibid

The contract provides an entitlement for the employer to engage in a termination process. They have the right to do so at any moment as long as they give notice to the contractors who form the second parties within the contract⁶⁹. It must be noted that an employer should not come into the contract of termination with the intention of completing the project by them. It is also against the contract if the employer calls for end of the contract because they have the desire to hire other contractors of their choice. This is regarded as bias and it falls under the category of indecency.

4.7 Termination by the Contractor

After exploring the circumstances under which the employer can terminate a construction contract, the role of the contractor will be discussed. The first circumstance under which this will be effected is when the engineer does not certify the payment. Additionally on the issue of payment, the employer must make proper arrangements for the remuneration process and failure to it; the contractor will slow down the construction pace or indefinitely suspend it until the payment is honored⁷⁰. This action must be done within 21 days of giving notice.

The termination of contracts under FIDIC standard of contract is executed as per the UAE laws thus bringing some similarities. For instance, either of the parties may choose to terminate the contract on condition that the other party has not fulfilled the terms of the contract. More specifically is the deliberate refusal by the employer to pay the contractor. In this case, both provisions empower the contractor to terminate the contract and make claims for the compensation that is due to them for the work that they have completed. Within the contract appendices, there is

⁶⁹ Ibid

⁷⁰ Morledge R and Smith A, *Building Procurement* (John Wiley & Sons 2013)

a certain amount of money that is stipulated for the employers to compensate the contractor in the event that the contract is brought to a halt prematurely.

The contractor is entitled to termination in the event that they do not receive sufficient information within 42 days concerning the agreement about the financial arrangement of the employer. Under the FIDIC standard contracts⁷¹, the contractor has the right to terminate the contract if 56 days elapse before the engineer issues a certificate of payment. Sub clause 14.7 requires that a contractor in a construction contract receives an interim payment within 42 days of contract signing and if these terms are not honored then they are at liberty to terminate the contract⁷². Besides these issues, it is worth admitting that there is a common notion, which states that when one party does not heed to the contract specifications, the other party has no duty to carry on with it. Therefore in this case, the contractor will have the moral authority to terminate the contract in the event that the employer does not perform their duties.

Earlier on, it was observed that the contractor may suspend the contract if proper payment arrangements are not made. Article 894 provides effective guidance to this. As decided by Judge Muhammad Abdul Qadir Al Sulti in the Union Supreme Court case 213/Judicial Year 23⁷³, in instances where the contractor is unable to complete the execution of the works that he had started because of some force majeure reasons that he was not part of, then he may set aside the contract. The delay in funding could give the contractor the right to terminate the contract. This suspension is done as a persuasive tool that will force the employer to make the payments. In instances where the employer fails to respond to the engineer's advice within the right time to issue a certificate of

⁷¹ Bunni NG, *The FIDIC Forms of Contract* (John Wiley & Sons, 2013) 74

⁷² Ibid

⁷³ Westlaw Gulf

payment, then the suspension period is always lengthened. This scenario is detrimental for the life of the contract because it would likely result in the termination if the contractor runs out of patience⁷⁴. Ideally, a long period of suspension will drastically affect the workings on the project. The last condition under which a FIDIC contract is terminated by a contractor is when the employer declares bankruptcy. This implies that the latter would not have the ability to sustain the payment claimed by the contractor⁷⁵. If this happens, then the company in the capacity of the employer will be liquidated and the terms of the contract will change, leading to contract termination.

Once the period under which the notice is issued elapses and termination takes effect, the contractor will bring all further works to an end. Nonetheless, some bits of work will be sustained especially those that are concerned with life and property safeguarding⁷⁶. In order for the payment procedure to be facilitated, the contractor will be expected to return the plant and material documents so that the engineers can do an assessment. Besides, the final stages of the contract mean that the contractor should clear the site by removing all the performance tools to give room for another contractor who would be hired to complete the project. After the contract has been wound up by the contractor, the final obligations by the employer would be to issue the contractor the performance security which ceases to be under the former's custody. Consequently, sub clause 19.6 dictates that the employer remits the due sums of money to the contractor. Obviously, additional compensation would be issued to the contractor to cover up for the damages that they may have suffered as a result of the termination.

