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**The rights and limitations of employer to terminate
construction contracts in UAE**

حقوق وقيود صاحب العمل لفسخ عقود البناء في الإمارات العربية المتحدة

by

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**Dissertation submitted in fulfilment
of the requirements for the degree of
MSc CONSTRUCTION LAW AND DISPUTE RESOLUTION
at
The British University in Dubai**

July 2017

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ABSTRACT

The United Arab Emirates constitutes one of the most pronounced construction industries. Evidence of this lies in the large number of extensive, highly complex and ambitious structures under construction in the country. The success of these construction projects, however, is attributable to malpractice by project developers in the country who misuse their contractual right to terminate for convenience.

Contracts used in the construction sector are one-sided since they favor the employer more than it does the contractor. Despite this practice, the UAE civil code provides for the rights of each party to terminate the contract.

The intent of this dissertation is to identify these rights and unveil how the employers in the UAE abuse this power for their benefit but at the expense of the contractor. As the source of the contract's funding, the employer's exposure to risk is high. Following the downturn of 2007-2008 which crippled many projects, employers are not willing to expose themselves to such risks that threaten the very survival of the employer's business.

تشكل دولة الإمارات العربية المتحدة واحدة من أبرز الصناعات الإنشائية. والدليل على ذلك يكمن في العدد الكبير من المشاريع واسعة النطاق وقيد الإنشاء في الدولة. ومع ذلك، يتعلق نجاح مشاريع البناء إلى سوء الممارسة من قبل مطوري المشاريع في الدولة الذين يسيئون استخدام حقهم التعاقد في فسخ العقود لدواعي الملاءمة.

العقود المستخدمة في قطاع البناء هي من جانب واحد لأنها تأيد صاحب العمل أكثر من المقاول. على الرغم من هذه الممارسة، ينص القانون المدني الإماراتي على حقوق كل طرف في فسخ العقد.

الهدف من هذه الرسالة العلمية هو تحديد الحقوق وكشف النقاب عن كيفية استخدام أصحاب العمل في الإمارات لهذه السلطة لمصلحتهم ولكن على حساب المقاول. كمصدر لتمويل العقد، فإن تعرض صاحب العمل للمخاطر مرتفع. بعد الانكماش الذي حدث في 2007-2008 والذي أدى إلى توقف العديد من المشاريع، فإن أصحاب العمل ليسوا على استعداد لتعرض أنفسهم لمثل هذه المخاطر التي تهدد نجاة مهنة وتجارة صاحب العمل.

ACKNOWLEDGEMENT

On the beginning of this report, I would like to give my sincere and deepest obligations towards everyone who helped me in this dissertation. I wouldn't have made it without their support, guidance and cooperation.

I am very grateful and would like to send my appreciation to Dr. Abba Kolo for his guidance on how to start and accomplish my tasks on time. I am also thankful to the faculty of business Prof. Aymen Masadeh for his teaching and sharing his experience with us that helped me completing this report.

I would like also to extend my appreciation towards my family members and friends who kept supporting me during all this time, without them I wouldn't have completed this dissertation.

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1.0. Introduction

A contract plays a crucial role in governing a relationship between two or more parties by stipulating how the parties will interact. During termination, a contract will stipulate the procedures and processes that the contracting parties ought to follow to ensure that both of them benefit equally. The absence of the contract, therefore, implies that the termination process will lack structure and thus, provide an opportunity for the dominant party to manipulate and extort the other party. However, the presence of the contract and contract law alone does not mean that the contractual agreement is foul-proof. In the UAE, the contract law is present and is upheld by the courts. However, instances of employers terminating contracts unlawfully are still prevalent. The employer does not have a right to end a contract in a manner that does not comply with the provisions of the contract. In spite of this, good faith concepts are not being applied in the UAE giving room for malpractices in contractual agreements.

While most standard contract forms have provisions that govern the way contracting parties can terminate or suspend a contract. In practice, however, parties will often fail to follow these provisions precisely. That can either be by allowing the stipulated periods to elapse before the suspension or termination is done or by failing to furnish the other party appropriate notices¹. Before the application of any law, there is a need to ensure that the background of the law is known. Being a civil code, the interpretation of certain concepts might differ from those of the common law. That might have serious repercussions for the contracting parties since it could mean tremendous losses.

Contract laws that bear a common law background do not have provisions for contract suspension unless there is a specific endowment for it expressed by the contracting parties. However, ending a contract prematurely is considered repudiation under the common law. In case one of the contracting parties makes it clear that it is no longer their wish to participate in a contract, the other party can either insist on performance or accept it as a repudiation. On the other hand, the UAE civil code does not provide for either repudiation or suspension of contracts. Article 247 of the UAE civil code (hereinafter referred to as the civil code) asserts that a party that when one of the parties does not make the necessary payments, the other party has the right to refuse to continue with the work. The scenario presented above is an accentuation of the potential differences between common and civil law.

There is a clear distinction made between the everyday contracts and the commercial contracts (referred to commonly as the Muqawala contracts) entered into in the UAE. As such, construction contracts are subject to the law applied to the Muqawala contracts owing to their commercial nature. Termination of a construction contract would, therefore, be subject to article 892 of the civil code². That means that it can occur when the agreed services or works are complete, by mutual consent or following a court order. However, `considering the

¹ Gould N, 'UAE - Civil Code: Suspension and Termination of Construction Contracts' (n.d) <https://www.fenwickelliott.com/sites/default/files/nick_gould_-_uae_-_civil_code> accessed July 9, 2017

² MacCuish A and Newdigate N, 'Suspension Under the UAE Civil Code, FIDIC, and the Roman Law Maxim of Exceptio Non Adimpleti Contractus (ENAC*) - Real Estate and (Suspension Under the UAE Civil Code, FIDIC, and the Roman Law Maxim of Exceptio Non Adimpleti Contractus (ENAC*) - Real Estate and Construction - United Arab Emirates)' (n.d), <[http://www.mondaq.com/x/451986/Contract Law/This is the first of two articles which look at various selfhelp remedies available for the unpaid contractor](http://www.mondaq.com/x/451986/Contract+Law/This+is+the+first+of+two+articles+which+look+at+various+selfhelp+remedies+available+for+the+unpaid+contractor)> accessed July 9, 2017

potential consequences of a contract termination that does not go accordingly in the UAE is integral. The rationale for this lies in the fact that termination is a rather drastic step whose impacts are far-reaching. Regardless of the clarity of the termination clause or how a particular event coverage by a contractual ground for termination is effective, rarely has the termination process been seamless and without difficulty.

In instances where the employer is the one soliciting for termination, there will be an inevitable delay when it comes to bringing on board a replacement contractor³. Before the hiring of a new contractor, the employer needs to settle the engagements with the previous contractor which might not only be costly but time-consuming. If the contractor is the one pushing for contract termination, it is most likely an outcome of the failure of the employer to certify or pay the sums due to the contractor. Even if the employer can pay, there will be a reason for non-payment. Early warning mechanisms are important to allow for the correction of the breach before it becomes a ground for termination. Furthermore, before deciding to terminate the contract, it is important to discern whether he or she possesses the right to terminate the contract or not.

Instances of parties incorrectly assuming that they possess the right to terminate leading to unlawful terminations of contracts are common. In the UAE, there is a common misconception that the employer possesses the right to terminate a contract⁴. While in some situations that may be true, there are others in which the employer lacks the right to terminate. Wrongfully terminating a contract can render a termination process ineffective and expose the ‘terminating party’ to damages claim. Even if the termination of the contract is on legal grounds, provided one lacks the right to terminate, the termination process becomes invalid. Following the principles of freedom of contract, the parties can agree on the circumstances that may allow for the termination of a contract as the FIDIC contracts state. It is important, however, to understand that the right to terminate is subject to the provisions of the UAE laws.

1.1. Research questions

For the purpose of fulfilling the parameters of this research, the following research questions ought to be addressed.

1. What are the key issues surrounding the UAE construction law?
2. How is the construction contract formed under the common and the civil law?
3. What rights, both contractual and non-contractual, do the participants in a contract agreement have in the termination of a contract?
4. What are the rights of the employer in the de-scoping of a contract?
5. What recommendations, if any, best apply to the research problem?

³ Al Tamimi & Company - Advocates and Legal Consultants -Scott Lambert and Zehra Manni, When the Clock is Ticking and the Contractor is in Delay: What Can You Do?, (n.d), Available at: <<http://www.lexology.com/library/detail.aspx?g=7f33e0d9-e032-4464-8257-0264440afc64>> accessed July 9, 2017

⁴ Gould N, ‘UAE - Civil Code: Suspension and Termination of Construction Contracts’ (n.d) <https://www.fenwickelliott.com/sites/default/files/nick_gould_-_uae_-_civil_code> accessed July 9, 2017

1.2. Aims of the research

The construction industry is one of the fastest growing in the world following the highly ambitious projects that its participants engage in. However, the progress is for the benefit of one party and the peril of another. The contracts in the industry are highly biased following the fact that they only benefit the employer at the expense of the contractor. In this regard, the employer has the right to terminate the contract for convenience even if the contractor stands to lose. Therefore, the focus of this research is on unveiling the rights of both parties as provided for by the UAE construction law in comparison to other jurisdictions and related case laws. The intention of the research is to reveal this biasness of the construction contracts in the UAE.

1.3. Research methodology

The research will embrace a qualitative approach in which data will be sourced from secondary sources. These sources will be scholarly articles that from which pertinent information about the research problem will be sourced. Moreover, the research will also utilize a case study approach in which different case laws may be revisited to provide valuable input and insights. Using the case study approach will be integral in providing an in-depth analysis into the research problem.

2.0. Key Issues in the UAE Construction Law

Unlike a common law system, the UAE civil code is not subject to statutory exceptions. Instead, the contracting parties have the freedom to agree what their contract may contain. However, the civil code imports several contractual requirements into the execution of construction contracts which can be found mainly in articles between 872 and 896. One such import is the decennial liability concept under article 880 of the civil code. It imposes a liability of 10 years to consultants and contractors with regards to structural defects. The liability cannot be contracted out (as stated in article 882). Furthermore, unlike jurisdictions such as France, there is no insurance to provide cover for the contractors. However, the liability that the contractors face in this situation is limited to serious defects on the structure that have the potential to cause a collapse. Another imported concept in the UAE civil code is that of liquidated penalties or damages. If the actual losses experienced fall below or above the proposed amount for the damages claim, either party has the right to challenge the provision.

2.1. Suspension

Under article 247 of the civil code, a party may refute its contractual obligations only if the other party fails to perform its mutual obligation⁵. That is, whenever one of the parties does not meet its end of the bargain, the counterparty has the freedom to refuse to participate in the contract. That immediately qualifies as a ground contract suspension. When the right to suspend the contract is absent in the contract, the contractor will have the capacity to suspend the performance of a contract on the grounds of non-payment. To prevent wrongful suspension, it is important that the party that is soliciting for a suspension to seek advice. The reason for this is that a wrongful suspension amounts to a breach of contract permitting the other party to take legal action.

2.2. Restrictions on Termination

Clause 892 provides that ending a construction contract in the UAE is possible on three grounds. The first option is by both parties performing their contractual obligations and completing the contract successfully. The second option is when either party seeks a court order following defaults by the counterparty and the third option entails both parties coming to a mutual agreement to terminate the contract.⁶ However, an unclear aspect here regards the impact of the clause if one of the parties breaches the contract. Parties seeking contract termination can only use a court order or seek a mutual consent from the counterparty. The absence of clarification on the actions to be taken in case of an alleged breach of the contract provides a loophole that many employers in the UAE have been exploiting for a long time. To avert the complications caused by this absence, many contemporary contracts include, in their termination clauses, deemed consent that allows a party to terminate a contract following the defaulting of the other party. Since this approach is relatively new and untested, it is still unclear whether the approach satisfies the requirements of Article 892. Moreover, a court order will still be needed in lieu of consent from the party in breach of the contract at the time the other party intends to exercise its right to end the contract.

⁵ Thomas RW and Wright M, *Construction contract claims*, (Macmillan Education 2016), 93

⁶ Thomas RW and Wright M, *Construction contract claims*, (Macmillan Education 2016), 95

2.3. Good Faith

Similar to other civil law jurisdictions, the UAE civil code also imposes a duty of good faith on the parties participating in a contract. Good faith is a principle that goes beyond the requirements of contractual obligations extending to the virtue of nature, the law and the customs that come with it. The UAE civil code fails to account for the prevention principle. It provides that a party cannot bind the other to a completion date if the reason preventing its accomplishment is delay caused by the party pushing for the enforcement of the completion date. A party, however can seek to enforce a completion date. It should be careful since if by any chance its actions to enforce the date become an impediment towards the performance of the contract, the party can face litigation for breaching the contract obligation of good faith.

2.4. Limitation of Liability

Any attempt, according to the civil code, to exclude liability for a harmful act during the execution of a contract shall be deemed void⁷. The consideration, in this case, is the direct actions of the contracting parties in their pursuit to fulfill their contractual obligations. The prevention of parties from excluding their liabilities for death or personal injury is on the grounds of public policy. If in the execution of a contract there is death or injury, the parties need to ensure the provision of compensation to the victims. Another related issue in the construction law is the limitation period. It is the period within which the reporting of a defect should transpire. In the UAE, the limitation period provided under Article 893 is 15 years from the date of discovery of the breach.

2.5. Indemnities

The English common law distinguishes between a claim brought under an indemnity and a damages claim. However, the concept is absent in the UAE civil code since a breach of contract under this system does not give rise to a debt claim. In the case of a contract breach, the injured party can only receive compensation for the losses that are identifiable as a direct consequence of the breach in question. That includes the loss of profit but only that which is a reflection of the profits the claimant can prove to be an outcome of the breach.