⁷⁴ Grose M, *Construction Law in the United Arab Emirates and the Gulf* (John Wiley & Sons, 2016) 72

⁷⁵ Barrett K, *Defective Construction Work* (John Wiley & Sons 2009) 46

⁷⁶ Ibid

4.8 Force Majeure

Force majeure is a unique circumstance that none of the parties to the contract has control over. The event arises after the parties have signed the contract and prior to signing, they could do nothing to avert it. The provisions of the FIDIC contracts state that a force majeure is not attributable to any party in the contract⁷⁷. Nevertheless, any party that foresees a constraint in performance of its obligations as a result of force majeure must notify the other party about such event and the responsibility that could have been prevented. This notification must be implemented within 14 days of realization. The impacts of force majeure are far reaching thus the parties must all endeavor to minimize the conditions under which a force majeure can occur⁷⁸. Given that force majeure delays the performance of the contract, efforts to counter it would drastically reduce the delays. The efforts to minimize the force majeure could bear fruit for the affected parties or it may be eradicated completely. In the event that the party successfully gets rid of the effects, then it will have to notify the other party of the new developments.

It is important to examine some of the consequences that arise as a result of the existence of force majeure. First of all, any contractor who is prohibited from executing their obligations as a result of force majeure will be delayed from completing their tasks⁷⁹. In addition, they will be forced to incur costs which they did not anticipate within the course of the contract. Under such

⁷⁷ Furst S, Ramsey V, Hannaford S and Williamson A, *Keating on Construction Contracts* (Sweet & Maxwell, 2012) 45

⁷⁸ Furst S, Ramsey V, Hannaford S and Williamson A, *Keating on Construction Contracts* (Sweet & Maxwell, 2012) 78.

⁷⁹ Ulrichsen K, *The United Arab Emirates: Power, Politics and Policy-making* (Routledge, 2016) 29

circumstances, the contractor will make claims as compensation of the uncertain expenditures that they engaged in. The matter is determined by the engineer after receiving the claim notice.

The impact of force majeure may take a considerably long period of time. If the contractor is prevented from performing their duties and the delay extends into between 84 and 140 days, and notice has been issued, then either the contractor or the employer will gain grounds for which they can call for termination of the contract through issuance of notice⁸⁰. Force majeure could be a condition where the parties to the contract have no control over an issue that is either unlawful or unpreventable yet it would sabotage the existence of the contract. Force majeure makes it difficult for the employer and the contractor to fulfill their mandate thus the contract ceases to exist. Basically, the parties lose the rights to execute the obligations under the initial contract terms.

4.9 Claims, Disputes and Arbitration

The termination of a contract may be remedied through a series of actions that would be done in favor of both parties so as to solve the dispute. For the case of the contractor, they would be entitled to additional time by the employer and the engineer so that they can complete their duties. They would also be entitled to financial compensation in connection with the contract or any other additional duties performed in relation to the contract. If the contractor is convicted that they are entitled to these benefits, then they are required to communicate this to the engineer within a period of 28 days so that their claims can be settled⁸¹. The clauses are clear and failure to make claims within the 28 day time period will imply that the contractor will not have the right to have the time extended; neither will they have their payment increased.

⁸⁰ Ibid

⁸¹ Sergeant M and Wieliczko M, *Construction Contract Variations* (CRC Press 2014) 55.

The contractor is required to make the claims in proper details within 42 days of becoming aware that there is a circumstance under which a claim should be made. Ideally, the contractor will be expected to make a serious claim through the engineer by drafting a detailed document, providing tangible reasons for why they are making the claim for time extension and additional payment. The settlement of the disputes is done through selection of a Dispute Adjudication Board whereby both parties in the contract appoint persons that will be approved by either party⁸². Sometimes the parties may disagree on the choices they may have made in the appointment⁸³. The solution to such a situation is that reference is made to the contract appendix which often outlines the procedures upon which the arbitration body can be selected. Nonetheless, this is an additional cost to the parties because each of them will pay a fee towards remunerating the selected board.

In dealing with the contract termination, differences between the two provisions are evident. In the FIDIC contract, there is comprehensive coverage of the terminologies that explain the requirements in the contract. This includes the provision of the definition of terms such as parties as well as completion of dates. On the other hand, the UAE laws do not give word by word explanations; rather they go all the way to draft the clauses. Some of the words in the UAE laws may be difficult to interpret, for example those that depict both genders. However, the most important thing to affirm in this case is that there is the need to adhere to the terms and conditions that regard the contract when ensuring that it is terminated in a successful manner. Without in depth analysis and consideration of the situations, the involved party always stands to suffer from

⁸² Kerr M, Ryburn D, McLaren B and Dentons ZO, 'Construction and Projects in United Arab Emirates: Overview' [2014] 9.