2.6. Main trends in the UAE construction market

2.6.1. Procurement arrangements

Just like in any other jurisdiction, the main players in a construction contract are the contractor and the employer also known as the project developer. The employers, according to the UAE market, are in three categories⁸. The first category is that of leisure and commercial real estate developers who are either partly or fully owned by the government. The second category consists of the public works authorities as well as the public utilities. Similarly, these fall under the ownership of the government. However, there are some public utilities procured through public, private partnerships structures so that the government is a member of the project company. The final category is that of oil and gas companies which belong to the

⁷ Brown M, 'Construction & Engineering- the Update' (2008) 1(57) PL 33

⁸ AYAZ ALI JALBANI, 'SUPPLY CHAIN MANAGEMENT IN UAE CONSTRUCTION INDUSTRY' (MSc in Construction Project Management, Heriot Watt University, UK 2010).

government, and the Abu Dhabi National Oil Company is a perfect example⁹. The essence of understanding the categories of employers within the UAE jurisdiction is to ensure that parties entering a contract make sound decisions. For instance, if the government is the employer, the contracts a contractor will enter will be highly one sided biased towards the government's end.

Within the construction market, the use of consultants has become a common practice. They provide services such as architecture, electrical and mechanical engineering services, project management and supervision, and also civil and structural engineering services¹⁰. In most of the cases, however, employers will seek to use their designs, project management and supervision consultants and a separate contractor to execute the project in line with the design. An alternative option to this is that the contractor is responsible for not only the actual construction but also the formulation of the project's design.

2.6.2. Standard contracts in the UAE

Substantial construction contracts in the UAE are commonly by the FIDIC guidelines, and the three primary ones include the Red Book, the Yellow Book, and the Silver Book¹¹. The Red Book provides for the conditions of construction contracts in which the employer provides the contractor with the design of the projects. The Yellow Book, on the other hand, stipulates the conditions for construction contracts in which the contractor bears responsibility for both the design and the actual construction. Finally, the Silver Book elucidates the conditions under which Turnkey or EPC projects. An increasing utilization and acceptance of the 1999 edition of the FIDIC contract guidelines are noticeable in the UAE. However, it is still common to find the 1987 edition still in use.

For instance, it is a requirement in the Abu Dhabi government departments responsible for the procurement of construction projects to ensure that it utilizes the conditions outlined in the Abu Dhabi Government Conditions of Contract for either design and build contracts or the construction only counterparts introduced in 2007¹². The basis of these guidelines is the 1999 FIDIC Yellow and Red Books. They have been, however, subject to further amendments by shifting an additional significant amount of risk to the contractor. In Dubai, as a member of the UAE, there is no express specification of the contract forms that the government should utilize¹³. Some government departments in the state such as the Roads and Transport Authority have their distinct contract conditions. The RTA conditions are by the 1987 Red Book proving the earlier assertion. They are also subject to the amendments that shift the risk to the contractor's half. For the international projects, contracts used are normally FIDIC based.

⁹ Emirates, 'Emirates and China' (Emirates 2016) <https://cdn.ek.aero/downloads/ek/pdfs/fact_sheets/Emirates_and_China_factsheet_English_version_Apr16_2.pdf> accessed 22 July 2017.

¹⁰ AYAZ ALI JALBANI, 'SUPPLY CHAIN MANAGEMENT IN UAE CONSTRUCTION INDUSTRY' (MSc in Construction Project Management, Heriot Watt University, UK 2010).

¹¹ 'Conflict Bites When Money Is Tight | Arabianoilandgas.Com' (*Arabian Oil and Gas*, 2017) <<http://www.arabianoilandgas.com/article-5013-conflict-bites-when-money-is-tight/>> accessed 21 July 2017.

¹² Haitham Nobanee, 'Current Assets Management And Operating Cash Flow Of UAE Construction Companies' SSRN Electronic Journal.

¹³ 'Conflict Bites When Money Is Tight | Arabianoilandgas.Com' (*Arabian Oil and Gas*, 2017) <<http://www.arabianoilandgas.com/article-5013-conflict-bites-when-money-is-tight/>> accessed 21 July 2017.

Major projects such as the PPPs, however, employers are dependent on bespoke contracts consisting of specific contractual terms.

2.6.3. Enforceability of TFC clauses

With the current trend in the UAE, a fundamental question bothering scholars regards whether the right to terminate for convenience is an unfettered right of the employer. In the UAE, many contracts reach their termination stages without the consent of the contractor. Employers are exercising this right without reason as a result of the one-sidedness of the contracts used in the construction projects¹⁴. Therefore, is there a need for a reason before exercising the TFC rights?

Apart from the right of an employer to end a contract under the common law, most construction and engineering contracts consist of provisions that permit the termination of a contract following the occurrence of certain circumstances such as insolvency or serious and repeated defaults of either party. The same is applicable under the UAE law which allows for the termination of a contract when circumstances that occur are beyond the control of the parties. That is why UAE construction contracts utilize the Force Majeure clauses to allow for smooth procedures of this nature. The UAE code provides that force majeure events excuse the contracting parties from the execution of their legal obligations apart from the payment obligation¹⁵. However, in the case of such an event, both parties lose their entitlement to compensation from the other party. In some cases, in the UAE, termination of a contract is possible even when the other party is excused from the performance of its contractual obligations for a defined period.

The Force Majeure clause enforcement is evident in case 556/2009¹⁶ presided over by the Union Supreme Court. According to this court, the general contract rule applies unless a party's execution of its contractual obligations is prevented by circumstances beyond its control. The court recognizes that the circumstances can be by default of the party or an outcome of extraneous causes. In such an instance, the other party cannot indemnify the other party. The argument goes further to recognize the provisions of article 106 (2) (c) and (d). These sections of the civil code state that a party exercising a right that is disproportionate to the potential harm is unlawful. The same is the case if the right exceeds the limits of usage and custom. As such, contractual liability will only arise in instances where the three pillars are justifiable. Harm is one of these pillars and hence can prevent either party from exercising its right to terminate a contract.

The case law further identifies that, in accordance with the article 105 of the civil code, the power to make compensation available to an aggrieved party is the discretionary power of

¹⁴ Muhammad Tahir Abdullah, 'Role of UAE Courts In International Commercial Arbitration' (Requirement for LLM (International Business & Commercial Law), University of Bedfordshire 2013).

¹⁵ Muhammad Tahir Abdullah, 'Role of UAE Courts In International Commercial Arbitration' (Requirement for LLM (International Business & Commercial Law), University of Bedfordshire 2013).

¹⁶ *Union Supreme Court, 556/2009* [2010] Union Supreme court, 556/2009 (Union Supreme court).

the trial court¹⁷. It is the responsibility of the court to conduct the assessment of the damages incurred by the aggrieved party to ascertain whether or not it qualifies for compensation. The article clearly asserts that while the obligor is contractually required to ensure that it meets its obligations, the reasons for which this party has not done so should be reviewed to determine the causes before it is forced to compensate the other contracting party. If sufficient justification for the harm caused by the obligor is found, then the trial court will have to order this party to compensate the injured side.

Before the enforcement of TFC provisions, both common and civil laws require that the other party receives a notice from the terminating party about the termination. The rationale for this is to provide the defaulting party with the opportunity to correct the issue to avoid termination¹⁸. It is only when the correction becomes impossible that termination becomes a viable option. Most of the contracts in the UAE today utilize the TFC clauses. However, most of them are primarily one-sided thereby favoring the employer in the sense that most contracts provide only the employer with this right. Some contracts also provide this opportunity to the contractor, but they are not common in the UAE. The TFC clauses allow the party with the right to terminate to end a contract without furnishing the counterparty with a reason.

Article 218 of the UAE code allows for the enforcement of the TFC provisions following the length of the contract. Naturally, muqawala contracts are long-term and thus provide sufficient grounds for the termination of the contract. The rationale for this lies in the fact that long term contracts are subject to changing circumstances that could render them impossible to execute as evidenced by the existence of the Force Majeure provisions. A case law that can provide insight into this is the Dubai Cessation no. 218/2005 dated 20th February 2006 where the court asserted that there is an exception to the general rule that contracts are binding to the parties¹⁹. Instead, the court posited that the employer possesses the right to terminate a contract for convenience if, by its nature, the contract is long-term. The court further agreed that this rationale is applicable to the sub-contracts entered by the contracting parties. The Ministry of Justice Commentary of the UAE asserted that the Article 218 recognizes this exception by providing for the option of conditionality²⁰. From a legal perspective, the option recognizes that long-term contracts are subject to change. Even though the Article does not specifically identify the muqawala contracts, their long-term nature implies that they are susceptible to changes that may impact the performance of the contract.

The increasing use of the TFC clauses can be attributed to the fact that the employers in the UAE envisage them as an escape route in situations where funds run out or when there is a need for drastic changes in the design of the project. To avoid the confrontational problem brought by termination procedures, some employers resort to de-scoping.

2.6.4. Nature of TFC provisions

The question regarding whether the TFC rights are subject to the provisions of good faith has been on the minds of many legal scholars. Civil law jurisdictions depend on the duty

¹⁷ *Union Supreme Court, 556/2009* [2010] Union Supreme court, 556/2009 (Union Supreme court).

¹⁸ 'ERI Awarded Contracts in UAE and China' (2008) 2008 Membrane Technology.

¹⁹ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (John Wiley & Sons 2016).

²⁰ Michael Grose, (2016).

of good faith concept which is implied in most of these jurisdictions. That is unlike the English common law jurisdictions such as Wales and England which are reluctant to have the principle implied in the contracts²¹. The origin of their reluctance is the fact that they intend for the contracting parties to execute them in a manner conforming to the intentions of the parties freely negotiated and expressed in the underlying contract. A recent trend in the common law jurisdictions such as Canada, Scotland and Australia involves the recognition of the implied duty of good faith in the commercial contracts.

To expound on this, the recent case between Yam Seng and International Trade Corporation can be revisited. In the case, there are instances where the implied duty ought to be recognized. However, the presiding judge posited that he was in doubt of the fact that the English law was at a stage in which it was ready for the recognition of the principle as implied under the law. However, the judge saw no difficulty in implying the duty in any ordinary commercial contract as long as it corresponds with the presumed intentions of the contractual parties. In another case between the Mid Essex Hospital versus the Compass Group, the Court of Appeal made an acknowledgment that certain contract categories contain an implied duty. However, the Court made a clear statement that for it to recognize the implied duty, the disputing party need to ensure that there are express terms.

So, for a party terminating for convenience, is it a requirement for it to act in good faith? A recent case between Hadley Design Associates versus the Lord Mayor presided over by Judge Richard Seymour can shed light on this subject. It was the judgment of Sir Richard that it is not possible to imply the duty of good faith in the context of the TFC clause²². The underlying contract, in this case, contained clear provisions that allowed for the termination of the contract at any time b either party provided a one-month notice was made. According to the clause, no reason for the termination was necessary. In the case, the employer ended the contract without providing the reasons why as the TFC clause required. Further, it was clear that the employer intended to employ another contractor to perform the contract after ending the contract with the current one. The argument of Hadley Design was that the contract consisted of an implied duty which required that the employer should pursue the termination in good faith. Failing to uphold the principle, according to Hadley Design, was a breach of the implied term. The judge, however, concluded that enforcing the duty would inhibit the operation of the express terms for termination. Hence, the case law highlights that good faith principles do not apply to termination provisions.

Consequently, this begs the question of whether an express provision of the duty of good faith has the potential of ruling out a termination for convenience. So, what will happen if a contract contains provisions for both good faith and termination for convenience? From a general perspective, one party terminating for convenience is perceivable as an act of bad faith by the counterparty. The contract between TSG Building Services and South Anglia contained a TFC clause. However, the presiding judge claimed that the express terms of good faith do

²¹ AYAZ ALI JALBANI, 'SUPPLY CHAIN MANAGEMENT IN UAE CONSTRUCTION INDUSTRY' (MSc in Construction Project Management, Heriot Watt University, UK 2010).

²² Hermann Gartner, 'Implicit Contracts and Industrial Relations - Evidence from German Employer-Employee Data' (2015) 35 Economics Bulletin <<http://www.accessecon.com/Pubs/EB/2015/Volume35/EB-15-V35-I1-P34.pdf>> accessed 22 July 2017.

not affect the rights of either party to end the contract at will. According to the judge, the duty of good faith failed to apply to the termination rights since it is not a responsibility.

The rationale for this argument was that termination at will did not result in a role, and neither is dependent upon the expertise of the terminating party. The contract did not expressly demand that South Anglia should act in good faith during the termination. The contract specified that the TFC right is not only conditional but also unqualified.

3.0. The formation of a contract

Before the recognition of a contract under any law, the fulfillment of certain primary requirements is necessary. However, the absence of any of these elements could render the contract unenforceable. The most fundamental requirements for a contract formation in the UAE are offer and acceptance, as stipulated by Article 130 of the UAE civil code²³. In this sense, a party needs to approach another with an offer that could involve anything ranging from the manufacturing of a product to the marketing of a product. After the presentation of the offer, the other party needs to communicate its official acceptance of the contract. A requirement of Article 129 is that these components should not only be defined in the contract but should also be a product of mutual consent of both parties. It should be a point of note that these provisions are equally applicable to construction contracts in the UAE.

There are further provisions in the UAE civil code that are specific to the Muqawala contracts and consequently, the construction contracts. These provisions can be found in articles from and between Articles 872 to 896 of the code²⁴. According to Article 874, for a construction contract to be binding and valid, it should constitute a clear elucidation of the subject matter, the intended work, and the manner as well as the time and price of the performance. Express terms that require a construction contract to be in writing are absent. However, satisfying these provisions would be impossible to achieve in an oral contract. For instance, the letter of intent should be in writing. It constitutes the offer and acceptance elements of the contract. For the courts to give the letter a contractual effect, it should fulfill all the requirements discussed.

3.1. UAE and Construction Contracts

Infrastructure and construction projects procurement under the FIDIC provisions is a common practice in the UAE despite the common habit of amending these contracts. The UAE legal system believes itself to be as efficient and capable of handling every dispute that falls within its jurisdiction. That has resulted in the system giving its system precedence over foreign laws and provisions. Despite the generic nature of the FIDIC contracts and the fact that they are internationally recognized, they still require amendments for their use within the UAE construction market²⁵. A common mistake often made by new entrants of the UAE construction market regards the assumption that every provision of the FIDIC contracts or any other contract form is fully enforceable under the UAE jurisdiction. As history shows, the habit of amending contracts is highly predominant in the UAE. Furthermore, some of the mandatory laws of the country are impossible to contract out of. Hence, they cause an alteration in the manner of risk allocation as initially agreed by the contracting parties.

Payment is, to a large extent, the lifeblood of any project, particularly construction projects. In the UAE, there are various pricing and payment methods available. However, the UAE differs from the other jurisdictions in the sense that no provisions are preventing the parties from agreeing to the 'pay when paid' payment mechanisms. From another angle, this

²³ Barringer TA, "Book Reviews," The Round Table, (n.d), 99 (559)

²⁴ Barringer TA, "Book Reviews," The Round Table, (n.d), 99 (558)

²⁵ Iyad Mohammad Jadalhaq, 'Duress and Its Impact on Contracts in the UAE Law On Civil Transactions: Analytical Study In The Light Of Islamic Jurisprudence' (2017) 31 Arab Law Quarterly.

means that it is not among the obligations of the main contractor to extend payment to the subcontractor including the variations payments until such a time that it receives payment from the employer. In this case, the payment should be specifically set aside for the payment of the subcontract works under claim. The UAE civil code does not recognize the 'pay when paid' concept. Hence, to ensure enforceability, the contracting parties need to ensure that the provisions for the concept are clear and express.

A further difference between the UAE and other jurisdictions in the Middle East is that it does not allow the subcontractors to bring their claims directly against the employer. The rationale for this is rather simple. A contract will be between the employer and the main contractor. Therefore, any issues between the two parties strictly remain between the two parties. When the main contractor hires a subcontractor, the contract is between the two parties. The only link between the subcontractor and the employer is that the funds come from the latter party. These conditions will not apply only when the contractor assigns its entitlements to the payment of the relevant subcontract works from the employer, and the chances of that happening are extremely slim.

Another impact of the UAE law on the construction contracts is evident in the damages claim. The starting principle of any contract in the UAE is that the parties should specifically perform their obligations as initially agreed in the contract²⁶. Therefore, the awarding of damages claims will only be on the grounds of non-performance of the underlying obligations. Once the damages claim is awarded to either party, there are measures in place to compensate the innocent party for the actual loss as a result of the contract breach. Before the innocent party can impose its claim, it has to substantiate the loss incurred. The UAE law fails to recognize any express mitigation duty. However, it is an expectation of the courts that the injured party should have reasonable steps in place to reduce or mitigate the potential losses attributed to the breach²⁷. For this reason, it is possible for the courts to revise the damages claim downwards. The UAE law lacks specific definitions of the concepts of 'consequential' or 'indirect' losses leaving this to the interpretation of the courts. Without an express provision in the contract, the parties will have to use whatever the courts provide.

Another interesting impact of the UAE law on construction contracts concerns the limitations imposed on the liabilities of the contracting parties. The UAE law provides for the limitation of liability in the construction contracts. Further, construction contracts typically include the use of caps on liability²⁸. However, a contractually agreed liability does not mean that it is unchangeable. Following the request of either party, it is possible for the courts to

²⁶ Essam Zanelding, 'Construction Claims In United Arab Emirates: Types, Causes, And Frequency' [2006] International Journal of Project Management <https://www.researchgate.net/profile/Essam_Zaneldin/publication/229284815_Construction_claims_in_United_Arab_Emirates_Types_causes_and_frequency/links/543fb1720cf21227a11aacc0/Construction-claims-in-United-Arab-Emirates-Types-causes-and-frequency.pdf> accessed 22 July 2017.

Essam Zanelding, 'Construction Claims In United Arab Emirates: Types, Causes, And Frequency' [2006] International Journal of Project Management <https://www.researchgate.net/profile/Essam_Zaneldin/publication/229284815_Construction_claims_in_United_Arab_Emirates_Types_causes_and_frequency/links/543fb1720cf21227a11aacc0/Construction-claims-in-United-Arab-Emirates-Types-causes-and-frequency.pdf> accessed 22 July 2017.

²⁸ Iyad Mohammad Jadalhaq, p.31.

decrease or increase the agreed upon damages to ensure that the compensation is equal to the actual losses incurred by the grieving party. For the party endeavoring to have the reassessment of the damages done bears the burden to demonstrate that the adjustment of the agreed compensation is necessary. The revision of damages has become especially significant in the context of liquidated damages. Despite the absence of a prohibition on the rate of the liquidated damages having a punitive effect, in the case of an onerous rate can be challenged by the counterparty.

The UAE law also affects the manner in which the construction contracts are terminated in the nation. These contracts are characterized, in the UAE, as muqawala which is describable as a contract for works. The law of the country asserts the termination of the muqawala is only possible when the works agreed upon are completed, as a result of mutual consent of both parties, or following a court order. The termination rights contractually agreed are respected in the UAE during practice that is including the termination for convenience²⁹. Under the jurisdiction, however, it is a requirement for the court to review and possibly ratify the termination. That is unless the order for court intervention is waived by bespoke drafting. An important consideration point is that the UAE code stipulates that the contractor bears a legal entitlement to retain the possession of the construction site following a termination if the employer fails to remit the sums due.

In a case where the contractor decides to exercise this legal right, preventing the employer from accessing the site is possible. Consequently, the completion of the project will be impossible until the determination and settlement of the contractor's entitlements. Ultimately, this results in significant costs as well as wasted time. A typical characteristic of construction contracts is that they are long thereby binding the parties for long periods. A prudent choice for the stakeholders is to ensure that they completely comprehend the risks of a contract before appending their signatures.

3.2. Implied terms in a contract

The UAE civil code takes into account the principle of freedom of contract. Noting that the law in the UAE imports certain statutory implied terms which cannot be exempted or excluded from the contracting process. Article 246(1) of the UAE Civil Code, for instance, requires that the performance of a contract should be by good faith³⁰. In the UAE, the good faith principle is acknowledged and has been subject to varied interpretations over time. In the construction contracts, the principle could be taken to imply that the performance of any of the services detailed in the contract should be with reasonable care and skill. Section 2 of the same article asserts that the contractual parties should embrace their legal obligations provided in the contract by the law, nature, and customs surrounding the transaction. This article's scope is potentially wide to the extent that it contains a large set of implied terms. For this reason, a potential risk lies in the existence of the principle of freedom in the UAE law. That is the terms of the contract will continually be subject to supplementation and reinterpretation by the courts in different circumstances.

²⁹ Iyad Mohammad Jadalhaq, p.31.

³⁰ Barringer TA, "Book Reviews," The Round Table, (n.d), 99 (558)

3.3. Concept of Good Faith in Contracts

The concept has roots in the doctrine of freedom of contracts. A well-known fact regards the reluctance of the English common law to imply the concept in commercial agreements. On the other hand, nations governed by civil law such as the UAE, executing a contract in a manner that depicts good faith is fundamental³¹. That is attributable to the differing degree of religious strictness between the UAE and some of the countries using the common law. For instance, the USA runs by the common law. The nation encourages freedom in religion so that the influence of religion on matters of law is limited. The UAE, on the other hand, is a Muslim nation that embraces strict religious rules. As such, the influence of religion on matters of law is high. Evidence of this is in the use of Sharia law as the primary governing laws of the nation and Sharia courts to enforce them. Failing to abide by the provided laws means that a religious law has been broken and thus, punishment becomes necessary.

3.3.1. English Law on Good Faith

A case that can shed light on the perception of good faith under the provisions of the English common law is that involving *Yam Seng vs (ITC) the International Trade Corporation*. The name of the fragrance was ‘Manchester United.’ During the case, the court adopted a rather broad and purposive approach pertinent to the circumstances where good faith obligations were applicable³². The outcome was the increasing expectations that the courts open to the concept in a wider perspective. The argument of the distributor (Yam Seng) was that the contract contained an implied term that the contracting parties ought to perform the contract in good faith. Contrary to this expectation, the ITC had failed to act in good faith by prejudicing the distributor’s sales. ITC achieved this by offering the same products in the local markets at a duty-free price lower than what Yam Seng had agreed to offer. In the case, ITC’s intentions were to let Yam Seng bear expenses for the performance of the contract yet it was not willing to supply the products. As such, it resulted in loss of profit. ITC had also offered false information that the distributor used in its endeavors leading to its detriment.

The courts, however, identified that only two implications of obligations in the contract between the two parties. The first obligation was not to undercut the duty-free prices which is a provision under the usual standards that govern commercial dealings. The second obligation was to not knowingly or willingly provide falsified information. It was an obligation implied as a matter of fact between the parties during the creation of the contract. The outcomes of the case, however, was subject to other influence as a result of the broad and purposive approach taken by the courts. An external influence entailed the fact that the contract was long-term in nature. Hence, it required effective communication and cooperation between the parties.

Another case took a rather different turn from this. It involved the *Compass Group versus Mid Essex Hospital*. The case is different because the courts settled for a rather narrow and restrictive approach. The case also involved a long-term contract for catering services. However, the contract in question entailed an express duty of the parties to cooperate with one another in good faith. The issue driving the lawsuit was that the Trust sought to terminate the

³¹ Barringer TA, “Book Reviews,” *The Round Table*, (n.d), 99 (557)

³² Practical Law UK. “*Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB).” Available at: <https://uk.practicallaw.thomsonreuters.com/D-026-5857?__lrTS=20170426221521248&transitionType=Default&contextData=%28sc.Default%29> accessed July 9, 2017

contract since Compass had exceeded the allowed service failure points in any given six months period³³. Consequently, the questions on the judge's mind was whether or not the clause introduced an overarching obligation over the parties requiring them to act in good faith. The argument put forth by the court was that while the obligation is present, its focus was on the obligation to take all possible reasonable actions to ensure there is effective communication of instructions and information between the parties. The parties were not bound to act in good faith when it came to anything else.

Unsatisfied, the courts resorted to overturning their first decision on the grounds that commercial sense did not support adding a predominant duty of good faith when the contract already provides for it. By applying this reasoning, the court asserted that the Trust had every right to impose the service failure points on Compass Ltd following its consistent failure to meet its contractual obligations.

Another interesting case that might promote the understanding of this principle is TSG Building Services plc vs. South Anglia Housing Ltd. The contract had a clause that spelled out that the team members from both parties ought to act in good faith. Furthermore, the contract asserted that each party had the unqualified and unconditional right to terminate allowing for the termination of the contract for convenience. When SAH terminated the contract, TSG claimed that it was wrongful since it breached the good faith clause provided for in the contract³⁴. It was, therefore, the court's responsibility to discern whether or not the clause was pervasive in the sense that it applied to the entire contract and hence applicable to the provisions for termination. It was the court's argument that an express obligation possessed potential pervasiveness. Hence, depending on the drafting and nature of the clause, it could be possible for the clause to affect the entire contract. Contrary to this argument, the court claimed that this was not the case since the contract provided an unqualified right to terminate for convenience. The obligation to act in good faith is not extendable to this provision implying that the entitlement to terminate the contract by SAH was absolute. That is, each party had the power and right to terminate the contract at any time.

From the case law examples, it is clear that the English Courts lack a general doctrine of good faith. In the case involving Yam Seng, the courts appear to have sidelined it as a result of the absence of a clear good faith doctrine. Under the English Common law, the parties will have to create an express duty of good faith if they need one. Avoiding complications should be their utmost priority and to achieve that, they may need to think out the scope of the duty better. The English law prevents the concepts of good faith from overruling an absolute right provided for in the contract such as the right to terminate for convenience. It would be different, however, for a case where there is evidence suggesting a breach of the express obligation demanding the parties to act in good faith in a situation involving a discretionary right. The discretion of the decision maker is highly limited in this instance as explained above.

³³ 'Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (T/A Medirest): CA 15 Mar 2013' (2017) <<http://swarb.co.uk/mid-essex-hospital-services-nhs-trust-v-compass-group-uk-and-ireland-ltd-ta-medirest-ca-15-mar-2013/>> accessed July 9, 2017

³⁴ 'TSG Building Services Plc v South Anglia Housing Ltd [2013] EWHC 1151' (2013) <http://www.adjudication.co.uk/archive/view/case/1502/tsg_building_services_plc_v_south_anglia_housing_ltd_%5B2013%5D_ewhc_1151> accessed July 9, 2017

3.3.2. Good Faith in the UAE Contract Law

A duty of good faith is an implied concept in all the contracts under the UAE jurisdiction. Emphasis on the concept is present in the fairness principles enacted by the Sharia law. Under Article 246 of the UAE civil code, the performance of a contract should be in line with its contents in a manner that complies with the demands of good faith³⁵. The clause is nothing short of a requirement that the contracting parties should abstain from using the contract's terms and conditions as a platform to abuse the rights of the counterparty. It also serves as a reminder to parties that they need to embrace reasoning and moderation to prevent unjustified damage. It is an argument by the Dubai Court of Cassation that when one party acts contrary to the provisions of good faith, it provides the other party with a cause of action. Unlike the English law, the duty of good faith is a principle.

In the decision of whether an act by a party entails bad faith, UAE courts will consider Article 106 of the civil code which stipulates the various conditions in which a party freedom to exercise its rights face limitation³⁶. One condition regards the intention of the party to infringe on the counterparty's rights. The purpose of a contract is to level the playing field for both parties to ensure fair transactions. Infringing on the rights of another is an irrefutable show of bad faith. The second condition comes in when the outcome of the contract goes against the provisions of the Islamic Sharia, public order, morals or even the law itself. Consider a contract involving an illegal product such as hard drugs. That is not only against the laws of the country but also against the public order and morals of the Muslim people. In such an instance, the contracting parties cannot be allowed to exercise their rights.