⁸³ Grose M, *Construction Law in the United Arab Emirates and the Gulf* (John Wiley & Sons, 2016) 67

the negative consequences of not following the set guidelines of the contract in the best ways possible as asserted.

The issue of termination does not come as a result of conflicts alone but also the incapacitation by the contracting parties to continue with the contract. For example, the issue of insolvency is a major factor to be considered if at all the contract will be sustained . In regard to this issue, the contract can be terminated through mutual consent without seeking litigation through the courts. Basically, the parties can agree outside the judicial precincts so that the matter is settled. A contract is an agreement where people assent to the terms of it out of volition. The company stakeholders engage in the contract if they are convinced that they would benefit from the activities of the other party . The issue of volition is a universal concept whereby nobody should be coerced into accepting a legal agreement. Many legal frameworks in the whole world have been guided by this principle which is a tenet of fairness. The laws of superior countries in the US and Europe have been drafted with specific reference to the value of volition . For this reason, the UAE laws and the FIDIC provisions also borrow from the concept of volition whereby people and organizations enter into contracts out of their own conviction. Therefore the similarity between the two laws is exhibited as a result of this universal facet.

CHAPTER FIVE: SIMILARITIES BETWEEN UAE LAWS AND THE FIDIC STANDARD CONTRACTS

5.1 Introduction

UAE laws and the FIDIC standard contracts are laws of contracts that are both applied in the country. It should therefore not come as a surprise to find some disparities within their applicability because some of the clauses do not apply similarly in different situations. Nonetheless, there are vast similarities owing to the fact that the laws and contracts have been designed for the same kind of projects and the contracts are signed in the same environment⁸⁴. The disparities exist but not on a very large scale. It must be noted that some laws are universal and they are applied on the basis of the regard for human nature. Within the FIDIC contractual standards and the UAE laws, there is need to take care of all the interests of individuals⁸⁵. FIDIC standards and UAE laws were drafted under different circumstances and by different legal experts. The issue of timing is also crucial in the analysis of both laws. These factors on the other hand contribute immensely to the reason for the presence of the differences within the laws. Therefore the various issues leading to the differences and similarities will be examined in detail.

5.2 Similarities

⁸⁴ Baker E, Mellors B, Chalmers S, and Lavers A, *FIDIC Contracts: Law and Practice* (CRC Press, 2013) 72

⁸⁵ Ibid

First of all, the contractual provisions in both FIDIC and UAE law related contracts that include two parties. These two parties include the employer and the contractor. The definition of a contract may extend beyond two parties but in the FIDIC standards and the UAE laws, the above mentioned parties exist⁸⁶. The execution of any contract relies on the capacity of both parties to enter into a legally binding agreement whereby they would discuss the issues relating to the contractual rights and obligations. Once the parties have agreed to the terms, they would not have the contract terminated easily in the future⁸⁷. Nonetheless, this leads to the next issue which is the powers vested in the contracting parties. All the parties in the contract have been empowered to call for a termination in the event that they are not satisfied that the other party has acted in accordance to the contract. In particular, each party has the right to call for a termination. In both forms of the contract and law, the arbitrating organ is the court which comes in to solve any issue which may arise as a result of contract breaching⁸⁸. Nonetheless, it should be understood that the court should not be termed as the third party. Rather, it should be considered as a party that only restores the benefits of the contracting parties in case they wish to end the contract without prejudice. The reason why the court is not termed as the third party is because the stakeholders do not append any signature in the initial process of forming the contract, rather it comes in to read the terms and make judgment about policies that were instituted earlier on.

5.3 Similarities in the Conditions for Termination

⁸⁶ Sergeant M and Wieliczko M, *Construction Contract Variations* (CRC Press 2014) 21

⁸⁷ Potts K and Ankrah N, *Construction Cost Management: Learning from Case Studies* (Routledge 2014) 36

⁸⁸ Ibid

The termination of contracts in both the FIDIC standard of contract and the UAE laws are executed under similar circumstances. For instance, either of the parties may choose to terminate the contract on condition that the other party has not fulfilled the terms of the contract. More specifically is the deliberate refusal by the employer to pay the contractor. In this case, both provisions empower the contractor to terminate the contract and make claims for the compensation that is due to them for the work that they have completed. Within the contract appendices, there is a certain amount of money that is stipulated for the employers to compensate the contractor in the event that the contract is brought to a halt prematurely.