When the desired outcome of a contract is not proportional to the potential harm that the counterparty will sustain, the rights of that party will not be passed as per article 106. It is common to find larger corporations manipulating the smaller ones to meet their desires even if it might cost the smaller company. A contract is formulated to ensure that both parties benefit from the relationship. Hence, no harm should befall either party during the execution of the contract. Another condition stipulated in the code involves an instance when the contract exceeds the bounds of practice or custom. Every contract in the UAE should be executed in line with the normal practices and customs. Failure of this could result in the contract going against the laws and rules of the country as stipulated in the second condition.

From an analysis of these conditions, it is evident that the interpretation of a contract will not be by its terms alone but also against the requirements of good faith, equity, and customs of UAE. Parties acting in good faith is not just a demand that they should not deceive one another. Instead, it is a strong and positive obligation seeking to uphold equity and UAE customs. On the contrary, it is a legal obligation of the parties to deal with each other in good faith. The logic behind this is that the good faith concept is pervasive in all commercial contracts in the UAE. Contrary to the common law jurisdictions such as the USA and the UK where the concept of good faith has been devised and developed through court processes, the UAE's concept of good faith is in code form. Hence, it means that it forms an intrinsic part of the law. However, the codification of the law implies that there is little guidance on the subject.

³⁵ Heba Hussien, 'WATER QUALITY MODELING OF DUBAI CREEK USING HEC - RAS' (Master of Science in Civil Engineering, American University of Sharjah 2015).

³⁶ Gould N, 'UAE - Civil Code: Suspension and Termination of Construction Contracts' (n.d) <https://www.fenwickelliott.com/sites/default/files/nick_gould_-_uae_-_civil_code> accessed July 9, 2017

That explains why there are numerous malpractices in the UAE related to contracts and contract law.

Good faith, in the context of construction, requires that the employer should cooperate with the contractor effectively. That means that in the case of change requests by the employer, communication should not only be timely but also fair. The contractor, on the other hand, is under obligation to ensure that there is no delay in the execution of the contract. A difference between the UAE's and Qatar's civil code is that the latter provides for the obligation to act in good faith but fails to provide for negotiating the contract in good faith. Hence, during the negotiations, the parties have the freedom to embrace an adversarial approach which terminates once the contract deal is sealed. Allowing this is purposed to ensure that the contracting parties can settle on the terms and conditions that best suit their needs.

A good question here would be how the UAE courts would interpret the good faith duty in a situation where the contracting parties demand that the underlying contract should be under the governance of foreign law such as the English law. Article 19 of the UAE civil code states that the substance and form of contractual obligations should be subject to the law of the nation in which the parties reside. From a simplistic perspective, the resident country of the parties will be the basis of the decision on which law the contract will be subject to. If the parties are from different states, the applicable law will be from the country in which the conclusion of the contract occurred. That is unless the parties agree to use another law or it becomes apparent from the surrounding circumstances that the parties wish to have another law guiding their underlying contract.

The article provides inherent permission to the contracting parties to choose the law that would govern their contract. In practice, however, the courts in UAE disregard this and invariably apply the UAE law. The UAE considers itself to have a competent jurisdiction with the ability to adjudicate disputes that occur within its boundaries. It should be a point of note that the UAE willingly accept jurisdiction over the cases within the country's borders. Once the UAE courts accept jurisdiction, in instances where the parties expressly chose a foreign law as a basis for its contract, they may experience the duty of good faith instead of their choice law. In such a case, the parties may be charged with a more onerous duty than they had anticipated during the contract negotiations. Thus, it is prudent, on the side of the contracting parties, to ensure that they are aware whether or not the contract will be executed in the UAE that result in UAE courts taking jurisdiction.

The duty of good faith potentially limits the rights and freedoms of the parties. As such, it has wide-ranging ramifications, especially in the UAE. In the UAE, for instance, good faith can be used as evidence to support a breach allegation. Consider an instance where the building materials used in the execution of a construction contract are found to be defective. It will be easy to determine if there is a breach of contract when there is an effort by either party to conceal the material once the building has started. In such a case, the failure of the party to meet its good faith obligations is usable as evidence against it in a court proceeding.

Another potential implication that can arise regards the dependence on a time bar notice such as the one provided under the clause 20.1 of the FIDIC contracts. The pervasiveness of the concept of good faith in the UAE would increase the restrictions on the use of a time bar notice if the parties relying on the notice were already aware of the breach. For example, cogitate on a notification of a claim that was made and recorded informally during a meeting but was never made formal. The party that will be pushing for the time bar notice will already

have been aware of the defect; hence, it would be an act of bad faith to pretend not to be informed despite the communication.

Another limitation imposed by the concept of good faith revolves around the aversion of liability concerning claim made as a result of a time bar being deemed unlawful. That is especially in cases where the losses incurred are both serious and unequal with the claim of the employer to be notified within the stipulated period. For example, clause 20.1 of the FIDIC contracts provides 28 days for this notice to reach the employer. Furthermore, Article 106(1) of the civil code asserts that an individual will be liable for his or her unlawful exercise of one's rights. Thus, averting one's liability is equivalent to breaking the code. Coupled with the obligation of good faith, the effectiveness of a time bar is challengeable.

The UAE civil code warrants that the parties have the freedom to fix a pre-agreed compensation amount or mechanism in their contract. However, while incorporating the concept of good faith in the interpretation of the contract, the court may vary the amount to match the losses incurred in an event. That is regardless of the efforts of the employer to prevent the situation if any. From a typical point of view, it would be unwise to compensate another for damages with an amount lower than the damages incurred. That is a show of bad faith and hence cannot be tolerated in the UAE courts.

Another implication regards the fact that the concept of good faith is also applicable to termination for convenience clauses. However, in this case, it is worth noting the concept is not applicable to the obligation itself. Instead, the good faith concept applies to the performance of the obligation. Sometimes, however, this right accorded to the employer can sometimes be seen as a contradiction of the good faith implied in the civil code. It is enforceable because, during the time of entry, the parties entered freely without coercion. Although the courts might uphold this decision, it would be unwise for the employer to depend on this provision during circumstances that may affect the performance of a contract in a manner that is inconsistent with the principle of good faith. That is because the courts might take a different perspective on the case. Consider an instance where a contract provides for the termination of a contract for convenience but, it confines the liability of the employer to compensate the contractor until the termination date arrives. When the employer ends the contract before any work is done yet it is after mobilization, it would be a show of bad faith since the contractor would not receive compensation for the costs incurred.

Case 556/2009³⁷ presided over by the Union Supreme Court recognizes the effect of the general rules of contract engagement. Furthermore, it refers to article 246 and 247 that specify the contract should be performed in accordance with its contents and hence, should be in line with the dictations of good faith. If a contracting party fails to perform its contractual obligations, it is a show of bad faith unless the cause of the default is justifiable as force majeure. It is only under such a condition that the obligations of a party can be absconded by the court of law. However, the defendant has a responsibility to prove that the circumstances that prevented it from performing its obligations were extraneous and beyond its control.

³⁷ *Union Supreme Court, 556/2009* [2010] Union Supreme court, 556/2009 (Union Supreme court).

Case law 501/2010³⁸ also touches on the subject of good faith where it revisits the provisions of article 514 of the Civil Transactions Law. The article provides that the seller has a responsibility to deliver an item to the purchaser once the transactions come to an end. The rationale for this provision is that a sale involves the transfer of ownership of an item. The same law provides that the subject matter is applicable to things that will take place in the future as is the case of commercial contracts. That implies that this provision applies to construction contracts where the contractor needs to deliver the construction project as agreed in the contract. Failure to do so is not only a breach of contract but also a show of bad faith. Article 246 of Civil Transactions Code³⁹ also asserts that contracting parties should engage in a manner that complies with good faith provisions. In this case, the contractor is not only obliged to perform the terms of the contract but also to do so in a manner that is in line with the law, nature and customs of the country.

Case 425/20 470⁴⁰ is also evidence of the fact that the UAE law provides for the duty of good faith. The case clearly refers to the impact of article 246 that stipulates that the performance of a contract should be in line with its contents as well as in a manner consistent with the duty of good faith. Not only is its performance limited to the contents but also extends to the ancillaries of it. This case law also registers the impact of article 514 of the civil code regarding the fact that a seller should provide the purchaser with the item sold as initially agreed. The case also identifies that if the contract regards land, its ownership should be transferred to the buyer after the conclusion of the sale without any obstacle.

³⁸*Abu Dhabi Court of Cassation, 501/2010 -434(161)* [2010] Abu Dhabi Court of Cassation, 501/2010 -434(161) (Abu Dhabi Court of Cassation).

³⁹*Abu Dhabi Court of Cassation, 501/2010 -434(161)* [2010] Abu Dhabi Court of Cassation, 501/2010 -434(161) (Abu Dhabi Court of Cassation).

⁴⁰*Union Supreme Court, 425/Judicial Year 20 470* [2000] Union Supreme court, 425/Judicial Year 20 470 (Union Supreme court).

4.0. Contractual and Non-Contractual Rights to Terminate a Contract

4.1. Non-Contractual Right to Terminate

Most of the standard contracts typically contain express provisions and guidelines that regulate the rights of both parties involved in a contractual arrangement under different defined circumstances.

4.1.1. Frustration

One of the non-contractual rights to terminate comes as a result of frustration experienced by one of the parties. The frustration is not an outcome of defaulting of either party. Instead, it is an outcome of external circumstances which prevent the execution of the contract as it was intended originally. In this situation, the result should be that further execution of the contract is impossible, illegal or is different from the original intentions of a party at the time they entered the agreement. Once a frustrating event occurs, the contract is terminated excusing the parties from their contractual obligations. However, any liabilities accrued up to that point will still be there.

Case 213/ Judicial Year 23⁴¹ also provides insight into frustration and how it applies. In line with frustration, is the application of Force Majeure clauses discussed earlier in the paper. This case law identifies article 894 of the civil code which asserts that in an instance where the contractor fails to complete its obligations following force majeure reasons that it has no part in, the contract will end and the positions of the parties liquidated. In this instance, the parties will not be able to exercise their contractual right to terminate for convenience. In this case, the employer will have to compensate the contractor for works already performed and the costs expended to perform the uncompleted works. However, if the delay in completion of the works are as a result of the circumstances in which the contractor participated in, the employer will have the grounds to terminate the contract for convenience.

Another case that provides useful insight into the frustration issue is case 722/21 735⁴². The case deals with the issue of the liability of the contractor. For instance, in an instance where the building collapses after the completion or where a defect manifests itself, the liability will be the contractor's since it is their responsibility to guarantee that there will be no defects in the final output. The provision of this case law is that the employer bears no burden to prove that the fault lies with the contractor since the presence of the defect alone is proof enough. The contractor's burden will be to deny the causal connection between him and the harm is not there. It is the court's responsibility to determine whether the contractor is the cause of the defect or if there is an extraneous cause in which the contractor did not participate. If the latter is true, the contractor will be under the protection of the force majeure provisions. Proving the participation of the contractor will be an independent expert who will certify whether the defect is as a result of poor performance on the part of the contractor or an extraneous cause.

Before terminating the contract, however, the parties need to be sure that a frustrating event has occurred to prevent wrongful termination that could result in a damage charge.

⁴¹ *Union Supreme Court, 213/Judicial Year 23* [2003] Union Supreme court, 213/Judicial Year 23 (Union Supreme court).

⁴² *Union Supreme Court, 722/Judicial Year 21 735* [2001] Union Supreme court, 722/Judicial Year 21 735 (Union Supreme court).

Without a true frustrating event, the parties will not have a means of justifying why they have not fulfilled their contractual obligation. Some events, however, do not qualify as frustrating events. For instance, a contract being too expensive to perform is not a frustrating event. During the contract negotiations, the parties need to ensure that they possess the capacity to perform the contractual obligations proposed. When an event occurs yet it has been accounted for in the contract, the potential consequences will be as provided in the contract. Therefore, it fails to qualify as a frustrating event. The contracting parties need to exercise caution if they intend prevent a potential overlap with the force majeure clauses.

Force Majeure is a French terminology for ‘superior force.’ It is a common clause used in contracts that free the contracting parties from liability in case a circumstance that is beyond their control which bars them from performing their contractual obligations. Considering the rise in recent crises such as swine flu, foot and mouth and so on, the force majeure clause has become more important than ever before. It is considered an emergency plan by people in the business world today. In construction, for example, a project can be delayed because of a circumstance beyond the control of the contractor such as an outbreak. It is the role of the force majeure clause to save the contracting parties from suffering penalties they could not otherwise avoid.

4.1.2 Repudiation

This occurs in instances when one of the parties breaches the contract seriously to the extent that it entitles the other party to consider the contract terminated and seek compensation for any damages incurred. It could be either be an anticipatory or material breach depending on the intensity of the breach. Some of the breaches that could amount to repudiation include the refusal of a party to perform one’s obligations, the abandonment of a work site by a contractor, employment of other contractors to do the same work or even the failure of an employer to provide the contractor with access to the site. An important point of note is that some breaches are not clear cut. Thus, if the innocent party intends to treat the contract as a repudiated one, it should ensure that the breach qualifies. Otherwise, it could amount to wrongful termination of a contract. If the party is sure that the breach qualifies as a ‘repudiatory,’ then it has every right to exercise its right to terminate a contract.