Another condition for termination in both cases is when the contractor or the employer files for bankruptcy. This means that for the case of the contractor, the company may not be in a position to solicit for materials to complete the project. It would only be prudent that the contractor bows and informs the employer about the constraints so that another contractor can be hired⁸⁹. In the case where the employer is a company and it goes bankrupt, it would not have the money to remunerate the contractor. The company is bound to be liquidated so that the proceeds can be used to remunerate the contractor.

It was mentioned prior that the courts are called upon to arbitrate in the event that the contracting parties get into conflict and they wish to terminate the contract. The similarity emanating from this factor is the issue time lines issued by the judges. In both provisions, a judge of the court of law will determine the time lines in which the offended party will be compensated. In most cases, the time lines are issued in multiples of seven but the maximum period that can be

⁸⁹ Morledge R and Smith A, *Building Procurement* (John Wiley & Sons 2013)

given is 42 days⁹⁰. In a court ruling regarding to contract termination, the judges may refer to previously determined cases to give a ruling on the current cases especially if they bear the same aspects.

The issue of termination does not come as a result of conflicts alone but also the incapacitation by the contracting parties to continue with the contract. For example, the issue of insolvency is a major factor to be considered if at all the contract will be sustained⁹¹. In regard to this issue, the contract can be terminated through mutual consent without seeking litigation through the courts. Basically, the parties can agree outside the judicial precincts so that the matter is settled. A contract is an agreement where people assent to the terms of it out of volition. The company stakeholders engage in the contract if they are convinced that they would benefit from the activities of the other party⁹². The issue of volition is a universal concept whereby nobody should be coerced into accepting a legal agreement. Many legal frameworks in the whole world have been guided by this principle which is a tenet of fairness. The laws of superior countries in the US and Europe have been drafted with specific reference to the value of volition⁹³. For this reason, the UAE laws and the FIDIC provisions also borrow from the concept of volition whereby people and

⁹⁰ IBP, Inc., *UAE Largest Importers Directory Volume 1 Strategic Information and Contacts* (Lulu.com 2013) 67

⁹¹ Lloyd E, 'What Happens When It All Goes Wrong? Terminating A Construction Contract from a UAE Law Perspective,' (*tamimi*, 3 Aug 2017) <<http://www.tamimi.com/en/magazine/law-update/section-11/may-8/what-happens-when-it-all-goes-wrong-terminating-a-construction-contract-from-a-uae-law-perspective.html>> accesses 4 Aug 2017

⁹² Ibid

⁹³ Ibid

organizations enter into contracts out of their own conviction. Therefore the similarity between the two laws is exhibited as a result of this universal facet.

5.4 Similarities after Termination

The period of termination is characterized by several procedures that should be undertaken in order to facilitate the completion of the project. In both provisions, it is regarded as a massive breach of the law if the arbitrating agents discover that the party initiating the termination was biased and implemented the process to benefit another company of interest. Once any party has signed a contract, they are under obligation to respect the contract provisions to the letter⁹⁴. In the event that another company or party expresses interest, it is against the law to end the contract so that the new entity can be accommodated. FIDIC standards and the UAE laws are both clear about this issue and the consequences outlined for the offending party are so devastating.

After termination, the parties must own up the share required to compensate the other party to enable them continue with their activities. In the event that the contractor has called for termination, they should provide a conducive environment for the transition process where a replacement company can take up the job. In the event that the employer has called for termination, the company or individual should arrange for effective compensation to the contractor⁹⁵.

The FIDIC standard contracts and the UAE laws have been drafted and the need to have a working partnership between the employer and the contractor is based on the issue of good faith and freedom from fraudulence. The laws were drafted with specific regard to this important virtue. Essentially, it is expected that the parties will execute their mandates in the best possible ways so

⁹⁴ Clamp H, Cox S, Udom K and Lupton S, *Which Contract?: Choosing the Appropriate Building Contract* (Royal Institute of British Architects, 2012) 109

⁹⁵ Ibid

that they can achieve their goals⁹⁶. The value of good faith is priceless and nobody can be forced to exercise the demands of good faith. Through good faith, the parties will be able to behave in a manner that will be beneficial to the business for which they sign the contracts. Ideally, good faith will guide the parties to act without engaging in illegal or unethical conduct⁹⁷. The provisions within both forms of the instruments are similar because the contracts are basically related. Most businesses have prospered as a result of good faith hence it is not only a preserve of the contracting companies. Utmost good faith is an idea borrowed from the field of insurance and the parties have complied to make the field a success. There is no doubt that the contracts that are signed and executed with regard to this factor will be successful. Precisely, companies and institutions that come into contract through both the FIDIC and UAE provisions often utilize the virtue of good faith.

5.5 Differences

Despite the fact that the UAE laws and the FIDIC contractual terms are both legally enforceable within the country, there are massive disparities in the clauses. Having discussed the similarities, the need to explore the differences is inevitable. The first difference comes in the notion about the initial stages of the contract⁹⁸. In the FIDIC contract, there is comprehensive coverage of the terminologies that explain the requirements in the contract. For instance, there are

⁹⁶ Rowlinson M, *Practical Guide to the NEC3 Engineering and Construction Contract* (Wiley 2016) 27

⁹⁷ Hetreed J, Ross A and Baden-Powell C, *Architect's Pocket Book* (Taylor & Francis, 2017) 22

⁹⁸ Godwin W, *International Construction Contracts: A Handbook*, (John Wiley & Sons, 2012) 40

definitions of terms, such as parties and completion of dates. It is evident that the FIDIC provisions offer more detail to the parties so that they can deeply understand the intricate issues of the contract terms⁹⁹. On the contrary, the UAE laws do not provide word by word explanations; rather they go all the way to draft the clauses. Some of the words in the UAE laws may be difficult to interpret, for example those that depict both genders. The contract is also clear about the time lines in the initial procedures. Basically, the appendix of the contract contains all the highlights about what should be expected in the FIDIC contracts. The UAE laws have no such provisions.

5.6 Role of the Engineers

The clauses within the FIDIC standards have extensively covered the role of the engineer and in some way this might be termed as a third party but not entirely. It is not clear whether the UAE laws engage an engineer as a contractual party, but the clauses are silent about the whole issue. The engineer plays a major role in the FIDIC contract because he gives the specifications about how the project should look like. Ideally, he forms an integral part as an appointee of the employer. The work of the engineer is clear cut and they are expected to work alongside other professionals to achieve the practical goals of the employer¹⁰⁰. Given that the engineer is appointed to serve the interests of the employer, it is inevitable that they cannot be third parties in the contract because their role is subjective. The contract is binding between the employer and the contractor thus the engineer has implied authority to act on behalf of the employer. The engineer may exercise some jurisdiction over some decisions which are made without reference to the desires of the employer¹⁰¹. These are the provisions of the FIDIC standards. The staffs that were mentioned as

⁹⁹ Ibid

¹⁰⁰ Glover J, and Hughes S, *Understanding the FIDIC Red Book: A Clause by Clause Commentary* (Sweet & Maxwell, 2011) 76

¹⁰¹ Ibid

part of the engineer's team may work on behalf of the engineer only if they have been delegated part of the job. Hence they cannot be appointed to work on the entire project¹⁰². As it regards the duties and functions of the engineer, the FIDIC terms have been explicit in the manner in which they define the roles. On the other hand, the UAE laws do not mention or explain the core responsibilities that are preserved for the engineer.

5.7 Role of the Employer

The employer is an important member in the contract. The FIDIC contracts stipulate that the employer can give a contractor the right to own the site and manipulate it for the period of the contract. When the contractor is empowered, they have the capacity to execute their responsibility without much influence from the external sources¹⁰³. The contractor is however expected to utilize the rights effectively and deliver the job outlined for them in the stipulated time lines. It is very detrimental for the employer if the contractor does not implement the role because the former will have to incur extra expenses to compensate for the time lost. Within UAE law, the clauses are silent about the rights of the contractor and whether they can have the audacity to execute their roles without disturbance. UAE laws do not give such clarifications, rather they are too general. They are not quite reliable for contracts which may go to an advanced stage and demand for a thorough examination of the law¹⁰⁴. The FIDIC contracts provide for communication between the engineer and the contractor in case the employer is not content with the amount of work that has

¹⁰² Glover J, and Hughes S, *Understanding the FIDIC Red Book: A Clause by Clause Commentary* (Sweet & Maxwell, 2011) 56

¹⁰³ Khanlari R, Fard MS, *FIDIC Plant and Design-Build Form of Contract Illustrated* (John Wiley & Sons 2015) 120

¹⁰⁴ Ibid 122

been done. Generally, the engineer is regarded as the second arbitrator in this arrangement alongside the courts and this is the other difference between UAE laws and the FIDIC standards¹⁰⁵. Besides the arbitration issue, there is no provision for communication between the contractor and the engineer as it pertains to the construction contracts. The engineer's views are also supposed to be taken into consideration at this point.