When one of the parties repudiates, it does not mean that there can be no further obligations. The innocent party needs to accept the repudiation. There is, however, no standard form of acceptance of a repudiation despite there being a requirement for unequivocal acceptance by both parties. Once accepted, both parties become exempted from their obligation irrespective of the remaining unperformed obligations and damages caused during the execution of the contract. There will be damages for repudiation which the innocent party receives. The purpose of this compensation is to put the innocent party in a position that it would initially have been in if the contract would have been performed appropriately as initially agreed. In situations where the innocent party rejects the repudiation, affirmation of the contract is the only option. The innocent party’s entitlement to the damages claim will still be valid, but the contract will remain in force. However, inadvertent affirmation of the contract by the innocent party could result in difficulties since it could send a wrong message. The party might act in a manner that is contradicts acceptance is equivocal. The absence of a formal and effective way to communicate acceptance of the repudiation could mean that the counterparty could be misinformed about the acceptance of the action. It may mistakenly believe that the action has been accepted yet the innocent party has affirmed the contract. Consequently, the counterparty may find itself in breach of the contract.

4.2. Contractual Right to Terminate

Some contracts contain termination clauses which allow the contracting parties to end their relationship following the failure of either party to fulfill certain circumstantial conditions. These clauses primarily seek to deal with breaches of certain contractual obligations.

4.2.1. Termination for Convenience

It allows either party to terminate a contract without having the need to establish that a breach has been committed or an event that has the potential to prevent the performance of a contract has transpired. The clause can be particularly instrumental in situations where the employer has not made a decision on how to exploit the land or lacks the needed financing. The clause can also be useful when the contractor discovers that the project is either too risky or largely unprofitable or when the project has been in suspension for a long time with no hope of restoration.

4.2.1.1. Termination of Contracts for Convenience in the UAE

The UAE civil code provides that terminating a contract is possible in only three ways. That is by mutual consent from both parties, court order or by the operation of the law. The articles 892 to 896 of the code provides information about how Muqawala contracts terminate; hence, it covers the construction contract. Article 247 of the civil code provides that the unilateral termination of a contract lacks a legal effect in the nation. However, a common practice in the UAE reveals that in construction cases, the employer can unilaterally end a contract. The court of appeal in UAE elucidates that the rationale behind the exception provided to the employer is that Muqawala contracts are normally long-term. Thus, circumstances can easily change between the onset of the contract to its completion.

The exception included in the UAE civil code bears its origin in the Egyptian law. The rule requires that whenever the main contractor provides the subcontractor with a notice to terminate a subcontract, the contract will come to an end only after the compensation of the subcontractor has been achieved. The subcontractor's compensation will include any expenses incurred during the performance of the contract, loss of profit and works already performed. The origin of this rule is Article 663 of the Egyptian code⁴³. The statutory code containing the civil code forms the primary source of law in the UAE. Thus, the judges have no power to make law in the country. However, the UAE legal system has been subject to the influence from the Egyptian civil code concerning laws, practice, and courts. In some cases where the UAE civil code lacks provisions for the case, judges normally resort to the Egyptian code.

4.2.1.2. UAE Case Law Example

A recent case between a subcontractor (claimant) and his main contractor (defendant) may provide insight into the concept of termination for convenience. The claimant was

⁴³ MacCuish A and Newdigate N, 'Suspension Under the UAE Civil Code, FIDIC, and the Roman Law Maxim of Exceptio Non Adimpleti Contractus (ENAC*) - Real Estate and (Suspension Under the UAE Civil Code, FIDIC, and the Roman Law Maxim of Exceptio Non Adimpleti Contractus (ENAC*) - Real Estate and Construction - United Arab Emirates)' (n.d), <[http://www.mondaq.com/x/451986/Contract Law/This is the first of two articles which look at various selfhelp remedies available for the unpaid contractor](http://www.mondaq.com/x/451986/Contract+Law/This+is+the+first+of+two+articles+which+look+at+various+selfhelp+remedies+available+for+the+unpaid+contractor)> accessed July 9, 2017

demanding AED 8,739,230 as well as a 12 percent interest that has been accruing from the due date. The supplication of lights and associated accessories was the primary requirement of the contract. The budgeted amount was AED 10,378,800. The claimant started the manufacturing producing a batch of products to meet the demands of the contract and the schedule provided by the defendant. The defendant bought the required raw materials required in the production of the items required by the defendant. As scheduled, a batch was received by the defendant, but there was no further delivery. So, the defendant asked the subcontractor to store the remaining items until instructed otherwise. The main contractor paid AED 544,928 only to the subcontractor out of the entire sum. The claimant's argument was that the main contractor's breach of contract resulted not only in material losses but also became detrimental to the reputation of the business.

The argument of the main contractor was that the subcontract and the main contract were back to back. The employer of the main contract terminated the main contract which made it impossible to continue with the subcontract. The Court made a reference to Article 872 of the code which defines a muqawala contract. It can be defined as a contract that requires either party to execute work or undertakes to make a thing in exchange for consideration provided by the counterparty. It was the establishment of the court the employer had the right to terminate a muqawala contract before its full implementation. The right is an exception can be varied or revoked by mutual consent of the participating parties. In the case, the courts provided the employer with the legal option of unilaterally ending the contract while ensuring that the interests of the subcontractor are maintained. These interests were maintained by ensuring that the claimant received compensation for the expenses, work already done and the loss of profit pertinent to the disrupted reputation of the claimant's business.

From this case example, unilateral termination or the termination for convenience can be an attractive form of termination because the project is not feasible or the uncertainty is too great. In such a case, the party pushing for the termination does not need to make an argument that a fundamental or material breach is the cause of the termination. The party just needs to be prepared to compensate the other party. In the case above, the employer terminated the contract, but when the case was presented to the courts, the employer is offered the option of terminating the contract for convenience.

4.3. Suspension Rights

The presence of suspension clauses in a contract can be helpful to either party involved in the contract. It can, however, be overlooked sometimes when the focus of the parties is on coming up with the termination clauses. Focusing on termination clauses can lead the parties to disregard the significance of a suspension clause. Something to bear in mind is that suspension and termination in contract law share a rather close relationship. Depending on the manner in which the suspension clause is drafted. The ultimate consequence can very well be the same as that of termination. That is in cases where either party possesses the right to terminate; they may decide to end the contract once the suspension period is over.

Evidence of the close relationship between termination and suspension regards the fact that the two share similar justifications⁴⁴. For instance, on the short-run, some circumstances

⁴⁴ Elliott PF and Gould N, 'Suspension and Termination' (n.d) <https://www.fenwickelliott.com/sites/default/files/suspension_and_termination.pdf>

may arise that may have the potential to prevent the performance of a contract. The primary difference between termination and suspension is that the latter deals with the short run while the former focuses on the long run. When a contract cannot be performed in the short run, the parties will opt for suspension until such a time the contract becomes feasible once again. The parties can use the concept occasionally when they require space and time to continue with another project. However, it should be acceptable to the other party which is possible through effective communication.

The absence of express terms in the contract defining the suspension could render it difficult to assert one's right to suspend a contract. That may be because courts consistently refuse to recognize the existence of such a right. For this reason, parties need to consider including a suspension clause in the contract to avoid being shut down by the courts. The parties need to ensure that they have the capacity to bear the consequences of the suspension. The suspension period should also be present to reduce the potential for confusion or complications. There should also be guidelines that stipulate the length of time that a contract can remain in suspension before it can be terminated. Further consideration should be accorded to what happens when works resume after a suspension. These pieces of information are crucial to ensure a smooth transition on and off suspension. Before the use of the provision for either suspension or termination, it would be instrumental for the parties to exercise caution as it could lead to further damage legally. Once these rights are invoked, the procedural requirements and the contract's notice should be followed strictly.

4.4. Security against the construction deal risks in the UAE

The recent months in the UAE witnessed a major slowdown in the number of projects performed in the construction market. As such, the situation has become less than ideal for the participants of the construction industry. Stagnating projects as a result of the economic downturn are forcing contractors and project developers to face challenges encouraging some to take drastic measures such as project cancellations to survive the onslaught⁴⁵. Each construction project comes with distinct objectives and particularities which are responsible for dictating the options available for survival. Hence, there is a need for the contracting parties to ensure that they undertake a pragmatic introspection whose intent is to provide an objective assessment of the current state and potential liabilities. Working in conjunction with experts such as auditors, lawyers, and independent experts, the parties will gain insight into their contractual and commercial position allowing them to settle on the best options. Fortunately for the construction market, the UAE code provides a number of options by taking into account the unique elements of the construction contracts. The options range from project suspension to termination which is the last resort. For the success of these options, negotiations form a critical component of contract enforcement.

Apart from its commercial significance, negotiation, under the UAE law, is the most convenient path out of the impasse. According to the UAE code, the variation or termination of a contract is possible when there is a mutual agreement between the parties. Through negotiation, the need for a court intervention to effect a termination becomes unnecessary. Negotiations allow the contractual parties to table their expectations and intentions allowing for an agreement which becomes enforceable under the law. The party representatives,

⁴⁵ Ahmad Qasim Farah, 'Duty Of The Insured To Disclose Risks In Terrestrial Insurance Contracts In Jordan, UAE And France: An Analytical Study Upheld By Recent Decisions Of Courts Of Cassation' (2015) 29 Arab Law Quarterly.

therefore, should meet and discuss their situations as well as the viability of the project before arriving at the right option that will cushion both parties from losses. Since the UAE code binds the parties to perform their legal obligations, it is, therefore, necessary to ensure that the negotiations are carried out in good faith.

The rationale for this concerns the fact that negotiations possess the potential to cause a number of scenarios⁴⁶. For instance, an ideal scenario that negotiations can lead to is the variation of the contracts which scholars identify as de-scoping or the omission of works. The reason for the variation can be to accommodate the mutual needs of the parties thereby ensuring the project's survival. As discussed later in the essay, the UAE law provides for a contract's variation so that the courts will consider it an inherent part of the contract if it is an outcome of a negotiation and mutual consent of the parties. Typically, once the employer decides upon the variation of a contract, the contractor becomes immediately entitled to compensation from the employer. However, if the variation or the addition of works to the contract was a part of the project's design, it implies that it was out of a mutual agreement. The UAE law expressly asserts that in such an instance, the contractor's remuneration is subject to revision.

Allowing for the unilateral termination of a contract by either party remains a controversial issue in the UAE. The reason for this regards the fact that the confines responsible for the limitation of how the rights are exercised are still uncertain. Furthermore, the interaction between the contractual terms about the TFC rights and the civil code is still unclear. Furthering this assertion is the fact that most of the construction contracts are one-sided reducing the employer's risks while increasing those of the contractor⁴⁷. That is attributable to the high involvement of the government as the employer in most of the contracts. With its power to make law, the government has been able to tweak the UAE contract law to work to its benefit. Since the code does not expressly identify some important aspects of TFC such as whether the duty of good faith applies to it or not, the law remains open to interpretation.

Further evidence of the controversial nature of TFC is that despite the existence of the unilateral right to terminate, it still has the potential of exposing the terminating party to loss of profit and damages claims from the counterparty. If the termination is deemed wrongful by the courts, the terminating party can be sued for wrongful termination of the contract. Before the termination is in effect, a thorough review of the contractual terms consistent with the termination clauses is necessary to ensure that there is no risk of liabilities. If the termination is not an outcome of mutual consent, a court intervention is necessary to effect the end of the contract. The problem with this is that it results in lawsuits that are both time and resource consuming. Before the parties can resort to using this approach, they need to ensure that there is no other option available for them to take.

Any of the parties have the right to request the cancellation of a contract as a last resort. Adding to the controversial nature of TFC, it is a requirement for the parties to ensure that they

⁴⁶ Ahmad Qasim Farah, 'Duty Of The Insured To Disclose Risks In Terrestrial Insurance Contracts In Jordan, Uae And France: An Analytical Study Upheld By Recent Decisions Of Courts Of Cassation' (2015) 29 Arab Law Quarterly.

⁴⁷ Ahmad Qasim Farah, 'Duty Of The Insured To Disclose Risks In Terrestrial Insurance Contracts In Jordan, UAE And France: An Analytical Study Upheld By Recent Decisions Of Courts Of Cassation' (2015) 29 Arab Law Quarterly.

review the jurisdiction clause to ensure that the right tribunal is handling the case⁴⁸. The UAE law allows for contracting parties to choose the law to which their contract will be subject. In practice, however, the UAE courts have a habit of disregarding foreign law following their belief that they can handle every case in their jurisdiction. The UAE code further provides that the parties have the freedom to invoke the cancellation of the contracts for a variety of reasons. For example, the termination can be by non-performance or force majeure reasons.

4.5. Remedies Available for Unlawful Termination

From the state of things in the UAE, the employer will always benefit more from a contract than the contractor. While the employer has a right to terminate a contract for convenience, the contractor is left to feel the weight of the termination. Surviving in the nation (for the contractors) might require a different approach. Unless the legal system in the UAE gains more transparency, contractors may have to choose to claim that the employer is in breach of the contract as a means of preventing him from invoking their right to terminate. The principle is still a 'grey area' in the UAE implying that the contractors can capitalize it to their advantage allowing them to recover their potential losses that may arise from the early termination of the contract.

In the event of a breach of contract, the UAE civil code provides the parties to the contract with remedy options. Through the code, UAE courts have a wide range of power with which they can order appropriate remedies for the aggrieved parties. Two primary remedy options available in the UAE legal system are damages and specific performance⁴⁹. The latter is describable as an equitable remedy while the former is a legal remedy. Damages are the most common form of remedies available to contracting parties in the UAE. They can be described as the pecuniary compensation offered for the injury or loss that has been incurred as a result of unlawful conduct by another party. Specific performance, on the other hand, essentially allow the plaintiff to get what he bargained for during contract negotiations instead of being paid damages for not receiving it. The UAE courts, however, lack the power to order the implementation of specific performance. Articles 380 and 382 provide that granting specific performance orders will only be possible if the circumstances surrounding the case require it thereby citing the possibility of a personal element resulting in the contract breach. From a general sense, equitable remedies cannot be chosen over damages in a case where the latter is considered the adequate remedy.