The employer in the FIDIC contract is at liberty to carry on the work by entering into a contract with a contractor when other contractors continue working on the project. This implies that some of the work would be given to the contractor to complete it. A FIDIC contract does not imply that the contractor in the agreement has to do the entire project. Nonetheless, they can perform the duties together with the third party contractors so that they work in harmony. The UAE laws do not have the provision where the contractor can work alongside other contractors. In fact this law is quite rigid and the project to be worked on must solely be allocated to the existing contractor who has the capacity to handle it up to the end¹⁰⁶. UAE law clearly contains such provisions because this will limit the tendencies by contracting firms to shift blame to others in case the work is not done in the proper manner.

It is easier to perform transactions in the FIDIC provisions because the contracting parties can be assured of coherence as a result of presence of engineers. Engineers in the FIDIC contractual standards are instrumental in the provision of information from one party to another

¹⁰⁵ Khanlari R, Fard MS, *FIDIC Plant and Design-Build Form of Contract Illustrated* (John Wiley & Sons 2015) 47

¹⁰⁶ Elliot F, 'Descoping in Construction Contracts in the UAE' (*fenwickelliott.com*, 26 Feb 2017) <<https://www.fenwickelliott.com/research-insight/annual-review/2015/descoping-construction-contracts-uae>> accessed 4 August 2017.

and they act as intermediaries¹⁰⁷. In the event that the contract is terminated, the engineers take up the role of putting the documentations together to process compensation. Sometimes the employers may have a claim to the money that is offered to the contractor. It is upon the engineer to communicate the claim to the contractor or the employer may put up the claim on their own. UAE law does not provide for the empowerment of the engineers because they are believed to be non members of the contract.

5.8 Role of the Contractor

The FIDIC stipulations basically explain the relationship that exists between the contractor and the engineer. The contractor has the responsibility of executing the instructions from the engineer. In the case of UAE law, the contractor's role has been generalized and there is no specific linkage to the engineer thus the difference arises so sharply due to the lack of mention of the engineers. Moreover, the contractor in the FIDIC standards has been empowered to perform their duties according to their own designs as long as they inform the engineer. On the other hand, there is little or no mention of the contractor empowerment in UAE law. As noted earlier, UAE law has a specific name which they use to refer to the construction contracts. They are referred to as the contracts of *Muqawala*. This is not a major difference as such but only the terminologies differ. The FIDIC contracts also deal with the construction contracts in the country of the UAE but the naming of the contracts is different.

5.9 Force Majeure and Majeure Supervenes

The above mentioned concepts are used separately but they refer to the same thing. In the FIDIC provisions, the term force majeure is used and it refers to the external factors that may lead to the termination of the contract other than the employer or the contractor. The concept of majeure

¹⁰⁷ Ibid

is used in UAE law and it basically means the same as force majeure. Therefore the difference comes in the terminologies¹⁰⁸. The good thing about the FIDIC contracts is that such technical words are explained to those who intend to use the contracts. In the event of majeure supervenes, the contract comes to an end without specific reference to the law. Contrary to this, force majeure in the FIDIC standards provides for notification by the parties that may foresee the possibility of an external factor sabotaging the contract. It is clear that the parties should provide information to the partners in the contract within 14 days so that they can take the necessary precautions.

The last difference between the FIDIC contractual standards and UAE law is that FIDIC standards provide for an arbitration platform where disputes and claims are solved. These steps are critical because they may avert the possibility of having a premature termination¹⁰⁹. For instance, if the contractor is found to be running out of time and the job has not been completed, they can ask for more time to complete the project. For the case of UAE law, there are no specific arbitration methods to solve the imminent causes of termination thus a contract signed under this law will easily come to an end.

CHAPTER SIX: RECOMMENDATION

Various recommendations can be provided in improving the provisions on the termination of construction contracts. As mentioned earlier, the provisions in the United Arab Emirates laws

¹⁰⁸ Ulrichsen K, *The United Arab Emirates: Power, Politics and Policy-making* (Routledge, 2016) 52

¹⁰⁹ Ulrichsen K, *The United Arab Emirates: Power, Politics and Policy-making* (Routledge, 2016) 57

on the termination of construction contracts are not as stringent when compared to the standard provisions. This is because this nation lacks the proper documentation of the provisions on the termination of construction contracts. From a general perspective, the provisions on the termination of construction contract require a high level of serious consideration. The parties involved in the contract are required to provide significant information that is honest and well-documented. It is significant to document this information for future reference. The documentation of this information is also significant as the information is reviewed in the process of the termination of the contract.

Additionally, Article 218 dictates that no contract shall be deemed as binding if there is a phrase that nullifies the propriety of the contract termination being determined in a court of law or through mutual consent. The contract may be valid but lack of the aforementioned credentials will discredit it entirely. Every party to the contract has the option of canceling it as they see fit. They are not under any obligation to stick to the contract if they disagree with the terms. This article needs to be amended so as the agreements on the construction contracts to be considered as binding. Individuals should not just engage in the termination of the contract if they see themselves unfit. Rather, contracts should only be terminated if the conditions applicable to them are violated by the parties involved.

To add on, judges should have an absolute powers in observing the interests of the parties involved in construction contracts because of the chances of the occurrence of corruption in the process. Rather, contracting bodies and clients should have mutual conversations and come up with fair agreements at the end. With reference to article 249 of the CTC, the federal constitution still gives immense powers to the judges to examine the interests of both parties where there are uncertainties. Normally, there are some contingencies which arise against the will of both parties.

The contingencies are unavoidable thus the court has to give a sound ruling that will satisfy either of them. This article is categorical about such unknown causes especially if they have a devastating impact. For instance if the life of the obligator is put at risk as a result, then the judge must ensure that such devastation is reduced to levels that are containable. Involving judges in contractual agreements can result in the lack of fairness in tandem to the specific interests of every party involved in the contract. Their elimination and involving the parties themselves promotes fairness. However, when the differences cannot be resolved among the parties, then an action should be taken to solve the problem permanently through the court.

Furthermore, there is the need for providing explanations to the major terms in UAE law on the grounds for the termination of construction contracts. The parties involved in a construction ought to have a clear understanding of the specific terms that are applicable in the case of construction contracts. Understanding these terms helps in better comprehending the provisions that are applicable under every term. For instance, they should clearly understand terms such as contractor, employer and termination of contracts. By being familiar with these terms, individuals can understand that the employer is under instructions to give the contractor access to the site and the right to possess the property at the site for the stipulated time within the contract. The time lines are often outlined in the appendix of the tender but under the circumstance of their absence, the employer will provide sufficient time for the contractor to execute the rights. Apart from this, they will be able to understand that it is the sole responsibility of the employer to select the engineer of their choice. The engineer will be expected to work with another set of professionals from the engineering field. The group must be certified by engineering boards and they must prove that they are fit for the project. Moreover, they will understand that a contractor is required by law to effectively respond to the engineer in regard to the methods of construction. At any moment when

the engineer requires such information, the contractor must avail it in its original form. In tandem to the termination of contracts, they will understand that there are various conditions that promote the termination of construction contracts.

Moreover, in the application of the laws on the grounds for the termination of construction contracts, FIDIC has to ensure that it also takes into consideration the specific sources of law of the various nations of the world. This ensures that the established rules are compatible with the laws of these nations. This eliminates the consequences of clashes in the application of these laws. Despite the fact that UAE law and the FIDIC contractual terms govern the same people in the same country, there are massive disparities in the clauses. The first difference comes in the notion about the initial stages of the contract. In the FIDIC contract, there is comprehensive coverage of the terminologies that explain the requirements in the contract. For instance, there are definitions of terms, such as parties and completion of dates. It is evident that the FIDIC provisions give more detail to the parties so that they can deeply understand the intricate issues of the contract terms. On the other hand, UAE law does not offer word by word explanations; rather they go all the way to draft the clauses. Some of the terminology in UAE law may be difficult to interpret, for example those that depict both genders. The contract is also clear about the time lines in the initial procedures. Basically, the appendix of the contract contains all the highlights about what should be expected in the FIDIC contracts. UAE law contains no such provisions. Based on the above mentioned example, it is evident that there is the need of bridging the gap that exists between these laws in order to avoid disparities in the application of the laws.

Lastly, FIDIC should be flexible enough when dealing with different nationalities. Various nations are governed by different laws. Apart from this, there are different bodies that are concerned with the formulation of laws in the various nations of the world. FIDIC has to ensure

that there is a high level of flexibility especially when dealing with cases related to individuals from other countries for purposes of balance.

CHAPTER SEVEN: CONCLUSION

Contracts are particularly binding agreements whose rules ought to be adhered to strictly. A contract can be terminated in the cases whereby one of the parties involved in the contract has breached the conditions for the performance of the contract. There are various significances in tandem to the right to terminate a construction contract. Any party that has entered into a contract

has a right to terminate the contract if the terms of the contract are not met by the counter party. This is because in the process of the performance of a contract, a wide range of situations can take place that call for the termination of the construction contract. Such situations include lack of convenience and default by the contracting party. The choice of terminating a construction contract should be well thought through and various aspects put into consideration before the termination of the contract. The right of terminating a construction contract is both significant and practical. The right is significant in promoting the effectiveness and efficiency of the construction contract. The right to terminate a contract is also essential in the formation of the basis for the re-negotiation of the contract by the parties involved in a contract in the situations whereby there are difficulties in the contractual relationship.