It is clear, therefore, that for a contractor with the intentions to complete a project, a 'personal element' would be rare. The 'personal element' is normally tailored for irreplaceable items such as contracts involving the sale of a historical painting or something of sentimental value. As such, specific performance can only be awarded in situations where damages do not suffice as a remedy for the victimized party.

⁴⁸ Ahmad Qasim Farah, 'Duty Of The Insured To Disclose Risks In Terrestrial Insurance Contracts In Jordan, UAE And France: An Analytical Study Upheld By Recent Decisions Of Courts Of Cassation' (2015) 29 Arab Law Quarterly.

⁴⁹ Cugurullo F, 'How to Build a Sandcastle: An Analysis of the Genesis and Development of Masdar City- Journal of Urban Technology' (2013) 20(1)LS 23

The UAE law identifies the loss of profits as an outcome of a contract breach. Courts in the country are strict when it comes to the assessment of the losses incurred by a party following a breach of a contract. Awarding a contractor's claim of profit loss, occurrence of damage is expected in the future. From the judicial interpretation of the articles 246-2 and 282 to 298⁵⁰, damages can be awarded for any form of loss that is recognized by the code including consequential loss attributed to tortious acts. A criterion that must be satisfied is that there should be a deliberate and wrongful breach by one of the involved parties. Secondly, during the contracting period, the parties ought to have foreseen, predicted or expected the damages as a potential consequence of the breach.

⁵⁰ Chance C, 'A Guide to Business UAE-working paper' (2014) PL 35

5.0. Termination and Suspension under FIDIC Guidelines

A concept recognized both under the civil, and common law jurisdiction is the freedom of contract. However, civil law systems are normally codified and prescriptive in nature implying that its relevant provisions may be implied even in robustly drafted forms such as standard forms. The potential of such provisions having an undesirable and unanticipated impact on the outcomes of the termination process when a party's breach of contract basing on wrongful termination of a contract is exposed or during the obtaining of a court order. Revisiting the red and yellow books of the FIDIC guidelines might provide useful insight into how the process should be like.

Many civil codes provide for termination and suspension processes, and as shown above, the UAE is no different. Variations are there. For instance, in the UAE, the employer's right to terminate for convenience is given precedence over the contractor's following the adoption of an Egyptian rule. However, parties need to ensure that they expressly agree to the terms and conditions for either suspension or termination to prevent the complications of a legal system. When they include these clauses in their contracts, the ambiguousness of the contractual termination and suspension rights reduce. Furthermore, it is more advantageous to the parties to have these clauses since it renders the contractual relationship efficient.

The 15th and 16th clauses of the FIDIC contract identify the circumstances that could lead to the termination of a contract both by the employer. On the part of the contractor, the FIDIC contract provides circumstances that could lead to both termination and suspension of a contract⁵¹. The clauses provide a clear description of the procedural guidelines that should be followed in each instance as well as the financial arrangements that will be applicable following a contract termination or a suspension. Moreover, the clauses also provide wide-ranging information about the potential events that could lead to a termination of the contract. For instance, sub-clause 15.2 posits that following poor performance security offered by one party, the innocent party can terminate the contract⁵². Other actions that can warrant termination include abandonment of work by the contractor, the insolvency of the contractor and the failure of compliance with the notice to correct furnished by the employer. Further, clause 15.5 of the FIDIC contracts also provide the employer with the right to terminate for convenience provided the circumstances are suitable.

Sub-clause 15.2 of the FIDIC guidelines identifies the situations in which the employer might end a contract following the inappropriateness of the contractor's behavior. Sub-clause 15.2 (b)⁵³ asserts that the termination of a contract by the employer can be an outcome of the abandonment of works by the contractor. In this situation, the contractor's demonstration of an intention not to continue with the performance of its contractual obligations provides the employer with sufficient grounds for termination of the contract for convenience. A limitation of this clause is that here are no clear provisions of what conduct qualifies as an intention to abandon works. Sub-clause 15.2 (c)(i)⁵⁴ claims that the employer can terminate for convenience if the contractor lacks reasonable excuse after failure to comply with the

⁵¹ Sarbu Eugen, 'Employer's Claims under FIDIC Contracts' [2016] SSRN Electronic Journal.

⁵² 'Construction Sector Will Be 'Key Driver' Of Dubai Growth In 2017' (*ArabianBusiness.com*, 2017) <<http://www.arabianbusiness.com/construction-sector-will-be-key-driver-of-dubai-growth-in-2017-658964.html>> accessed 22 July 2017.

⁵³ Rebecca Saunders, (2017)

⁵⁴ Rebecca Saunders, (2017)

provisions of clause 8 which deals with the commencement, delays and suspension of contracts. Further, section (ii)⁵⁵ of the clause asserts that in case the contractor lacks reasonable excuse to comply with the notice issued in accordance with sub-clause 7.5⁵⁶ concerning rejection or sub-clause 7.6 concerning remedial work. That should be within 28 days upon receipt of the notice. Failure to comply with these provisions is sufficient ground for the employer to terminate the contract at will.

Another ground for contract termination by the employer emanates from sub-clause 15.2 (d)⁵⁷. The sub-clause asserts that the contract will be terminated if the contractor subcontracts either part or whole contractual works to a sub-contractor without the required agreement. In a view to protect the investment, it would be appropriate for the contractor to ensure that everything it engages in under the primary contract should be in line with the agreement. Such provisions are present in sub-clauses 1.7 and 4.4 that prohibit the assigning of its contractual obligations to a sub-contractor without receiving consent from the employer⁵⁸. In case of insolvency or bankruptcy of the contractor, the employer has the right to terminate the contractor following the provision of sub-clause 15.2 (e)⁵⁹. When the contractor is insolvent or bankrupt, it cannot meet its contractual obligations thereby providing the contractor with the right to terminate the contract. There are several instances provided by this sub-clause regarding how a contractor may go bankrupt. For instance, if the contractor goes into liquidation or if it faces an administration or receiving order or if the contractor performs its business under a receiver, manager or trustee to benefit its creditors⁶⁰.

Sub-clause 15.2 (f)⁶¹ provides a scenario concerning the contractor issuing or offering to give bribes or anything of value as a form of inducement. If a contractor engages in such an act for the purpose of getting another to do an action that relates to the contractor or for the purpose of showing favor or disfavor, then it provides grounds for the termination of the contract by the employer. The sub-clause allows the employer to end the contract even if the bribery is an action of a sub-contractor over which the contractor lacks control⁶². However, lawful inducements are excluded despite the absence of provisions describing which inducements qualify as lawful.

A case worth noting regarding FIDIC guidelines is the 2014 case between Obrascon Huarte Lain SA versus Her Majesty's Attorney General for Gibraltar conducted by the Technology and Construction Court of England and Wales⁶³. The case entailed a contractor that failed in proceeding with both the designing and execution of the contractual works without delay. In the case, the contractor received notices to correct according to the provisions of clause 15.1 of the FIDIC rules. Failure of the contractor to meet the requirements led to the employer furnishing the engineer with a notice of termination following clauses 15.2 (a), (b)

⁵⁵ Rebecca Saunders, (2017)

⁵⁶ Rebecca Saunders, (2017)

⁵⁷ Rebecca Saunders, (2017)

⁵⁸ Rebecca Saunders, (2017)

⁵⁹ Rebecca Saunders, (2017)

⁶⁰ Rebecca Saunders, (2017)

⁶¹ Rebecca Saunders, (2017)

⁶² Rebecca Saunders, (2017)

⁶³ 'A Significant New Case on the FIDIC Form | Lexology' (*Lexology.com*, 2017) <<https://www.lexology.com/library/detail.aspx?g=c7d71040-f2a7-41db-b466-ed1e757d422e>> accessed 21 August 2017.

and (c)⁶⁴. In case the contractor had not received a notice of correction as stated in clause 15.1, the termination could have been deemed illegal.

The contractor made claims that he encountered unanticipated circumstances that resulted in the delays seen in the execution of the contract. Therefore, it was his claim that he was entitled to a time and cost extension in accordance with the clause 4.12 detailing contract conditions. According to the clause, the ground conditions that can be considered reasonably foreseeable by an experienced contractor during the submission date of the tender should be considered. In the case, some information such as an environmental assessment, a contaminated land desk study and even a site investigation report was available for interpretation by the contractor as is required under clause 4.10⁶⁵. After careful consideration of this content material by the court, it concluded that the contractor had been informed of substantial contaminated material on the site but it had failed to consider this as a real risk. Since clause 4.10 asserted that it is the responsibility of the contractor to interpret the information provided, failure of the contractor to conduct some form of intelligent analysis and assessments regarding the presence of the contaminated material was a breach of the contract.

Most standard subcontract contract forms provide the main contractor with the entitlement of ending a subcontract following a notice of termination of the main contract⁶⁶. Caution should be taken since contracting parties should not assume that all subcontracts bear 'back-to-back' rights of termination or suspension. It could be possible that some subcontracts are independent so that the termination of the main contract does not automatically lead to their termination. The point is particularly important in the UAE following the high propensity of amending standard forms. Further, the concept of 'back-to-back' is not legal implying that the judges in the UAE or anywhere else in the Middle East may fail to recognize it. That is unless the term is incorporated in the main contract. Express terms should be present in the contract for the judges to legally recognize the 'back-to-back' principle implied.

According to the FIDIC guidelines, the termination clause contained in a subcontract should stipulate the intention of the party to allow the termination to happen by notice⁶⁷. Otherwise, the termination would not be automatic as it would require a court order to effect the process. Hence, a contractor who is intent on ending a subcontract possessing a 'back-to-back' relationship with the main contract when the express wordings in the contract allowing that is absent is inadvertently exposing itself to a wrongful termination claim.

5.1. Contract Certifiers

An interesting question is what does it take for a construction project to be deemed completed? What certifies that a certain construction project is complete? Under this subject, it is critical to understand that the UAE utilizes the United Kingdom's standard contracts (FIDIC requirements). These contracts stipulate that completion of works involves the

⁶⁴ 'A Significant New Case on the FIDIC Form | Lexology,' (2017)

⁶⁵ 'A Significant New Case on the FIDIC Form | Lexology,' (2017)

⁶⁶ Al Tamimi & Company - Advocates and Legal Consultants -Scott Lambert, 'New FIDIC White Book: The Key Changes' (May 31 2017) <<http://www.lexology.com/library/detail.aspx?g=d6d93f34-19bb-4372-b807-6f99d0d1ad08>>

⁶⁷ 'A Significant New Case on the FIDIC Form | Lexology,' (2017)

completion of all the practical endeavors of the project to allow for the beneficial occupation⁶⁸. That is in the exception of a few items which the courts will take into account. For instance, despite the existence of latent defects, the work will still be practically complete. A certificate is still issuable in this instance since latent defects are rather difficult to identify. However, for patent issues, a certificate asserting that the project is complete is not issuable. Contracts typically provide for this where they state that a contractor needs to ensure that it procures the Municipal Completion Certificate as well as a building completion certificate obtained from the General Directorate of Civil Defense⁶⁹. The two documents will allow for the use and occupation of the building. An important point of note is that completion is always on the basis of the satisfaction of the third-party certifier who could either be an engineer or an architect. Furthermore, the third party possesses the discretion to certify the completion or deem the project incomplete.

Any certificates issued as per the terms and conditions of the contract legally bind the contractual parties provided that it is from an authorized party⁷⁰. Considering the instance above, the certificates issued to show that the contract is complete bind the contracting parties. Once the certificate is issued, it shows that the contractor has fulfilled its contractual obligations. Hence, the employer should oblige by providing the due payments as agreed. So, what is the extent to which the certificates issued under a contraction contract bind the contracting parties? The issuance of these certificates is as per the provisions of the contract so that they are usable as evidence to prove instances of bad faith in the performance of the contract. The third party acting as the certifier is normally the representative of the employer who checks if the requirements of the contract have been met.

It is impossible to take direct action against the certifier since the construction contract is between the main contractor and the employer. Therefore, there is no contractual relationship between the contractor and the certifier hence there are no provisions that govern the interaction of the two parties. Whenever a dispute arises regarding the performance of contractual obligations will remain between the main contractor and the employer. Since the conflict is only between them. The UAE civil code is particularly silent about the impartiality of the certifier. However, Article 246 of the code states that every contract should be in a manner consistent with the principles of good faith⁷¹. Therefore, impartiality of the certifier could result in damages for an innocent party qualifying as bad faith.

⁶⁸ Stephen Gruneberg, 'Construction Contract Preparation and Management: From Concept to Completion' (2013) 31 Construction Management and Economics.

⁶⁹ Stephen Gruneberg, 'Construction Contract Preparation and Management: From Concept to Completion' (2013) 31 Construction Management and Economics.

⁷⁰ Al Tamimi & Company - Advocates and Legal Consultants -Scott Lambert, 'New FIDIC White Book: The Key Changes' (May 31 2017) <<http://www.lexology.com/library/detail.aspx?g=d6d93f34-19bb-4372-b807-6f99d0d1ad08>>

⁷¹ Al Tamimi & Company - Advocates and Legal Consultants -Scott Lambert, 'New FIDIC White Book: The Key Changes' (May 31 2017) <<http://www.lexology.com/library/detail.aspx?g=d6d93f34-19bb-4372-b807-6f99d0d1ad08>>

6.0. De-scoping rights of an employer

De-scoping is an issue that has been on the rise ever since the global financial crisis of 2008. Many employers resorted to de-scoping the construction works provided for in their contracts as a strategy to exit uncompleted projects during the crisis while others resorted to the use of termination provisions.

From a basic perspective, de-scoping entails the provision of instructions by the employer to the contractor regarding the omission of large parts of the contractual works. A stereotypic idea that is predominant among uninformed business parties is that the employer bears a contractual entitlement to de-scope a contract⁷². Partly, this view bears some elements of truth. Something to understand, however, is that there are situations where this assertion may become untrue. Many employers resort to providing these instructions for several reasons discussed below.