The choice of terminating construction contract by the employer or by the contractor should not be made if there is the occurrence of a minor breach in the performance of the contract or rather in the circumstances whereby there is not breach in the performance of the contract. Rather, this decision should only be made in the cases whereby there is a major breach of the conditions or the performance of the contract. The decision to end the contract should also made only in the situations whereby there are defaults in the contract. In the current global environment whereby the construction industry is characterized by the unprecedented rise in the costs that are used in buying the materials in construction especially in the developing countries, there is the prevalence of the issue of the termination of construction contracts. Contractors are the ones who typically engage in the termination of contracts due to the failure of making correct estimates in relation to the contractual costs. Many contractors are forced to terminate contracts due to the prices of the materials or the pretext of the contractual positions. The decline in the number of contractors has also increased the rate at which the cases of contract termination are being experienced.

Termination clauses are the most prevalent features when it comes to the standard contracts including the FIDIC. On most occasions, parties tend to commonly establish the conditions that they will follow in the course of their working in leading to the fulfillment of the obligations of the contract in a manner that is smooth enough. The reasons that can fuel the termination of construction contracts are such as one of the parties that are involved in a construction contract breaches the conditions that are applicable to the contract; when the performance obligations involved in the contract are not performed by one party to the contract; when certain conditions take place in the performance of the contract and the occurrence of prolonged suspension in the course of the performance of the contract. Either the contractor or the employer can terminate a construction contract. However, there are variations in the conditions or rather the rights for terminating construction contracts.

Therefore, the International Federation of Consulting Engineers (FIDIC) is critical and more reliable in terms of providing key directions connected to the termination of construction guidelines that ought to be applied by every contractor or employer all over the globe. The FIDIC was established in 1913 with the aim of promoting the interests of the firms that are concerned with consultation in the field of engineering all over the globe. FIDIC is commonly known for its wide range of standards in line with conditions that are required for contracts in various industries such as the construction industry, the plant industry and the design industry. Clause 15 of the standard contracts provided by FIDIC provides a clear overview of the circumstances under which a contract might be terminated by an employer due to a default by the contractor. The clause also provides a description of the procedures that ought to be followed as well as the applicable financial arrangements related to the termination of a contract. The clause also provides the termination for convenience of the employer.

It is worth noting that the United Arab Emirates works in tandem with its own terms and conditions on the construction contracts in terms of ensuring that there is a high level of fairness in the course of contract termination. Being a sovereign state, the UAE has the capacity to set its own standards and guidelines for ensuring that the construction contracts are always upheld and effectively promoted for the welfare of all Parties. In line with the provisions of Article 267 of the UAE Civil Code, one party's decision to activate the termination of the contract without the consideration of the implications it has on the other party comes with legal implications for the individual. Nonetheless, courts tend to give some flexibility on the employer's part by giving them the opportunity to freely undertake unilateral termination of the contracts of construction. Thus, in UAE law, an employer might engage in the termination of a contract and stop the contractual work at any time before the completion of the work of the contract. This is provided the contractor is compensated for all the incurred expenses for the work already done. The contractor should also be compensated for the profit that he or she could have made after the performance of the contract within the stipulated time frame. The court might play the role of reducing the compensation of the contractor based on the circumstances that provide a justification for the reduction of the compensation. There are however various variations in the application of the conditions for the termination of construction contracts between the FIDIC and the UAE law.

In dealing with the contract termination, differences between the two provisions are evident. In the FIDIC contract, there is comprehensive coverage of the terminologies that explain the requirements in the contract. This includes the provision of the definition of terms such as parties as well as completion of dates. On the other hand, the UAE laws do not give word by word explanations; rather they go all the way to draft the clauses. Some of the words in the UAE laws may be difficult to interpret, for example those that depict both genders. However, the most

important thing to affirm in this case is that there is the need to adhere to the terms and conditions that regard the contract when ensuring that it is terminated in a successful manner. Without in depth analysis and consideration of the situations, the involved party always stands to suffer from the negative consequences of not following the set guidelines of the contract in the best ways possible as asserted.

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