Funding problems is a potential motivation for employers to seek to reduce the scope of the contracts. Sometimes, during the life cycle of a construction project, an employer may experience unprecedented challenges that could reduce this party's financial capacity⁷³. Consequently, funding the project as provided for in the original plans becomes a challenge. The project becomes too expensive for the employee to fund. The law recognizes that the economic landscape is extremely volatile. Hence, both the contractor and the employer stand to face unforeseen circumstances. For instance, the employer becoming bankrupt maybe as a result of a drop in share value. Such circumstances are beyond the control of the employer which allows for drastic measures to ensure the survival of the party as a corporation.

De-scoping can also be an outcome of the employer finding a better deal than the current contractor offers. In this case, the employer omits large parts of the current contract leaving only a small portion for the current contractor. For the omitted works, the employer finds the alternative contractor that may be offering a better deal. The deal could be better in the sense that it offers better returns or better contract conditions or even that the new contractor works faster than the existing contractor.

The third reason that could encourage the de-scoping of a contract revolves around the incapability of the contractor. In this case, the employer may be having doubts regarding the ability of the contractor to perform its contractual obligations fully. A contractor's limitations may be financial-wise in that it may lack the ability to access the financial requirements of performing the contract. It can also be technical so that the contractor lacks the technology or workforce to perform the contract.

Another reason for contract de-scoping involves the poor performance of the contractor. In the performance of a contract, either party bears expectations which it expects the other party to fulfill. For instance, the contractor expects immediate payment after the completion and confirmation of the works performed. The employer, on the other hand, expects good and quality work which is an accentuation of good performance. If the employer becomes unhappy with the work of the contractor, the party might resort to de-scoping the contract before its

⁷² Neal R. Brendel, Wadih El-Riachi and Amy L. Barrette, 'The Availability In The UAE Of Liens To Secure Payment Under Construction Contracts' (2010) 24 Arab Law Quarterly.

⁷³ Neal R. Brendel, Wadih El-Riachi and Amy L. Barrette, 'The Availability In The UAE Of Liens To Secure Payment Under Construction Contracts' (2010) 24 Arab Law Quarterly.

complete ruin. Poor performance could be in the form of poor meeting of targets or even the presence of many defects in the construction work already done. In fear of having the entire contract performed recklessly leading to hefty losses and costs, the employer might seek to reduce the obligations of that contractor.

According to the provisions of many standard contracts, the employer possesses the entitlement to issue variations to the contracted works through the omission process. Thus, the employer does not have the need to go through the hustles of contract termination when a de-scoping option is available. For this reason, de-scoping has become an emerging issue. The prevalence of this provision gains further enhancement by the fact that the funding comes from the employer. Therefore, the contract performance is to be in conformity with the expectations of the employer and not the contractor. Hence, while the contractor's rights receive sufficient consideration, the employer's interests bear more consideration.

To avoid the difficult situations posed by contract terminations, de-scoping has become a non-confrontational solution for disputing parties. Whether for convenience or following the default of either party, termination normally causes a dispute between the contracting parties. That is attributable to the fact that construction contracts are commercial contracts implying the involvement of huge financial resources. Therefore, contracts could lead to tremendous losses to either party. Contract termination can lead to disputing since the contractor might have already performed the work to a certain extent.

Most of the contracts in the Gulf Region take the FIDIC contract form despite there being many subtle changes⁷⁴. The changes upset the balance of risk allocation existing between the parties. For instance, UAE contracts utilize a rather one-sided language one that is biased towards the employer. Why is it that the contractor lacks the capacity to cause a variation in the contract provisions? The root of this variation is traceable back to the Dubai Municipality construction contracts initially created for use by the Dubai Municipality operating as a government entity. Eventually, the variation found its way into the UAE civil code. While one-sided contracts are useful to governments which use them as governing tools, they are not instrumental to private employers focused on generating profits. As such, contractors need to keep a watchful eye before signing such an agreement. That is because they lack the FIDIC provisions of proper allocation of risk between the parties.

Nonetheless, whether standard or not, most of the construction contracts bear variation clauses. The absence of such provisions and clauses implies that neither the contractor nor the employer possesses a legal entitlement regarding the deviation from the initially agreed works performance scope. Thus, it is impossible for the employer to compel the contractor in a case where the variation provisions are absent. For example, if the employer requires the performance of additional works, it cannot compel the contractor to perform them without being in breach of the contract but only when the variation clauses are missing.

A primary significance of the variation clauses regards the fact that they introduce flexibility: a much-needed flexibility within the rather rigid UAE law structure. The rules

⁷⁴ Neal R. Brendel, Wadih El-Riachi and Amy L. Barrette, 'The Availability In The UAE Of Liens To Secure Payment Under Construction Contracts' (2010) 24 Arab Law Quarterly.

governing the contractual obligations of the parties are somewhat rigid⁷⁵. From a simplistic view, the absence of the variation provisions implies that the parties are to perform exactly what they were to do as per the initially agreed upon parameters. Failure to do this amounts to a contract breach. Thus, any changes to the scope will be an outcome of mutual agreements between the parties and should be under a written amendment to the underlying contract. The right of the employer to unilaterally amend the works scope without having to amend the entire contract consequently becomes void.

The FIDIC Red Book fourth edition is the most widely used contract standard in the Middle East. Clause 51 of this contract provides a definition of a variation. It describes a variation as a change applied to existing work or the addition of works. Through the engineer, the same clause entitles the employer to the right to effect an omission of works. The clause stipulates that: “The Engineer shall make any variations of the form, quality or quantity of the Works or any part thereof that may, in his opinion, be necessary and for that purpose, or for any other reason it shall, in his opinion, be appropriate, he shall have the authority to instruct the Contractor and the Contractor shall do any of the following: (b) Omit any such work (but not if the omitted work is to be carried out by the Employer or another contractor)⁷⁶.”

As typical of the legal system, the instruction of the engineer to omit large work portions can either be orally or in writing. However, the subsequent confirmation by the counterparty ought to be in writing. That is with respect to the form, quantity, and quality of the works or any portion of the work as well as the opinion of the engineer if necessary. It is an often occurrence where contractors try to pursue a loss of profit claim when contracts become de-scoped following the provisions of clause 51⁷⁷. Their argument is that if they had been allowed by the employer to perform their contractual obligations as initially agreed, they would have made profits. That is true since parties negotiate contract conditions that are suitable for both of them. For this reason, employers need to be keen to ensure that they exercise their de-scoping power carefully to prevent being in breach of the contract.

If the variation is invalid may be for not being in writing or for being inappropriate or unnecessary, it immediately qualifies as a contract breach since it results in profit loss. The other party immediately gains entitlement to the damages claim. Clause 51 forbids that after the evocation of the variation rights, the employer should not perform the work by itself or contract it out to another contractor unless the current contractor is proven to be either financially or technically unable to perform the requirements of the contract⁷⁸. An employer should ensure that it exercises caution to prevent the incurrence of losses from damages claims filed by the counterparty for not following the right procedure for evoking this entitlement. The practice is rather different in the UAE since the employer retains the right to impose a variation to the contract’s scope and get the omitted part performed by another contractor covered by a

⁷⁵ AlJazzy Bint Mohamed AlEid, 'A Financial Statement Analysis On Three Major Construction Companies In The UAE (Arabtec Holding PJSC , Drake & Scull PJSC And Emaar Properties PJSC)' (MSc Finance & Banking, The British University in Dubai 2015).

⁷⁶ Nicholas Gould and David Loosemore, 'Book Review: Fidic Contracts: Law and Practice Fidic Contracts: Law and Practice Baker Ellismellors Benchalmers Scottlavers Anthony, Informa, London, UK, 2009, ISBN 978-1-84311-628-8, £290.00, 583 Pp.' (2011) 164 Proceedings of the Institution of Civil Engineers - Management, Procurement and Law.

⁷⁷ Shēng Zhōng, 'Comparison Analysis Between FIDIC And CSG Contracts' (2014) 04 Smart Grid.

⁷⁸ Nicholas Gould and David Loosemore, p. 164.

separate contract. From this angle, the employer is immune to the loss of profit claims made by the contractor following these omissions.

An important point of note is that the variation clauses fail to give the employer the freedom of making significant or large scale omissions to the scope and nature of the works. According to the Red Book's clause 52.3, the contractor bears an entitlement to a fair valuation of the variations that have the potential to either decrease or increase the contract price by a margin of 15 percent⁷⁹. In such a case, the valuation of the changes will not be in line with the Bills of Quantity. Instead, the value will be an outcome of the agreement between the employer and the contractor. The determination of the amount will be in the hands of the engineer if the parties cannot agree on it.

The variation provision in the new Red Book is also a point worth considering. Clause 13 of the new Red Book asserts that the omission of any work but not if the omitted works are to be performed by others. Interestingly, this provision fails to assert if the employer will have the entitlement to perform the omitted works itself. Court decisions concerning this in the UAE are absent despite the concept being in use for over 15 years.

6.1. Termination versus De-scoping in the UAE

So, why is it that the employers tend to turn to de-scoping in the place of termination? Employers prefer de-scoping to prevent the confrontation that might result from terminating a contract. Furthermore, the consequences of breaching a contract following wrongful termination expose the employers to huge damage claims from the counterparty. Where de-scoping applies, therefore, employers will utilize it. Employers will use de-scoping for one of the reasons discussed below.

One scenario where this is possible when the project becomes too expensive and thus impossible for the employer to provide the funds. The UAE law provides the employer with the right to de-scope a contract in line with article 893 of the code⁸⁰. According to this provision, both the contractor and the employer have the right to terminate the contract following the existence of issues that have the potential to prevent either the completion or the performance of the contract. As discussed earlier, terminating a contract in the UAE requires mutual consent from either party or the intervention of the courts where there are no provisions in the contract providing the contractor with the unilateral right of termination the contract. In the UAE, the employers need to ensure that the contracts they negotiate provide them with this right to prevent the need for a court intervention. The provision ought to be clear in the sense that it mentions the due amounts or expenses that the contractor would eventually become entitled to once the termination process is complete⁸¹. The termination for convenience clause

⁷⁹ 'The Show Must Go On - Change Is Inevitable: Cancellation, Termination and Descoping: Brexit: Navigating the Unknown: Clyde & Co (En)' (*Clydeco.com*, 2017) <<https://www.clydeco.com/blog/brexit/article/the-show-must-go-on-contracting-strategies-for-the-impact-of-brexit-1>> accessed 21 July 2017.

⁸⁰ 'Descoping in Construction Contracts in the UAE' (*Fenwick Elliott*, 2017) <<https://www.fenwickelliott.com/research-insight/annual-review/2015/descoping-construction-contracts-uae>> accessed 21 July 2017.

⁸¹ 'Descoping in Construction Contracts in the UAE' (*Fenwick Elliott*, 2017) <<https://www.fenwickelliott.com/research-insight/annual-review/2015/descoping-construction-contracts-uae>> accessed 21 July 2017.

provides the employer with the freedom to change the scope of the contract as long as it is mutually agreed with the contractor. Since the employer is facing financial challenges, terminating the contract can be challenging if it does not meet the requirements provided under the contract. De-scoping, on the other hand, ensures that both parties do not fall to ruin if the employer becomes bankrupt.

De-scoping is particularly instrumental to the employer since it allows the employer to back out of a potentially bad deal. When the employer realizes that the contract it entered is potentially a bad deal, it immediately becomes a risk that the employer ought to bear. The reason is rather clear. During the negotiations, the parties are of sound mind. Hence, if they agree on a contract to the extent that they append their signatures, it becomes legally binding, and there is little to do to change that. If the employer intends to terminate the contract for convenience, it will need sufficient proof to show that the contractor is unable to perform its contractual obligations. Under the UAE law, the employer needs to show that the contractor is unable to achieve its obligations.

Furthermore, terminating the contract for convenience without a good reason translates to a breach of the good faith principle guiding the contract. The contractor might incur losses as a result of the termination, and that would be bad faith on the side of the employer. Hence, it has the potential of causing the courts to suspend the employer's right to terminate for convenience as it will have become a breach of the agreements. In this scenario, therefore, the employer should assess and compare the termination costs against the de-scoping costs before deciding. That is often the situation in the UAE being one of the fastest developing economies of the world. As a result, the formation of new companies has become a common practice. An employer can easily enter a construction company with one of the smaller companies as a strategy to cut costs only to realize that it is a wrong move may be because of the size of the contract too large for the contractor.

Assessing the costs of the two moves that an employer in such a situation is important since this party will be out to minimize its costs. The termination costs will be significantly higher in a case where the termination for convenience clauses are absent since it would require the intervention of the courts in the UAE jurisdiction⁸². As it is typical of lawsuits, it will lead to the incurrence of heavy expenditures which translate to losses for either party. Furthermore, some lawsuits take extremely long periods of time before the courts decide to explain the high expenditures associated. In situations where the termination for convenience provisions are present, the employer's best option is to terminate the contract instead of de-scoping and to hire a new contractor. Opting to de-scope rather than terminate a contract exposes the employer to the potential risk of becoming liable for the contractor's profit loss and damages caused by the breach. As discussed earlier, an employer would become liable under the UAE law for de-scoping a contract and the hiring of another contractor to perform the omitted works. Terminating a contract for convenience, on the other hand, limits the liability of the employer to profit loss claims only.

The third scenario entails the employer having doubts about the ability of the contractor to perform its contractual obligations. That could be as a result of the circumstances around the contractor changing significantly such as bankruptcy. The final scenario, on the other hand,

⁸² 'Descoping in Construction Contracts in the UAE' (*Fenwick Elliott*, 2017) <<https://www.fenwickelliott.com/research-insight/annual-review/2015/descoping-construction-contracts-uae>> accessed 21 July 2017.

results from the dissatisfaction of the employer resulting from the poor performance of the contractor. In both scenarios, a breach of the contract by the contractor or its inability to perform the contract is solvable by only one solution: termination. According to the FIDIC Red Book, the employer has the right to terminate the employment of the contractor following a default on its contractual obligations⁸³. It differs from the termination of the underlying contract since it remains in force. Once the employment of a contractor comes to an end, the employer becomes liable to pay the contractor any amounts due but only after the defects liability period expires.

It is also after the engineer assesses the execution costs of the project, costs associated with the remedy of the defects, execution delays and the incurred damages that the contractor receives its payment. These costs are subtracted from the contractor's payments. However, when the employer resorts to de-scoping, the right of the contractor to claim payments for the loss of profit becomes immediate. Moreover, Article 877 of the UAE code stipulates that the once an employer is unhappy with the performance of the contractor after the issuance of a notice to remedy fault to the contractor, it can request authority from the court to hire another contractor to perform the remaining part of the contract⁸⁴. However, in this situation, it is at the contractor's expense. In practice under the UAE jurisdiction, this procedure is fast allowing the employer to hire another contractor efficiently immediately.

Article 895 of the UAE code is also an important consideration point during the assessment by the employer regarding whether to use termination or de-scoping⁸⁵. The article provides that for a party experiencing harm as a result of a contract cancellation has the right to make a compensation claim against the counterparty to the extent that the customs acknowledge. Therefore, the assessment of the damages incurred from the contract termination would be in line with the customs used within the construction industry.

6.2. Circumstances that allows employers to omit works

Negative variations, commonly known as the de-scoping of works entails the removal of a part or the entire work package awarded to a contractor. A recent case involving Ipson Renovation Limited versus the Incorporated Owners of Connie Towers HKCFI2117 of 2016⁸⁶ involved the employer seeking to remove certain elements from the contractor's work scope. The reduction summed to an estimated 13 percent of the entire work package. The construction project in question entailed performing important structural, public health and fire safety work in an already-existing residential unit. It was the employer's intention to omit significant

⁸³ 'The Show Must Go On - Change Is Inevitable: Cancellation, Termination and Descoping: Brexit: Navigating the Unknown: Clyde & Co (En)' (*Clydeco.com*, 2017) <<https://www.clydeco.com/blog/brexit/article/the-show-must-go-on-contracting-strategies-for-the-impact-of-brexit-1>> accessed 21 July 2017.

⁸⁴ 'Gulf Construction Online - De-Scoping: How Much Is Too Much?' (*Gulfconstructiononline.com*, 2017) <https://www.gulfconstructiononline.com/news/1621830_Descoping-How-much-is-too-much.html> accessed 21 July 2017.

⁸⁵ 'The Show Must Go On - Change Is Inevitable: Cancellation, Termination and Descoping: Brexit: Navigating the Unknown: Clyde & Co (En)' (*Clydeco.com*, 2017) <<https://www.clydeco.com/blog/brexit/article/the-show-must-go-on-contracting-strategies-for-the-impact-of-brexit-1>> accessed 21 July 2017.

⁸⁶ 'ERI Awarded Contracts in UAE and China' (2008) 2008 Membrane Technology.

aspects of these works which would automatically result in the loss of profit on the part of the contractor. Also, the employer failed to make payments to the contractor on the grounds of the omitted works. As discussed earlier, financial constraints encourage employers to de-scope the contracts rather than terminate. The case between these two companies will provide a highlight of the potential implications that an employer seeking to de-scope works may face.

The variations clause provided for in the contract focused on the right of the employer to instruct the addition, alteration or variation of the work package pertinent to the maintenance and restoration of the project. It also provided for the omission of work. As such, the Hong Kong Court of First Instance asserted for the variation clause to be effective, there should be express and clear contractual terms spelling out the rights of the employer to omit some of the contractor's work items⁸⁷. Even though the contract provided for the power to omit works, it was the intention of the parties that the power should be exercised on works that represented important project aspects. Furthermore, the court upheld the decision that the power to omit works clause was not sufficiently broad in that it did not give the employer the power to omit the key works under scrutiny. As an outcome of the wrongful de-scoping attempt of the employer coupled with the failure to pay the contractor as well as other factors, the court decided that the employer repudiated the contract.

The demonstration of this case is that when the contractual terms are unclear, the employer will lose its entitlement to de-scope a substantial portion or even the contractor's work in entirety. The guiding rationale for this decision is that when an employer decides to de-scope a contract, it deprives the contractor of its opportunity to make a profit from the works omitted which are often the basis for the contractor's entry into the contract. It is considered a breach of contract's principle of good faith by the employer. However, if the contractor would have been benefiting in some way from a suitably-drafted variation provision in the sense that it adequately compensates it for the omitted works, the opportunity to de-scope is there. It is only possible from mutual agreements by the parties to de-scope.

From a general sense, the employer should not use its power to omit work to give the works to another contractor or to do the work itself. The courts will sustain this as a contract repudiation by the employer. Furthermore, it can be a show of bad faith by the employer to the contractor since de-scoping could affect the contractor's profits negatively. The right of the employee to omit and re-tender the works or perform them itself can only be in effect if the variation clause expressly provides for it or if there is a distinct mutual agreement by the parties. Omitting some of the work aspects can result in negative economic consequences for the contractor who may have already brought together significant resources for the sake of the contract. Consequently, that may result in the contractor incurring significant costs which are resources that could have been profitable on another project.

6.3. De-scoping under FIDIC guidelines

Variation provisions vary under different jurisdictions. The FIDIC contract forms provide some form of a framework that nations use as a benchmark for the execution of their contracts. The new Red Book of 1999 endeavors to create a limitation on the employer's right to de-scope contractual works. For instance, sub-clause 13.1(d) discusses the right of the

⁸⁷ 'UAE to Reclaim Crown from Saudi Arabia as Biggest Construction Market in Region' (*The National*, 2017) <<https://www.thenational.ae/business/property/uae-to-reclaim-crown-from-saudi-arabia-as-biggest-construction-market-in-region-1.48831>> accessed 22 July 2017.

employer to vary⁸⁸. The provision prohibits the employer from the omission of work if it is its intention to furnish the omitted work package to another contractor or even if its intention is to complete the works itself. As discussed above, that is an accentuation of bad faith since the employer will be directly causing the contractor a significant loss of profit. Furthermore, sub-clause 15.5 of the 1999 Red Book describes the entitlement of the employer to terminate for convenience⁸⁹. It prohibits the employer from ending a contract to provide it with the opportunity to perform the works itself or the opportunity to re-tender the works. However, it is not the intention of the Red Book to limit the extent of the works which the employer can omit. Any such limitations will either have to be inferred or implied as demonstrated in the Hong Kong case.

⁸⁸ Femeena Mohamed, 'Implications of Different Types of Variation under FIDIC 1999 REDBOOK' (*Academia.edu*, 2017) <http://www.academia.edu/11410122/Implications_of_different_types_of_Variation_under_FIDIC_1999_REDBOOK> accessed 21 July 2017.

⁸⁹ Femeena Mohamed, 'Implications of Different Types of Variation under FIDIC 1999 REDBOOK' (*Academia.edu*, 2017) <http://www.academia.edu/11410122/Implications_of_different_types_of_Variation_under_FIDIC_1999_REDBOOK> accessed 21 July 2017.

7.0. Recommendations for improvement

7.1. Potential improvements to the Standard Construction Contract Forms

One of the suggestion will be to reduce the one-sidedness of these contracts by risk allocation. When entering a contract, both parties need to have the same level of risk as they perform the contract. Parties enter a contractual relationship because a project promises profits to both parties. The intention of both parties here is to benefit from the project mutually. Why then, should the termination be left to only one party; the employer. The rights of the contractor to terminate a contract are not as elaborate as those of the contractor. That could partly be because the employer is the source of the financing of the contract. Hence, if the project goes sideways, it is the employer who will suffer the most risk. However, changes to the standard contract need to be amended to ensure that the risk is equal for both parties. To prevent the employer from abusing its right to terminate for convenience, the clause needs to be associated with good faith principles.

Preventing the employer from abusing its right, which is a common feature in the UAE construction market, an early cancellation fee can be imposed. The fee can be made quantifiable depending on the total works already performed. When the contract faces early termination, both parties will most certainly incur losses. The employer will have to compensate the contractor for any liabilities and works already done. Since it is the one sponsoring the project, it will have to bear the risks associated with the termination of the contract. For the contractor, there are expectations for it to perform the contract using its resources so that it can receive remuneration upon completion of the project. In the case of an early termination, the contractor may have already incurred costs of amassing the required resources. A move to mitigate this risk will be to introduce an early cancellation fee that will discourage either party from prematurely terminating a contract. The strategy will also ensure that in the case of a termination, the other party receives compensation.

It is possible to draft the fee into the TFC clauses allowing it to serve several purposes. One of them is that the fee would encourage the employer to reconsider its decision to end the contract for convenience. Before it can settle on this option, it should be willing to part with a large sum in the form of a cancellation fee. The practice is common in tenancy contracts. The fact that the strategy is already in use means that it can be instrumental in changing tides in the construction market in the UAE. The fee will also serve as compensation for the contractor who will incur losses as a result of the premature cancellation. Furthermore, the use of the cancellation fee will eliminate the onus of the contractor to claim compensation for the potential loss of opportunity and profits. Finally, the fee will aid in the aversion of the need for costly disputes and confrontation since the contractor should be satisfied with the compensation the fee offers.

Employers can seek the termination of a contract for various reasons. One such reason could be that the employer is unsatisfied with the performance of the current contract. As such, the employer may seek to end the contract to provide it with the opportunity to solicit a new contractor. De-scoping for this reason in the UAE is prohibited leaving the employer with the termination option. A negative effect of this move is that it will encourage the employer to abuse its TFC rights. To prevent this from happening, the standard contracts need to provide express terms that if the employer intends to restart the works at a later period, the current contractor should be given precedence before new contractors come into the picture. That will ensure that the contractor is cushioned from the employer's power misuse. This strategy could

introduce some potential complications. For instance, if the employer intends to restart the project, would it be obliged to use the same contractor?

Preventing the employer from abusing this right might require the addition of extra limitations in the UAE where employers have more freedom to invoke them. When the employer invokes termination because of a breach perpetrated by the contractor and fails, it would most certainly resolve to invoke the TFC rights. From a general point of view, this is a show of bad faith since it reveals that the intention of the employer is to cut off the contractor. If the lawsuit for the breach is unsuccessful, it implies that the contractor is not responsible for any of the problems or the contractor has rectified its position after the reception of the notice. Hence, the employer has no need to petition its TFC rights. To prevent this from happening, standard contracts need to incorporate contractual terms preventing the employer from relying on the TFC rights once it is unsuccessful in terminating the contract for breach reasons.

Another limitation that can prevent the overall misuse of the TFC clauses by the employer is one that ensures the employer will invoke the rights only if its intentions is to abandon the entire project completely. As stated above, the reasons for contract termination are plenty. Some employers, however, terminate contracts to allow them to enter new ones at the expense of the contractor. Introducing this limitation will ensure that if an employer uses its right to terminate for convenience, it has the intention of abandoning the project and not to get a cheaper contractor to perform the contract. The limitation can be construed as an element of the good faith principle. The purpose of these recommendations is to prevent the employer from misusing the contractual power of terminating a contract at will at the expense of the contractor which is a prevalent situation in the UAE construction market.

7.2. Recommendations for improvements to the UAE's statutory provisions on TFC in construction contracts

Many divergent opinions on the subject of termination for convenience exist illustrating the complexities that surround the subject. Debates on the subject tend to center on the matter of mutual consent as provided for in Article 892 of the code. From the provision, it is clear that there is a need for more transparent wording to clearly define what the actual constituents of a mutual consent are. A theory proposed by one of the scholars is that the Article 892 which dictates the conditions under which the termination of a muwawala contract is possible is intentionally vague for convenience. As stated above, the government is a part of most of the employers within the construction market in the UAE. To ensure that it is in control, most of the contracts used by these employers are one-sided in that they have the power to terminate the contract at will. Despite the presence of provisions that protect the contractor from this misuse, there is a need for clear terms that specify mutual consent details.

Considering complications present in the UAE construction market such as decennial liability, it is possible to argue that the purpose of the vagueness of the article is to ensure that the arbitrators and judges have flexibility while they decide cases brought before them⁹⁰. Unlike the common law, the UAE civil code is codified. Hence, there is little room for changes in the way cases are interpreted. The fixed nature of the statute reduces the flexibility of the judges and arbitrators in deciding cases. For this reason, the courts are forced to honor the

⁹⁰ Muhammad Tahir Abdullah, 'Role of UAE Courts In International Commercial Arbitration' (Requirement for LLM (International Business & Commercial Law), University of Bedfordshire 2013).

termination wishes of the employers rather than those of the contractor. By eliminating the vagueness of the Article, the judges will have room to incorporate arguments that protect the contractors from contractual abuse.

Most legal practitioners and experts argue that the 25 articles that cover the Muqawala are not sufficient to govern all the aspects of the construction contracts in the UAE. For this reason, other jurisdictions introduced specific legislations that allow for the elimination of the complex disputes that arise during the execution of construction projects. A good example is the Housing Grants, Construction, and Regeneration Act of the UK that came in force in 1996. Analyzing this issue alone makes it clear that the existing laws are not sufficient to manage a nation that boasts of not only some of the largest but also some of the most complex engineering and construction projects in the world.

7.3. Conclusion

From the research, it is evident that the muqawala articles are not in line with the progress made in the construction industry in the UAE over the previous two decades. There is a conflict between some of the articles and the general contracting rules resulting in divergent opinions. A good example that can elucidate this point can be seen in the non-binding judicial precedence present in the UAE courts. The apparent gray area is allowing employers to misuse their TFC rights at the contractor's expense. Contractors are not always in a position to exercise their right as often as the employers. For this reason, they stand to lose greatly from engaging in contracts in the UAE. That explains why there is a reduction of activity in the UAE construction market. This article provides some recommendations that can be instrumental towards ending this malpractice in the UAE.

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